



Social Networking Liabilities

Risks and Rights of Employees and Employers

Even if your company doesn't have an online presence, you can bet your employees do. What happens when the virtual world impacts the real one, and how is labour and employment law dealing with those impacts? WeirFoulds LLP partner Peter Biro tests your knowledge on social media and the law.

1 You are corporate counsel to a Canadian company. Your human resources manager advises that some of the company's employees have posted various "objectionable" statements on their respective Facebook walls — a public page. She then says: "Unfortunately, we don't have the right to discipline these employees because all of the postings were made from the employees' home computers outside of working hours."

- a) Right
- b) Wrong

2 You are general counsel to a Canadian company. At the company's Christmas party, your chief financial officer, who has had a few too many celebratory drinks, tells you proudly that he has created an online blog on which he has said some very unflattering things about co-workers and the company. He assures you that it is all very humorous and that he has cleverly used pseudonyms so that neither the co-workers nor the company are expressly identified. He offers to show you the blog by giving you a password that "grants you access" to the blog. Upon reading the blog, you determine that the comments amount to insubordination and that the "fictitious" individuals and company could easily be ascertained by anyone who knows the CFO or the company.

- a) You should recommend termination for cause.
- b) You cannot terminate the employee because he did not expressly identify the co-workers or the company.
- c) You cannot terminate the employee because he confided in you and granted you access to the blog.
- d) None of the above.

3 As in-house counsel to a Canadian company, you receive a complaint that derogatory statements about several of your company's employees have been posted on the MySpace wall of a co-worker. You determine the co-worker ought to be disciplined, as the comments have elicited complaints of harassment and intimidation that are permeating the workplace. When you confront the co-worker with your findings, he professes his innocence and says that he did not post those derogatory comments on his MySpace wall. Once you investigate further, you accept his version of events, but you terminate his employment for cause nonetheless because he should be held responsible for all the postings on his social networking site.

- a) Right
- b) Wrong

4 Can employers discipline employees for online activity during regular working hours even if such activity, including postings on social networking sites and blogs, does not pertain to the workplace or the company and does not in any way harm the employer or co-workers or are employees protected by a reasonable expectation of privacy with respect to such activity?

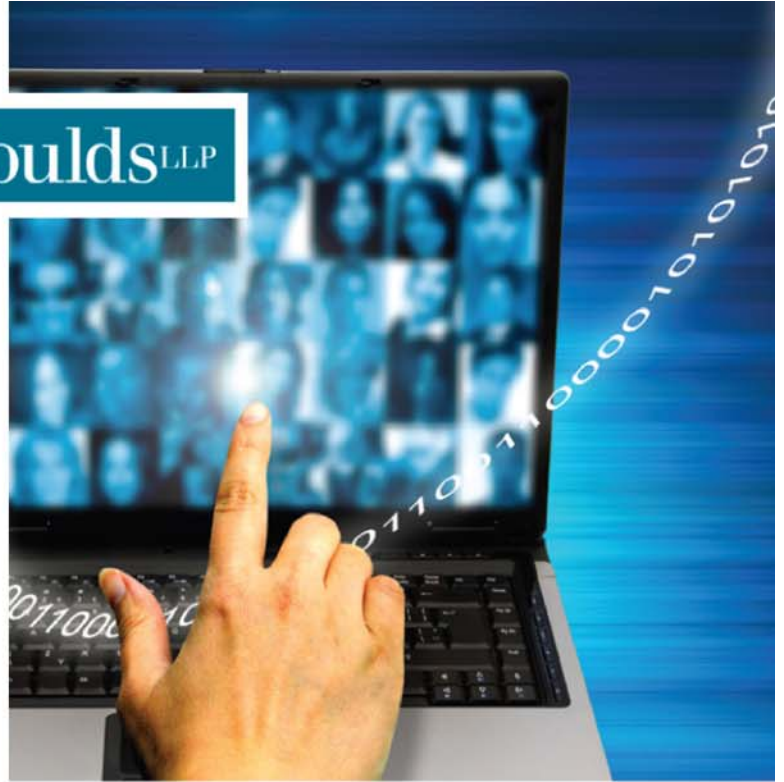
- a) Employers can discipline employees in such circumstances.
- b) Employers cannot discipline employees in such circumstances.
- c) It depends . . .

QUIZ ANSWERS

1 **WRONG.** The employer has an interest in any activity of an employee, which might undermine and irreparably damage the employment relationship, regardless of whether such activity is undertaken during working hours or using property or technology of the employer. The extent of the employer's interest and of its ability to discipline an employee for his or her online activity will depend on whether the online postings amount to insubordination, constitute harassment, cause injury to reputation, or breach the company's confidence, and also on the extent to which such postings are publicly accessible. See the British Columbia Labour Relations Board decision in *EV Logistics v. Retail Wholesale Union, Local 580*.

2 **(D).** You need to investigate the matter thoroughly before recommending any disciplinary action or taking any position. Assuming the blog contained defamatory statements, insults to co-workers, or would otherwise harm the interests of the company, you must first determine whether the CFO took steps to restrict access to the blog and ensure that it was a private site or whether it was accessible to others on the web. This will be relevant both to the matter of the CFO's intentions and to the potential for and extent of harm to the company and its employees. For reference see the Ontario arbitration award in *Chatham-Kent (Municipality) v. CAW - Canada, Local 127*.

3 **WRONG.** If the co-worker did not post the offensive comments and did not respond to them, and unless there is positive evidence that he was somehow complicit in their posting or promulgation, there will likely be no grounds for termination or other discipline as there was no evidence that the co-worker was guilty of harassment. Caution, however, that these cases are always very fact-specific. See the Alberta Arbitration Board ruling *Alberta Distillers Ltd. v. U.F.C.W., Local 1118*.



4 **(C).** It depends on whether the employer has curtailed the employees' reasonable expectation of privacy by introducing and implementing a policy expressly providing such online activity will be monitored by the employer and it is prohibited or restricted during working hours. An employee's privacy interest during working hours can be narrowly circumscribed by the employer, subject, of course, to certain considerations of personal dignity and of public policy.

YOUR RANKING?

- **One or fewer correct:** *Might be time to brush up.*
- **Two correct:** *Not bad, but could do better.*
- **Three correct:** *Very well done, but not perfect.*
- **Four correct:** *Impressive.*

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