

Managing Social Media:



Responsible Use at Work

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Outline

1. Current News
2. The Dark Side of Social Media
3. Laying a foundation for responsible social media use
4. Social Media & Recruitment
5. Managing performance relating to social media use (and mis-use)
6. Recent Case Law

Current Events



Social Media Sites

Social
Media is
prevalent
and
pervasive
today:

- Facebook
- Twitter
- LinkedIn
- FourSquare
- Pinterest
- Instagram
- Tumblr
- Google+
- YouTube



Current Events

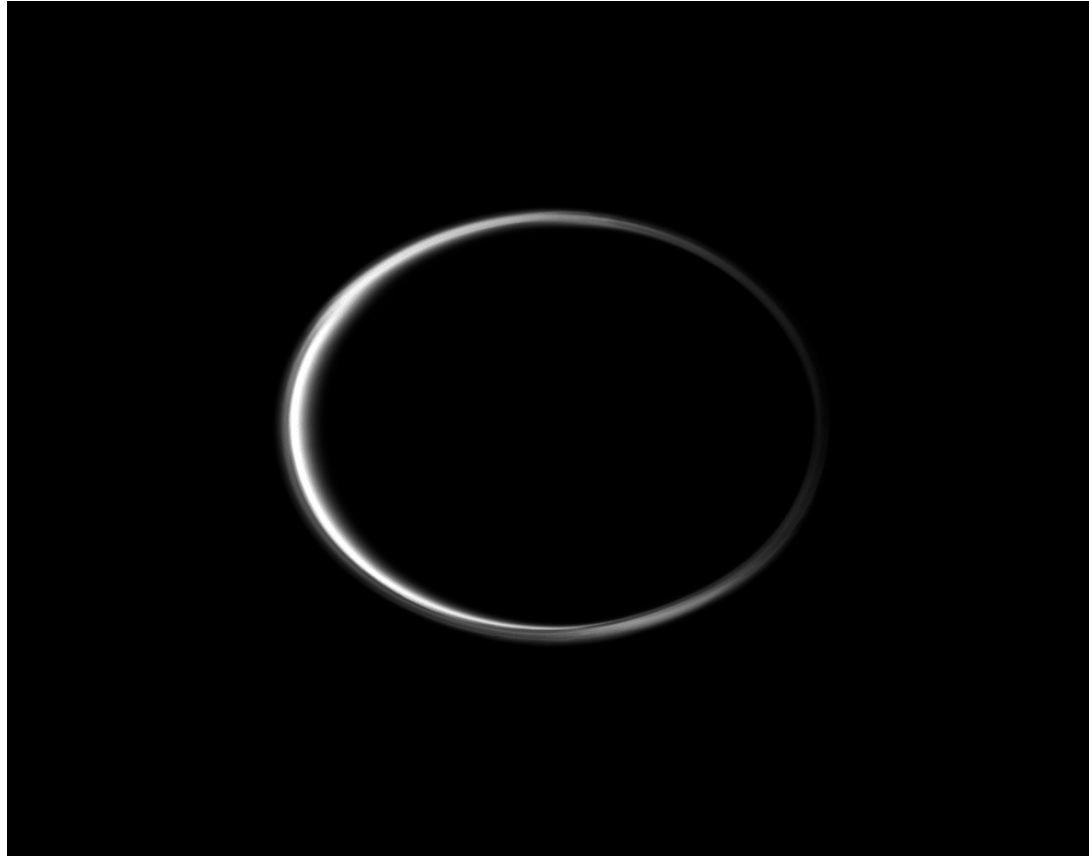
- **Canada**
 - Hydro One Employee
 - St. Lawrence College teacher
 - Calgary Taxi Guy
- **United States – IAC Employee**
- **United Kingdom – HSBC Legal Department**



Current Events

- **Australia – SBS Network Employee**
- **FIFA Communications Director Incident (June 2015)**
- **Europe – Tim Hunt, Nobel Prize Winning Employee**

The Dark Side of Social Media



The Dark Side of Social Media

- Proliferation of social media sites create a minefield for potential damage to an employer's reputation
- Enables (or sometimes encourages) rapid communicates without much forethought
- Once published, they live on(line) forever

The Dark Side of Social Media

- Potential Issues:
 - Cyber Bullying
 - Criminal Harassment
 - Defamation
 - Data Protection
 - Privacy Issues
 - Liability for Employers

Laying the Foundation



Laying the Foundation

- Best practices for developing a social media policy
- Integrating social media with other policies

Creating a Social Media Policy

- Serves to remind employees that *conduct which negatively reflects on the employer* – whether on or off-duty – constitutes grounds for discipline
- Highlights that the more visible the employee is online, the more the employee may be seen to be connected to the employer

Creating a Social Media Policy

- Key Areas to Cover:
 1. Be mindful of how conduct may impact the employer's business, employees, products or services
 2. Employee use of *employer's* social media accounts
 3. Employee use of *personal* social media in ways which could negatively affect the employer
 4. Discipline clause – communicate consequences

Creating a Social Media Policy



- Key Areas to Cover:
 5. Interactions between the Social Media policy and other applicable policies
 6. Include examples of good and bad use
 7. Confidentiality and leaks of confidential information
 8. Right to monitor social media use on employer owned technology and networks

Creating a Social Media Policy

- Practical Points:
 - Carefully draft with business realities in mind
 - Incorporate them by reference into employment contracts
 - Train Employees on them
 - Provide time for discussion and questions
 - Enforce them consistently
 - Walk the Talk: If you don't intend to enforce something, best to leave it out of the policy
 - Review them annually for potential updates

Integration

- Stand-alone policy vs. integrated policy
- Check consistency with:
 - Code of Conduct
 - Respectful Workplace Policy
 - Bullying and Harassment Policy
 - Internet Use Policy
 - Privacy Policy
 - Confidentiality Policy

Social Media & Recruitment

The Social Media Recruiter



Caution

- Must be careful when using social media to recruit, even with consent
 1. Risk of privacy complaint
 - If legislation isn't followed
 2. Risk of human rights complaint
 - Highly personal information containing details often protected under the *Human Rights Code*

Privacy Complaint

- Founded on breach of:
 - *Personal Information Protection and Electronic Documents Act* (Federal)[**PIPEDA**]
 - *Personal Information Protection Act* (BC)[**PIPA**]
- Both *PIPEDA* and *PIPA* require employers to obtain consent and identify the purpose for which “personal information” is collected, used or disclosed.

Privacy Complaint

- *PIPA* s. 13 contains an exception for employers collecting “employee personal information” without first obtaining consent from a candidate if:
 - a) the information is *collected, used or disclosed solely for the purposes of establishing (or managing or terminating) an employment relationship*;
 - b) it is *reasonable* to collect, use or disclose that information for the purposes of establishing an employment relationship; and
 - c) *prior notice is given to the person to explain the purpose of collecting, using or disclosing that information (i.e. to assess qualifications and suitability for the position)*

Privacy Complaint

- Key:
 - consent may be required (depending on the legislation) – ideal to have it
 - prior notification typically needs to be given before collection, use, disclosure
 - collection, use, disclosure must be...
 - *Reasonable!*
 - Obligation to ensure information collected is *accurate*

Privacy Complaint

- Further caution on the “accuracy” requirement - information on social media is often:
 - inaccurate;
 - outdated;
 - about third parties who have not given consent;
and
 - misrepresented or misidentified.

Human Rights Complaint

- Social Media often discloses a much broader array of information about a prospective employee than is needed, for example:
 - Religious & political beliefs
 - Sexual Orientation
 - Family Status
 - Disability

Human Rights Complaint

- *Human Rights Code:*
Protected Grounds
 - Race
 - Colour
 - Ancestry
 - Place of Origin
 - Political Belief
 - Religion
 - Marital Status
 - Family Status
 - Physical & Mental Disability
 - Sex
 - Sexual Orientation
 - Age

When recruiting

- Consider carefully whether social media checks need to be performed for the role
- If so:
 - determine what is “reasonable” for the job
 - obtain consent and explain the purpose for the collection
 - consider having it conducted by an external party who can screen the information that the employer receives
- Do not:
 - pretend to “friend” the employee to gain access surreptitiously
 - ask the candidate to surrender their passwords (only in very rare circumstances could this be justified)

Managing performance relating to mis-use of Social Media



Managing performance relating to mis-use of Social Media

- Employees can get in trouble by:
 - using their employers' social media account inappropriately; or
 - using their personal social media account in a way that reflects negatively on their employer.
 - The latter is where off-duty misconduct tends to appear

Managing performance relating to mis-use of Social Media

- If a strong foundation with a solid social media plan exists, it is much easier to manage performance
- Identify the offending behaviour
- Explain how it is inappropriate, breaches policy, etc.
- Provide a copy of the social media policy
- Have employee review and sign it (again)

Managing performance relating to mis-use of Social Media

- Proceed on a progressive discipline basis
- If in doubt, seek legal advice proactively
- Very serious misconduct may warrant just cause dismissal

Key Considerations

- Is the employee's position one which affects the employer's reputation?
- Is the public aware of where the employee works?

Just Cause

- Is the employee's conduct incompatible with the duties that go to the root of the employment relationship?
- Courts have recognized gross misconduct may support immediate termination of employment
- Challenging for employers to determine when the misconduct, in fact, justifies summary dismissal

McKinley v. BC Tel

- Contextual approach to determine whether misconduct constitutes just cause
- It is a question of proportionality
- There needs to be a balance between the severity of the employee misconduct and the sanction or discipline imposed by the employer

Recent Case Law





Labour Arbitrations

- Leading Decision:
 - *Re Lougheed Imports Ltd. (cob West Coast Mazda) 2010*
- Recent (companion) Decisions
 - *The City of Toronto and The Toronto Professional Fire Fighters' Association, Local 3888 (Bowman) (2014)*
 - *The City of Toronto and The Toronto Professional Fire Fighters' Association, Local 3888 (Edwards) (2014)*

Factors in Labour Arbitrations

1. Seriousness of the misconduct
2. Adverse effect on employment relationship
3. Prejudicial to employer or the employee's ability to properly carry out job functions
4. Harm to employer's reputation or product
5. Effect of off-duty conduct on the ability or willingness of other employees to work with the offender?

Factors in Labour Arbitrations

6. Repeated or isolated activity
7. Intention of harming employer
8. Was the statement to persons other than co-workers?
9. Were the statements made for the purpose of organizing other employees?

Kim v. International Triathlon Union, 2014 BCSC 2151

- First reported court decision relating to discipline and dismissal of an employee for social media (mis)use

Kim v. International Triathlon Union, 2014 BCSC 2151

- **Facts:**

- Kim = ITU's Senior Manager of Communications
- Duties included writing press releases, athlete biographies, web stories, the newsletters, working with the media, and being involved in ITU's social media
- Made various disparaging posts about ITU members, employees, and events on her personal Twitter, Facebook and blog

Kim v. International Triathlon Union, 2014 BCSC 2151

- **Facts:**

- Posts included a serious blog post titled “Taking Sh*t” in which Kim compared interactions with her boss to those she had during her life with an abusive parent
- Tweets referred to Board members being hungover after a party and the company using “propaganda” at an event

Kim v. International Triathlon Union, 2014 BCSC 2151

- **Facts:**
 - ITU dismissed Kim on the basis of “cumulative cause” as a result of all of the posts
 - Kim sued for wrongful dismissal

Kim v. International Triathlon Union, 2014 BCSC 2151

- **Issue:**
 - Did Kim’s conduct warrant summary dismissal for just cause?

- **Decision:**
 - Not in this case.

Kim v. International Triathlon Union, 2014 BCSC 2151

- **Decision:**

- ITU had no social media policy
- ITU was unable to argue cumulative cause for the total of each post combined as:
 - ITU was aware of the posts over time and did nothing to stop her
 - ITU never warned her that her conduct was improper
 - ITU never provided her with a reasonable opportunity to improve

QUESTIONS?

Thank you for attending!

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