Loyalty, Privacy, And Free Expression In The Digital Workplace

A growing number of employees are getting “dooced” at work these days. Doocing is defined by the Urban Dictionary as “the act of getting fired for something that you have written on the Web”. It originates from the fierce debate about privacy issues that occurred in 2002 when an American blogger was fired from her job as a web-designer and graphic artist because she had written satirical accounts of her experiences at work on her personal blog called *dooce.com*. More than 10 years later, employers are still grappling with the extent to which they can protect their business by monitoring and controlling what employees write on personal blogs or other social media.

Science-fiction has caught up with reality – today’s workplace is almost entirely digital. From the beginning of time until 2003, approximately 5 exabytes of information have been created (1 exabyte is roughly 10^{18} bytes). Since 2003, 5 exabytes of information are being created every 2 days. Those who previously may have been anti-social or inhibited are today able to express themselves freely through the relative anonymity that the internet provides. With this unimaginable volume of information circulating on a daily basis, how far can employers go in dictating do’s and don’ts regarding the information that employees are sharing?

When it comes to the workplace, certain obligations and duties are fundamental. In almost all jurisdictions, the duty of loyalty goes to the heart of the employment relationship. An employee’s duty to be loyal means that he or she must at all times act faithfully, honestly and in such a way that the employee’s conduct does not reflect poorly on the employer and is not contrary to the employer’s interests. Similarly, an employee must not, either deliberately or negligently, behave in a manner that will tarnish the employer’s reputation nor should confidential information be disclosed without the employer’s authorization.

Most employees post on social media from home. Can an employee’s off-duty web postings be scrutinized by his employer? Recall the case of the Delta Airlines’ flight attendant who was fired because she posted pictures of herself in a Delta Airlines uniform on her personal blog, which her employer considered to be inappropriate. More recently in Canada, Jeppe Hansen, an aspiring ballet star who beat out thousands of applicants for the job, was fired from the prestigious Royal Winnipeg Ballet after his employer discovered that he appeared in gay pornographic videos. The case has not yet made its way to the courts, but it is difficult to see what the connection is between Mr. Hansen’s ability to dance in the ballet while

performing in other art forms.

As a general rule, what an employee does outside of work is his business, and the employer's rights to address or otherwise control an employee's off-duty conduct is exceptional and limited to certain situations. However, technology has blurred the line between work life and private life. Technology has erased our social boundaries to the point that for some, it erodes our sense of civility (witness the global phenomenon of cyber bullying as a social plague). When Mark Zuckerberg created Facebook, he did so as David Kirkpatrick explains in his book *The Facebook Effect*, "on a radical social premise – that an inevitable enveloping transparency will overtake modern life… Facebook is causing a mass resetting of the boundaries of personal intimacy". We now live in a pervasive culture of sharing personal information, thoughts and feelings in real-time, through Facebook and other social media.

The problem with social media is that it is not always clear when the message is intended to be public or private. Employees are expressing themselves more freely but not always realizing the impact that their words might have on their employer or on their colleagues at work. The reflection that might otherwise be required by employees making statements regarding work or their employer, and the consequences of these actions, does not always take place when employees use social media. Younger persons in particular, regard Facebook as analogous to sharing a beer with colleagues and friends to confide details about their jobs. As one employee stated in her closing statement at her dismissal hearing, "How could I have assumed that a release on a Facebook page would be grounds for dismissal?" (*Groves* v. *Cargojet Holdings Ltd.* [2011] C.L.A.D. No. 257.)

For many employees, it comes down to the right to free speech. For example, in the law suit recently instituted by Porter Airlines against the *Canadian Office and Professional Employees Union*, Porter Airlines claims that comments made on Twitter and a video showing a false crash of a Porter plane and a false Porter advertisement have caused Porter to suffer damages to its reputation and business. The union responded by invoking its constitutionally protected right to free speech and its right to offer its version of the way employees see things.

While the right to free speech is preserved in the ***United Nation's Universal Declaration of Human Rights*** and is granted formal recognition by the laws of most nations, this right is not unfettered. Even in liberal democracies, like Canada and the U.S.A., there is some censorship on issues such as hate speech, obscenity and defamation.

Similarly, in the workplace, employers are entitled to protect their business from the information which employees can access and release if it is connected to or has an impact on the workplace. The situation becomes more complicated when employers allow the use of company-owned equipment for personal purposes; others allow employees to use their own devices for work-related matters, and some do both.

In the U.S., it is generally thought that there is no expectation of privacy on company-owned equipment. In Canada, the Supreme Court has recently held that employees may, in certain situations, have a reasonable expectation of privacy that extends to the contents of their work computer. In the case of ***R. v. Cole***, the fact that the laptop was owned by the employer and had been issued to Cole for employment related purposes, did not prevent the court from holding that Cole had a reasonable expectation of privacy over the personal information stored in the laptop's hard drive. In that case, the court noted that employees who had been given a laptop enjoyed exclusive possession of the device, used a password to restrict others' access and were expressly permitted to use the laptop for their own personal use. The

court also noted that there was no clear privacy policy that applied to the employees' laptops, nor was there any evidence to indicate that the employees' laptops were subject to any kind of monitoring program.

We know that globally, privacy protection has grown immensely in recent years. The Europeans treat privacy as a fundamental right and it is formally recognized as an aspect of human dignity. The American development of privacy law is much more focused on property rights and managing the reasonable expectations of employees. Canada falls somewhere in the middle and there are a number of laws both at the federal and provincial levels which protect personal information and privacy in the workplace.

Some employers try to control negative postings by asking employees for the passwords to their social media accounts as a condition of employment at hiring. This practice is unlikely to survive for very long. In an attempt to counteract this encroachment of privacy by employers, governments have enacted laws which show a growing momentum for social media privacy. For example, in May 2013, Oregon was the 10th state in the U.S.A. to enact a law prohibiting employers from accessing employees' private social media sites. This new law also makes it unlawful for employers to compel employees or applicants for employment to provide access to their personal protected social media accounts.

Employees are generally not prepared to tolerate encroachment on privacy. However, this, too, depends on cultural differences. In Germany for example, a member of the German Green Party's executive committee (Malte Spitz), has expressed the view that whenever the government begins to infringe on individual freedoms in Germany, society stands up. According to Mr. Spitz, given their history, Germans are not willing to trade in their liberty for potentially better security. Germans have experienced firsthand what happens when the government knows too much about someone and they have not forgotten what happens when secret police or intelligence agencies disregard privacy.

In contradistinction, a recent poll by the PEW Research Center for the People & the Press reported that a majority of Americans thought it was acceptable for the National Security Agency to track Americans' phone activities to investigate terrorism. This has led some commentators to conclude that Americans have less respect for their own privacy than they should. Some have even suggested that "privacy is dead" (see article by Karen Kranson and Marisa Warren in ABA Labour and Employment Law review, fall 2012) because "anyone's personal information on a social networking website is only as secure as his stupidest most electronically promiscuous friend, who may, either intentionally or inadvertently, expose others' private information to a much larger than intended audience."

Where does this leave employers and their right to protect their business by regulating employees' use of social media? It is fair to say that although technology has changed the playing field, the principles with respect to off-duty conduct in Canada have not changed. As long as employees must remain subordinate and loyal to their employer, there are limits to what they can express, even on their own devices and even if they are off-duty.

For example, in the case of *Wasaya Airways LP v. Air Line Pilots Association International* (Wyndels Grievance), a pilot's employment was terminated after he posted racist comments on Facebook directed at the airline's First Nations customers. Following his termination, the pilot removed the Facebook comments and apologized to his employer. Although the arbitrator found that the pilot's comments had the potential for a significant detrimental effect on the airline's reputation and ability to efficiently conduct its business, he did not hold entirely on behalf of the employer. The arbitrator noted that the employer had no formal social media

policy in place, and that the dismissal was unfair because a co-worker who had responded to the pilot's comments on Facebook only received a one-day suspension. The arbitrator held that the pilot's Facebook comments had rendered the employment relationship untenable, but nonetheless granted the pilot compensation following the dismissal.

In an earlier case, *Chatham-Kent (municipality) v. CAW Canada Local 127*, a personal caregiver in a nursing home created a personal website where she posted pictures and derogatory comments about residents in the nursing home and fellow employees. At hiring, the employee had signed a confidentiality agreement which was reviewed with her annually during training sessions. When the employer discovered the website, the employee was dismissed for breach of the confidentiality agreement, and insubordination. Despite the fact that the employee had been employed for 8 years and had apologized for her behavior, the dismissal was upheld.

Similarly, in the case of *Alberta v. Alberta Union of Provincial Employees (2011), 213 LAC 4th 299*, a child care professional was dismissed for posting negative and hurtful comments about her co-workers and employer, as well as disclosing confidential information and internal emails on her personal blog. The dismissal was upheld on the basis that the worker did not apologize when confronted initially; she defended her freedom of expression and refused to take down the offending posts. The court held that the employee never fully appreciated the impact of her posts on the employer and, as such, the employment relationship was irrevocably destroyed once the offensive blog was discovered.

In another case, ***Lougheed Imports Ltd. (West Coast Mazda) v. United Food and Commercial Workers International Union, Local 1518***, employees who were vocal union supporters and organizers were dismissed for posting offensive defamatory comments about the automobile garage where they worked on Facebook, including comments such as " west coast detail and accessory is a f***in joke….dont spend your money there as they are f***in crooks and are out to hose you… they're a bunch of greedy …… low life scumbags… wanna know how I really feel??????…". These and other similar Facebook comments were made to almost 377 people, including other employees. Given the damaging impact on the employer's business which these comments had, the dismissal of the complainants was upheld, even though the comments were made off-site during non-work hours.

In the *Groves* case (cited above), the employee was dismissed after having posted comments on Facebook threatening to kick her supervisor in the genitals and spit in his face and insulting the company and her workplace. The arbitrator found this to be offensive, disloyal and insubordinate, thus giving the employer just cause to discipline the employee, but not to the point of dismissal. Overall, the arbitrator found that the comments (three in total) were not materially connected to the workplace and that a reasonable person would conclude that the postings would have only a negligible effect on the ability of the company to maintain its reputation and to function efficiently.

In a more recent case, (*Canada Post Corp. v. Canadian Union of Postal Workers, [2012] C.L.A.D. No. 116*), a postal clerk made several Facebook postings that contained very abusive and threatening language towards her supervisors. Two of the targeted supervisors became very distraught and required time-off work; one of them actually needed medical attention. The court found that the postings were extremely offensive, to the point of bullying and were destructive of the workplace relationship. The employee did not apologize and showed little remorse. Her dismissal was upheld notwithstanding her age (approximately 50 years old) and more than 30 years of service.

Conclusion

In order for improper postings on the internet to constitute grounds for discipline or discharge in Canada, they must have a real and material connection to the workplace. The following factors are to be considered:

1. Has the employer's reputation been harmed?
2. Do the postings render the employee unable to properly perform his duties?
3. Do the postings lead to the refusal or reluctance of others to work with the employee who posted?
4. Do the postings make it difficult for the Company to efficiently manage its work or direct its staff?

As to whether dismissal or some other disciplinary measure is appropriate, all relevant circumstances must be considered, including:

1. length of service
2. nature of the position
3. prior disciplinary record
4. whether the employee is remorseful and apologetic
5. whether the employer has a policy on misuse of social media

Employers have to manage the delicate balance between protecting their business and respecting the rights of employees to privacy and free speech. A well-drafted and well-communicated policy which clearly identifies acceptable workplace practices and use of company equipment as well as personal equipment, both at work and off work, cannot be overemphasized.

Secondly, the workplace needs to adapt to the reality of today's digital world and embrace social media. Social media can assist in recruiting and marketing, but also in public relations. In response to an unauthorized live tweet from HMV's twitter account by a disgruntled employee who was in the process of being dismissed, the Company simply responded with a tweet that "one of our departing colleagues was understandably upset" and thanked customers for their "continued support".

Lastly, where the web postings are harmful to the employer's reputation or business interests, discipline should be imposed as a deterrent and message to other employees who also frequently use social media.

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