

**UNTANGLING THE WEB:
SOCIAL NETWORKING IN THE WORKPLACE**

MELANIE D. MCNAUGHT

This paper is for general discussion purposes and does not constitute legal advice or an opinion.

For legal advice regarding your particular circumstances, please contact us.

TABLE OF CONTENTS

INTRODUCTION	1
What is On-Line Social Networking?	2
Why Should Employers Care About Social Networking in the Workplace?	2
When is Social Networking Grounds for Discipline?	3
What Proactive Steps Should Employers be Taking?	11
CONCLUSION	13

INTRODUCTION¹

On-line social networking forums, such as Facebook and Twitter, are popular methods of communicating with friends, family or acquaintances and expressing opinions and interests.

As the popularity of on-line social networking grows, so too does its presence in the workplace. Many employers have had problems with employees using Facebook when they should be working, or with employees slandering other employees, or even the employer, on their blogs or Facebook pages. Many employers are considering whether they should have a policy on social networking or whether they should block such sites entirely.

While the technology may be new, the appropriate employer responses to social networking in the workplace are not, including policies regarding use and discipline for inappropriate use.

This paper will discuss the following issues raised by social networking in the workplace, including the following:

1. What is on-line social networking?
2. Why should employers care about social networking in the workplace?
3. When is social networking grounds for discipline?
 - a. Time theft
 - b. Defamation
 - c. Breach of confidentiality
4. What proactive steps can employers take to address social networking in the workplace?

¹ The author would like to acknowledge the contribution of Cheryl V. Rovis and Matthew Larsen for their assistance with this paper.

What is On-line Social Networking?

Facebook is a social networking website where users join networks organized by city, workplace, school, and region to connect and interact with people they have added to their contact list as “friends”. Users can create profiles including photos and lists of personal interests, exchange private or public messages, and join groups of friends. Facebook has a number of features through which users may interact such as “the Wall”, a space on every user’s profile page that allows friends to post messages for the user to see; or “Status”, which allows users to inform their friends of their whereabouts and actions at the particular time.

Twitter, the newest of the social networking forums, is increasing in popularity. It is a free micro-blogging service that allows users to send and read other users’ text based updates. Users normally use Twitter to update their friends on their social activities. Senders can restrict delivery to those in their circle of friends, but by default, the potential to access updates is limitless - any user may access an update.

Blogs are the oldest of the networking media. A blog is a web site, usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video. Many blogs provide commentary or news on a particular subject; others function more as personal on-line diaries. Unlike a diary, a blog is meant to be read by others.

MySpace is quite similar to a blog. It may be described as a user-friendly version of a blog, since it allows users to create personal websites with an easy-to-use template.

There are also various other sites, such as YouTube, which allow users to share videos or pictures with other users.

Why Should Employers Care About Social Networking in the Workplace?

If an employee is spending time on Facebook or their blog every day at work, an employer will naturally be concerned about productivity. One study suggested that access to Facebook in the workplace decreased

productivity by 1.5 per cent.² Excessive use during working hours may amount to time theft. In this sense, on-line social networking is not that different from Internet use or socializing in the old-fashioned way – i.e. face to face rather than via Facebook.

The nature of the technology leads to other concerns. Because blogs, Twitter and Facebook may be accessible to anyone who has Internet access, confidential and private information can be made public very quickly.³

An employer may also have a legitimate concern about how comments posted on Facebook or other social networking media can affect its reputation. The question arises as to whether an employer can discipline an employee for activities conducted outside the workplace, on personal time, using a personal computer. The cases below indicate that an employer may have cause to discipline and potentially discharge an employee for comments made on a blog (or other forum) where the content is easily accessible by the general public, identifies the employer, and seriously undermines the employer, supervisors, or co-workers.

Finally, anyone who uses social networking sites should be concerned about the security risks. Computer viruses and worms have been spread through social networking media. Often other users, who may be acquaintances, can post files on a person's blog or Facebook page. These files could contain viruses, and because they appear to be posted by someone the person knows, he or she may be more likely to open them than they otherwise would.

When is Social Networking Grounds for Discipline?

Social networking may be grounds for discipline in certain circumstances.

Discipline may be appropriate when an employee spends excessive working hours on Facebook or other social networking media. There are a number of awards that find that excessive use of the Internet for non-work purposes during working hours may amount to cause for discharge. There

² Bascaramurty, Dakshana, "Facebook at work decreases productivity by 1.5 per cent, says research firm", *Globe and Mail*, 28 July 2009 at <http://www.theglobeandmail.com/life/work/facebook-at-work-decreases-productivity-by-15-per-cent-says-research-firm/article1233207/>

³ Depending on the privacy settings selected by the user.

do not appear to be any reported decisions considering whether use of Facebook or other social networking media during working hours may be cause for discipline. Nevertheless, there seems to be no principled reason why time theft related to social networking would not also be considered cause for discipline.

Even when employees indulge in social networking in their spare time, discipline may be appropriate if they identify the employer and hurt its business interests, such as its reputational interest, its interest in protecting employees from harassment, and/or its interest in protecting confidential information.

For instance, in *Chatham-Kent (Municipality) v. C.A.W. Canada, Local 127 (Clarke Grievance)*,⁴ the grievor was discharged from her position at a retirement home when the Employer became aware of the contents of her publicly accessible blog, which she wrote at home during her free time.

Some of the contents of the grievor's blog were critical of management and of the home in general. The grievor identified two managers by first name or initials, and criticized a particular decision made by one of these managers that adversely affected her. In one posting, the grievor claimed that she was blackmailed by management. She described the new residence facility as a hole and stated that she is "friggin pissed off", and that she hates her job. She also referred to management in general as "stupid fucking assholes".

The grievor also disclosed personal information regarding some of the residents at the home.

Arbitrator Williamson found that these blog comments were insolent, disrespectful, and contemptuous of management. They were an attempt to undermine the reputation and authority of management. This type of conduct amounted to insubordinate behaviour.

Arbitrator Williamson was also satisfied that the grievor had breached the workplace confidentiality agreement when she disclosed the personal information concerning residents of the home.

⁴ [2007] O.L.A.A. No. 135 (Williamson).

The grievor explained that she was not computer literate and intended to set up a private blog between her and two other co-workers.

The Arbitrator did not consider this as a mitigating factor. He found that she was careless in setting up her blog, as there were clear messages during the set-up process that by ticking a certain box, her blog would be made available to the general public.

Arbitrator Williamson concluded that “[i]t must be found that the grievor’s setting up of a public blog was not outside her control and therefore an accidental situation, as it could have been avoided by the exercise of due care by the grievor in not ignoring the clearly visible warning from Microsoft that the webspace she had created was one accessible by the public.”⁵ Considering the maliciousness of the grievor’s comments, and the breach of confidentiality of patient information, her discharge was upheld.

During investigation, the employer had also become aware of two other employees’ blogs. One of these employees had posted pictures of some residents on her website without having obtained consent. However, there was no information on either of the sites related to medical diagnoses of residents, nor were there malicious and disrespectful comments like on the grievor’s blog. The employee with the photographs on her blog received a three day suspension while the other employee was given verbal counseling.

Chatham-Kent was applied in *EV Logistics v. Retail Wholesale Union, Local 580*.⁶ The grievor in this case was a young man with a history of depression. He wrote a blog from his home that included a photo from the workplace and identified the Employer. A couple of postings related to work, but he did not defame the Employer or any co-workers.

There were a number of racist and disturbing comments on his blog. He wrote: “I just hate humanity I wish the earth would do a massive eradication to the homo sapiens and kill us off for good especially those good for nothing people from south Asia aka INDIA [sic]”.

⁵ *Ibid*, at para. 30.

⁶ [2008] B.C.C.A.A.A. No. 22 (Laing).

The grievor also blogged about his admiration for Hitler, his anti-depressants, and how to use a meat grinder to commit suicide. He described a fantasy of pushing a disabled child down the stairs and throwing his wheelchair at him.

The Employer called the RCMP about the grievor's blog. After the RCMP met with the grievor, he voluntarily removed the blog and posted a long apology to anyone he may have offended. He explained that he was depressed and was posting on his blog to get attention.

The Employer was having difficulty with racism in the workplace, particularly against its South Asian employees. It could not prove that the grievor was involved in the racist graffiti or any other incidents, but argued that it could not tolerate an employee who publicized such racist and violent views and who brought the Employer into disrepute.

The Arbitrator found that an employer must establish one or more of the following in order to discipline an employee for off-duty conduct:

- the employee's misconduct was "sufficiently injurious" to the interests of the employer;
- the employee acted in a manner incompatible with the due and faithful discharge of his duties; and/or
- the employee's misconduct hurt or was likely to hurt the reputation of the employer.

The Arbitrator accepted that the grievor's blog was detrimental to the Employer's legitimate business interests, including its reputational interest, and that discipline was appropriate. Nevertheless, she held that discharge was not warranted under the circumstances. There were a number of mitigating factors, including the grievor's mental illness, his acknowledgement of wrongdoing, his discipline-free record, and his immediate apology. She found that the grievor was an immature young man who had made a foolish mistake, but he had learned from his mistake and would not likely repeat it. Under the circumstances, the grievor was reinstated without back pay.

In another case, *Alberta v. Alberta Union of Provincial Employees (R. Grievance)*,⁷ the grievor, an administrative employee in the Alberta public service, was dismissed after the Employer became aware of the contents of her personal blog site.

The blog identified the grievor by name, indicated that she lives in Edmonton, and revealed that she worked for the provincial government. Interspersed among postings of a personal nature were insulting postings about her co-workers, supervisors and workplace. In one post, titled “Aliens Around the Coffee Table”, the grievor described one co-worker as menopausal with a short term memory; she complained that a new co-worker had already used up all her sick time, family time, personal leave, and still managed to leave early; another co-worker was described as being cheap. While aliases were used, witnesses were able to accurately identify the employee upon whom each paragraph was based. In another post, the grievor expressed her criticisms concerning administrative change at work. Her comments included that she “works in a lunatic asylum”. She reproduced an e-mail sent by “Nurse Ratched (aka, the supervisor)” and then questioned, “[d]oes anyone else out there live in a world like mine with imbeciles and idiot savants (no offense to them) running the ship... And is anyone else’s ship being sailed down the highway to hell?” In addition to these insulting comments, the grievor posted an entry regarding a review by the Office of the Ombudsman of a confidential file she had been working on.

When department management first became aware of the existence of the blog and its contents, they decided to interview the grievor. When questioned, the grievor became defensive rather than apologetic about her hurtful comments.

The grievor was terminated on the basis that the contents of the blog had irreparably undermined the employment relationship.

The Union, in challenging the dismissal, argued that the employer had over-reacted, that the grievor’s attempts at an apology had been derailed by management, and that the employment relationship could be restored.

The Board denied the grievance, holding:

⁷ [2008] 174 L.A.C. (4th) 371.

[w]hile the Grievor has the right to create personal blogs and is entitled to her opinions about the people with whom she works, publicly displaying those opinions may have consequences within an employment relationship. The Board is satisfied that the Grievor, in expressing contempt for her managers, ridiculing her co-workers, and denigrating administrative processes, engaged in serious misconduct that irreparably severed the employment relationship, justifying discharge.

In coming to its decision, the Board noted that the grievor did nothing to prevent unlimited public access to her blog, but rather invited public access:

[T]he tone of her blogs placed them very much in the public arena and suggested that the Grievor relished addressing a wider audience... She used her own name in one of her blogs and disclosed that she worked for the provincial government in Edmonton. The Board rejects any professed ignorance on the Grievor's part of the public dimension of her blog.

The Board concluded that the grievor's insulting comments could only be characterized as insolent and insubordinate, even though they were not accompanied by a refusal to carry out an order to perform her assigned duties. Insolent, disrespectful, or insulting words may constitute a type of insubordination. In addition, "[m]ore damaging to the viability of the employment relationship are the Grievor's blog postings about her co-workers.... Though aliases are used, the people being described are easily identifiable to Department employees (and perhaps others)."

The decision was overturned on judicial review; however, this was for procedural reasons with respect to how the disciplinary interview was

conducted and not with respect to whether her misconduct merited discharge.⁸

In *Alberta Distillers Ltd. v. United Food and Commercial Workers*,⁹ the Employer dismissed an employee for harassment, including an allegation that she had made disparaging remarks about a fellow employee on another employee's Facebook "wall." Arbitrator Jones granted the union's motion for a non-suit, essentially finding the Employer had insufficient evidence the grievor had committed the alleged misconduct. This decision highlighted many of the pitfalls of "Facebook evidence":

With respect to the comment on the Grievor's Facebook wall, the uncontradicted evidence is that this comment was made by Donna Carlson, not the Grievor. While there is a slender amount of evidence from Nicole Teskey that she thought the Grievor had responded to that comment, this evidence is uncorroborated and no other witness makes this suggestion. None of the management witnesses saw the Facebook comment. Mr. Tuer incorrectly assumed that Nicole Teskey's statement that the comment was on the Grievor's wall meant that it had been sent by the Grievor. There is no evidence to support the allegation that the Grievor did anything on Facebook which constitutes harassment, let alone a persistent pattern of harassment, which would justify the Company imposing any discipline on him, let alone termination.

Clearly, there may be serious evidentiary issues with respect to Facebook comments. However, if it can be proven that a particular employee made the comments, *Chatham-Kent* and *Alberta* indicate that he or she may be subject to discipline.

In *Chatham-Kent* and *Alberta*, the Arbitrators placed great weight on the fact that these blog posts were available to anyone on the Internet.

⁸ [2009] A.J. No. 368.

⁹ [2009] A.G.A.A. No. 46.

Facebook's privacy settings tend to limit this and may remove this as an aggravating factor.

In the above cases, the inappropriate postings were done outside of working hours and were considered off-duty misconduct. Excessive use of Facebook during working hours may amount to time theft, just like excessive use of the Internet for any other purpose. Although there appear to be no reported decisions regarding excessive use of Facebook at work, the same principles would apply.

In *Ontario Power Generation and Society of Energy Professionals*,¹⁰ the grievor was dismissed for using company time and equipment for non-work purposes, including importing exotic dancers from Eastern Europe. The Employer investigated his use of the telephone, email and Internet for non-work purposes after a complaint from an employee that the grievor was frequently on the phone speaking a foreign language. The investigation revealed the grievor had 155 emails related to the exotic dancer business, plus 212 emails related to his hobby of collecting toy cars. In one year, he received approximately 635 calls and made approximately 437 calls related to the exotic dancer business, for a total of 48 hours of conversation. The grievor also made about 650 calls to his wife. The grievor also spent time searching the Internet in relation to the exotic dancer business. The grievor testified that he had performed non-work related tasks during his breaks and lunch, but evidence regarding the extent and timing of the calls and emails did not support this assertion.

Employees, including the grievor, had been trained in the company's Code of Conduct, which provided that there was zero tolerance for misuse of company resources. Arbitrator Nairn found that the Employer's expectations were clear.

Arbitrator Nairn did not accept that the grievor performed these non-work related activities mostly on breaks or that his use of company assets and time for non-work purposes fell within a reasonable range.

Arbitrator Nairn stated at page 153:

¹⁰ 141 L.A.C. (4th) 120 (Nairn).

This conduct is extremely serious. It goes beyond the kind of activity referred to in the case law cited by the union. It is a breach of the most fundamental employment obligation. Any employer is entitled to expect that an employee understands that when you're at work, being paid by the employer, you are to perform the work for that employer.

The Society also argued that the grievor's judgment and awareness were impaired by disability. Arbitrator Nairn found that the medical evidence fell short of establishing that the grievor was unable to appreciate that what he was doing was wrong.

Accordingly, Arbitrator Nairn was not persuaded that the grievor's conduct would improve if he were reinstated. Under the circumstances, the discharge was upheld.

Given the popularity of Facebook, one could imagine a case where an employee spent similar amounts of time communicating for non-work purposes on Facebook, rather than via phone and email.

What Proactive Steps Should Employers be Taking?

Some employers are blocking Facebook and other social networking sites from the workplace on the basis that there is no work-related purpose for accessing these sites. Other employers are allowing employees to access Facebook during breaks, or at other times, provided it does not interfere with their work. Some employers have embraced on-line social networking and have used it to their advantage by setting up their own company networks, allowing employees to build up relationships and exchange ideas and information across the globe. In turn, employees often become great brand ambassadors for the organization.

Regardless of whether on-line social networking is banned or embraced in the workplace, employers are well advised to consider drafting or amending policies to deal with on-line social networking.

Among other concerns, the use of social networking sites in the workplace raises privacy implications for both employees and employers. As a best practice and also to comply with any applicable privacy

legislation, employers should develop policies on the appropriate use of social networking sites in the workplace.

Among other things, a policy should address the following:

- Advise employees that the computer network is the employer's property and may be used only for legitimate business purposes;
- Advise employees whether minor personal use, including access to social networking sites, is permitted so long as it does not interfere with their employment obligations;
- Advise employees of prohibited uses of social networking media, including posting confidential information, defaming other employees or the employer, and excessive use (if any use is permitted);
- Advise employees not to post material protected under copyright law or make that material available to others for copying;
- Advise employees that the disclosure of confidential information regarding clients, other employees or the company is prohibited, except where specifically authorized;
- Advise employees that they should have no expectation of privacy in their use of the company's systems, including the Internet;
- Advise employees that they must comply with all laws and company policies in their use of the company's systems;
- Outline the potential risks and consequences of misuse;
- Address any workplace privacy issues, including whether there is any employer monitoring;
- Obtain from each employee a signed acknowledgment that the employee is aware of and understands the company's policy;
- Advise employees that any employee passwords for company systems do not guarantee privacy and may be overridden by the company;

- Carefully control the use and access to information obtained through monitoring;
- Prohibit the installation of software except by company IT personnel;
- Advise employees of penalties if the policy is violated, up to and including termination of employment.

The clear policy prohibiting inappropriate use of company assets was one of the key considerations in upholding the discharge in *Ontario Power Generation*, described above.

CONCLUSION

The development of on-line social networking sites such as Facebook and MySpace have allowed millions of people around the world to communicate quickly and inexpensively.

However, social networking sites are fraught with potential pitfalls. The problems associated with social networking in the workplace include loss of productivity and time theft, breach of confidentiality, potential defamatory content, harassment or discrimination issues, threats to the computer system security, and negative comments about coworkers and managers which lead to poor morale.

Social networking websites allow for the creation of on-line communities that allow individuals to create and share content instantly with others who have the same interests. Some network communities have been created across professional or occupational lines. In some sectors, this sharing of information and ideas leads to the risk that confidential information may be provided to others.

For employers, the ability to make use of any information obtained from these social networking sites may be problematic. In a legal proceeding, evidence from a social networking site would be subject to the same rules of admissibility and relevance as other evidence. Further, there may be other complicating issues related to how the information was obtained.

Some recent court decisions in personal injury cases have suggested that postings on Facebook may be relevant evidence and that plaintiffs may

be required to disclose information from “private” Facebook pages during the litigation process.¹¹ These precedents may be equally applicable in the employment context; for instance, if an employee alleged that he was too disabled to work, but his Facebook page showed pictures of him waterskiing or renovating his house.

When the employee is not accessing social networking sites on company assets or time, the employer would have to show a clear nexus between the information and the workplace or the individual’s employment duties prior to relying upon it to take any action against the employee.

The proactive employer may seek to embrace on-line social networking as an opportunity to enhance its business. Employers should seek to minimize the potential damage inherent in these social networking websites by communicating clear expectations to employees, as they relate to Internet conduct. This should be accompanied by a computer security policy, a communication policy, a privacy policy and/or a harassment policy which clearly set out acceptable uses of social networking sites. Further, employees should be made aware that the employer takes these policies seriously and will deal with breaches of these policies in an appropriate fashion, up to and including discharge where the circumstances warrant it.

¹¹ *Schuster v. Royal & Sun Alliance Insurance Co. of Canada*, [2009] O.J. No. 4518; *Leduc v. Roman*, [2009] O.J. No. 681.