

[« back to news](#)**Twitter Troubles – Managing an Employee’s Off Duty Social Media Activity**

*Article provided by CME Ontario Partners - Sherrard Kuzz LLP, Employment & Labour Lawyer: Andrew Brown, Partner*

Social media has revolutionized the way we communicate with our friends, families and community. In a little over a decade, platforms such as Twitter, LinkedIn and Facebook have grown to more than 302 million, 400 million and 1.59 billion users, respectively. Even our vocabulary has changed as words such as “tweet” take on new meaning while others such as “hashtag” are created.

Given the monumental rise in the popularity of social media, it is no surprise employers increasingly monitor employee use during working hours to protect computer networks and the corporate brand, and to ensure productivity. However, the use of social media is not restricted to working hours. As such, employers are now faced with the challenge of regulating employee social media use even after working hours.

A recent Ontario arbitration decision weighed in on an employer’s right to do so.

## **Twitter Troubles – Managing an Employee’s Off Duty Social Media Activity**

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### ***What Happened?***

In *Ontario Public Service Employees Union (Groves) and the Crown in Right of Ontario (Ministry of Community Safety and Correctional Services)*, a unionized public servant posted offensive content on his Twitter account. The account was public and monitored by the employer.

The first tweet involved sexually suggestive commentary about a car which the employee referred to as a woman. In response to the tweet, the employer gave the employee a non-disciplinary “Letter of Counsel” advising that inappropriate and disrespectful comments on social media, even if communicated outside the workplace, could have serious, negative consequences on the workplace and would not be condoned. Thereafter, the employee retweeted an extremely graphic and sexualized picture of a woman and, as a result, he was placed on a ten day disciplinary suspension.

A grievance was filed alleging the employee had been: i) unjustly disciplined for off duty social media activity; and ii) harassed and discriminated against *via* the employer’s efforts to counsel and regulate the employee’s off duty social media activity. In addition to seeking the removal of the suspension from his record, the employee sought one million dollars in damages.

### ***The Arbitrator's Decision***

After reviewing the circumstances of the tweets and the evidence of their impact on the workplace, the arbitrator concluded the suspension was unjustified.

Importantly, the arbitrator noted there was no evidence to suggest the tweets harmed the employer's reputation. Neither of the tweets made reference to the employer, nor was there anything in the employee's Twitter profile to link him to the employer. Consequently, the arbitrator ordered the suspension be removed from the employee's file and he be compensated for losses suffered as a result of serving the suspension.

However, the Plaintiff's claims of harassment and discrimination were dismissed. On this issue, the arbitrator found the employer was entitled to counsel the employee on appropriate social media use and to address concerns regarding off duty behaviour. Neither of these activities constituted harassment or discrimination.

### ***Lessons for Employers***

Monitoring and setting reasonable boundaries around off-duty use of social media activity is neither improper nor a form of harassment or discrimination; to the contrary, it may be good workplace management.

However, to justify discipline for an employee's off duty activity, an employer must be able to establish a connection between the offensive activity and the workplace. Where there is no connection between the activity and workplace, an employer will be hard-pressed to establish it has suffered harm which would justify disciplining an employee.

For instance, discipline may be justified where an employee's activity negatively targets the employer, management or co-workers, or where an employee posts images showing a person behaving inappropriately while wearing a company uniform or driving a company vehicle. Even if the connection to the workplace is not direct (such as the example of the uniform), so long as the inappropriate social media activity can be reasonably tracked back to the workplace, the employer has a legitimate interest in counseling and/or disciplining an employee.

To this end, employers may consider the following best practices:

#### **Generally**

- With the assistance of experienced employment counsel, develop and/or update a social media policy that reflects the organization's overall approach to social media. Provide suggestions or guidelines that identify appropriate and inappropriate social media use, prohibit activity that could have a negative impact on the organization, and advise employees their activities may be monitored during and outside working hours.
- Ensure every employee has read and agreed in writing to be bound by the policy (whether in an employment agreement, workplace handbook or set of policies).
- Enforce the social media policy consistently, transparently and fairly.

- From time to time, review with employees the policy and consequences of inappropriate social media activity.

### **In the Event of an Incident**

- Meet with the employee to identify and discuss the inappropriate content.
- Explain why the social media activity does not accord with the employer's expectations or, even better, its social media policy.
- Ask for and note the employee's explanation for his/her conduct.
- If the conduct is not connected or related to the workplace, use counseling as an opportunity to review the policy with the employee and reinforce good social media habits.
- If the conduct is related to the workplace, consider the appropriate level of discipline.

Inappropriate activity on social media can have a substantial impact on the workplace. It is therefore important (and good practice) for all employers to actively manage and proactively maintain ongoing dialogue with employees about the significance of this growing issue.

For assistance designing and/or updating a social media policy tailored to your workplace, and/or addressing a social media issue impacting your workplace, contact the employment law experts at **Sherrard Kuzz LLP**.

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