

When problems arise, difficult to prove impact

Hard to manage social media outside workplace

BY MICHAEL MCKIERNAN
For Law Times

Employers should not let the difficulties of regulating employees' off-duty social media use stop them from trying, employment lawyers say.

A string of high-profile cases have helped alert employers to the risks of off-colour social media posts by employees, but following through on their concerns with workplace discipline could prove more problematic than they might imagine, according to Mark Mendl, a partner in the labour, employment and regulatory law practice group at Baker & McKenzie LLP's Toronto office.

"Employers always have a presumptive right to regulate what happens inside the workplace. When the conduct occurs outside the workplace, whether on social media or elsewhere, it becomes much more difficult," he says. "Adjudicators are looking for a substantial and prejudicial impact on the employer's business, which is quite a high threshold to meet. Generally, they have been quite skeptical of assertions about the impact of behaviour outside the workplace."

Last summer, in *Ontario Public Service Employees Union (Groves) v Ontario (Community Safety and Correctional Services)*, a Grievance Settlement Board arbitrator overturned a correctional officer's



Matthew Curtis says employers' jobs are complicated when constructing and enforcing policies around social media use outside the workplace.

10-day suspension for posting a graphic and sexualized image of a woman on his public Twitter account after finding "no evidence" that the post harmed the employer's reputation. The officer's Twitter handle and account summary made no mention of his job with the provincial government, the arbitrator noted.

Still, Mendl says a comprehensive social media policy, including potential disciplinary steps, and combined with employee training, can help employers set expectations and head off trouble before it happens.

"At a minimum, you need an acceptable use policy that provides guidance on what acceptable social media behaviour is," Mendl says. "Many employers will prohibit posting anything

about work without explicit consent. If that's something you want to do, then you need to establish those behavioural norms with a specific policy."

For some employees, a simple primer on privacy settings and the public nature of social media accounts can prove enough to change their practice online.

"There still appears to be a belief among employees that social media posts are some private form of communication. They have to understand that it's a medium that creates a permanent electronic record. Once you post something, you lose control over what can be done with it," Mendl says.

Although the GSB arbitration over Twitter postings ultimately went against the employer, the arbitrator in that case also rejected the correctional officer's claim that the complaint against him constituted harassment and reprisal for an early grievance he had filed.

"It is not harassment for an employer to bring to an employee's attention concerns it may have regarding that employee's use of social media, especially where that employee has an open account that may be subject to scrutiny by anyone," wrote GSB vice chairwoman Gail Misra in her July 22 decision.

While employers are entitled to monitor employees' social media use, Andrew Brown, a lawyer with Toronto employment boutique Sherrard Kuzz LLP, says he

doesn't believe many do it as a matter of routine.

"I'm not sure it's a great use of time to regularly sift through every social media site they can think of looking for some degree of misconduct," he says. "A better way is to respond properly when an issue is raised."

Brown says employers should tailor their response depending on the severity of the situation.

"The first step is damage control. You may want to contact the employee or the site administrator to remove the post," he says.

Even borderline cases that may not justify discipline or relate directly to the workplace present an opportunity for coaching on appropriate future use, Brown says.

Matthew Curtis, a labour and employment lawyer with Denisons Canada LLP, says there are "no bright lines" when it comes to acceptable social media use off-duty. Employers' jobs are complicated when constructing and enforcing policies around the issue because of the competing rights involved, he says.

"There are certainly some privacy interests that become engaged, as well as freedom of speech" for employees, in addition to the employer's interest in maintaining its reputation, Curtis explains.

The Ottawa-Carleton District School Board recently caused a stir when it sent out guidelines to teachers that advised them not to post pictures of themselves "scantily clad" by the beach or with alcohol or drugs.

Although the guidelines formed only part of a training presentation to school principals, Mendl says the vagueness and potentially discriminatory nature of the phrase "scantily clad" could cause problems if incorporated into official board policies.

"If it appears it's directed toward female teachers only, that

could raise human rights issues," he says.

According to Curtis, social media issues tend to divide along the lines of off-duty and on-duty conduct.

"My view of policies is that they should cover both," he says.

Another case from 2016 shows that duties cut both ways when it comes to social media, and that employers can be held responsible for failing to protect employees whose jobs include operating company accounts.

In *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance)*, the union asked arbitrator Robert Howe to shut down the TTC's Twitter presence because it provided a platform for passengers to harass and verbally abuse employees. While most tweets were legitimate requests for transit assistance, Howe accepted a minority were racist, homophobic or in other ways offensive, threatening or abusive.

Although Howe denied to close the account, he found the TTC workplace extended to its social media sites. Instead, he directed the commission to develop a policy that enshrined its responsibility for monitoring the account and responding to abusive tweeters.

If Howe's reasoning is adopted in other cases, Mendl says employers who fail to deal appropriately with abusive posts could find themselves exposed to liability under the province's Occupational Health and Safety Act and human rights legislation.

"It's a cautionary tale for employers. They have got to carefully watch what is being said about their employees, and have policies and procedures in place for addressing derogatory comments," he says. "You can't just bury your head in the sand." **LT**