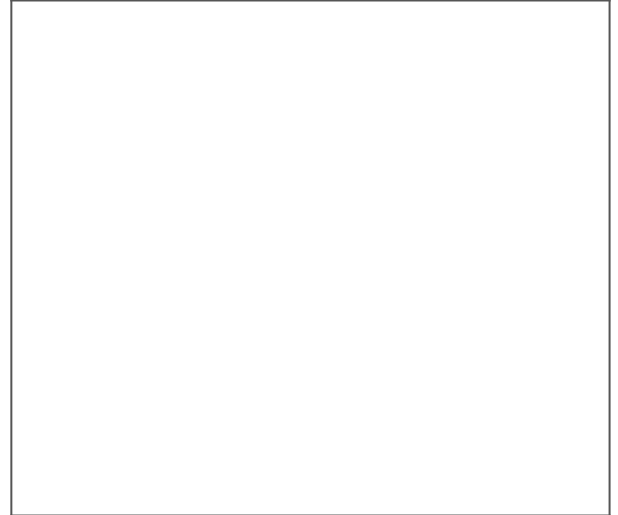


Be Careful Who Your “Friends” Are

published 03/01/2011

What You Post On Facebook Could Lead To Discipline At Work

I will admit it. Everyday, along with tens of millions of others, I log onto my Facebook account to peruse the status updates of my 100 or so “friends” - a group made up of family, close friends, co-workers, and a random assortment of people I went to high school with, sat beside on the bus, or met in an elevator once. Recently, I noticed the status of one “friend” who had had a bad day at work and was clearly ready to vent about it. “Wait,” I told him. “I wouldn’t be too quick to post anything about work if I were you.” “Why?” he asked. “My page is private, and what does it matter what I do on my own time anyway?”



From a legal perspective, these same questions have recently come into the limelight, as courts and labour arbitrators are now being called upon to decide whether employees can be disciplined - or even terminated - for making employment-related comments on social networking sites. The more that social networking becomes a part of everyday life - whether by way of Facebook, personal blogs, LinkedIn or Twitter (there may be others, but I suspect that even I am too old to keep up) - the more that these types of questions will need to be addressed.

Freedom of Speech vs. Duty of Fidelity

While employees do enjoy the same right to freedom of speech that every Canadian citizen does, that right must be balanced with the duty of fidelity an employee owes to his or her employer.

As one Alberta arbitrator has recognized, employees do have a right to create social networking sites and are indeed entitled to post their opinions about the people they work with - but publicly displaying those opinions may have consequences within their employment relations. Where those publicly-made comments verge on expressing contempt for management, ridiculing co-workers or slamming administrative processes or management

decisions, they may be cause for discipline, or even termination.

The Public Nature of the Internet

Courts and arbitrators have recently found that an individual can have no “reasonable expectation of privacy” on Facebook, even if they use special privacy settings. But even if your Facebook page is set to some air-tight privacy setting, employees should be mindful of who their “friends” are. If your group of Facebook friends includes co-workers - or worse, your boss - employment-related comments that you post can likely be treated by your employer as if you made the comments at work.

Not only is communication over Facebook considered not to be private, the unique and extraordinary nature of communication over the Internet compared to more traditional print media has been acknowledged by the courts: it is instantaneous, seamless, interactive, blunt, borderless, far-reaching, and accessible. It therefore has greater potential to damage the reputation of individuals and corporations.

Off-Duty Conduct

Generally, employers do not have authority over their employees’ conduct outside of working hours, unless the off-duty conduct affects the employers’ legitimate business interests. In other words, employees may be held accountable to their employers in situations where their off-duty conduct:

- Harms the employer’s reputation or products;
- Prevents the employee from performing his or her duties satisfactorily;
- Makes other employees refuse, or become reluctant or unable to work with that employee; or
- Upsets the efficiency of the employer’s operations.

Therefore, if a posting on a social networking site could fall into one of those categories, the employee may not be immune to discipline from his or her employer.

Revealing Confidential Information

Revealing or posting confidential information about your employer - or its customers - on a social networking site may also be grounds for discipline or termination. Not only might this result in a violation of the implicit trust relationship you share with your employer, it could amount to a violation of specific terms of the employment contract if, for example, you have signed a confidentiality agreement.

Some Recent Cases

In one recent British Columbia case (2010), an employee of an auto detailing shop made a number of angry, work-related comments on his Facebook page, including predicting that there might be an “accident” at work in the near future, making derogatory comments about his supervisors, and generally referring to the company as “crooks” who were out to rip people off. The employee’s group of Facebook “friends” included some of his co-workers. One co-worker, uncomfortable with the nature of the comments, reported them to the employer, who then terminated the employee. The arbitrator upheld the termination, determining that an individual can have no serious expectation of privacy when publishing comments on Facebook, that the comments made about his supervisors were offensive and egregious, and that the comments were damaging to the employer’s business.

In another recent case (2010), the employee was a pilot who posted a list of items on his Facebook page under the heading “you know you fly in the north, when” His employer was a company that flew up north and whose client base was made up mostly of clients who lived in the north. The comments showed a lack of respect for the company’s clients, besmirched their dignity, and did not reflect company values. The arbitrator noted that it was not unreasonable to assume that his comments would have broad exposure to the public domain, and that posting the comments on the Internet created potential harm to the company’s reputation. In the circumstances, the arbitrator imposed a 4 month suspension.

Conclusion

From a legal perspective, one can have little to no expectation of privacy for comments posted on social networking sites. To make matters worse, if those comments are work-related, employers may have grounds for disciplining - or in egregious cases, terminating - the employee. Of course, each case will depend on the nature and content of the comments, whether they are damaging to the employer’s business, and the individual circumstances of the case. Employees who have a bad day at work might therefore be best to take a breather and think twice before taking to Facebook.

Please contact **businessdevdept@tdslaw.com** to connect with a lawyer on this topic.

DISCLAIMER: *This article is presented for informational purposes only. The content does not constitute legal advice or solicitation and does not create a solicitor client relationship. The views expressed are solely the authors' and should not be attributed to any other party, including Thompson Dorfman Sweatman LLP (TDS), its affiliate companies or its clients. The authors make no guarantees regarding the accuracy or adequacy of the information contained herein or linked to via this article. The authors are not able to provide free legal advice. If you are seeking advice on specific matters, please contact Keith LaBossiere, CEO & Managing Partner at kdl@tdslaw.com, or 204.934.2587. Please be aware that any unsolicited information sent to the author(s) cannot be considered to be solicitor-client privileged.*

While care is taken to ensure the accuracy for the purposes stated, before relying upon these articles, you should seek and be guided by legal advice based on your specific circumstances. We would be pleased to provide you with our assistance on any of the issues raised in these articles.