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FACEBOOK COMMENTS: JUST CAUSE FOR TERMINATION?

Social networking sites, like Facebook and Twitter, are one of the fastest growing areas of concern for employers. Their concern is understandable since these sites allow users to publish a great deal of information about themselves to a potentially large audience, including comments that may be critical of coworkers or detrimental to employers' interests and reputation. The British Columbia Labour Relations Board's decision in *Lougheed Imports Ltd.*¹ establishes that employees have no reasonable expectation of privacy in comments made on social networking sites and when those comments are damaging to the employer's business or offensive, insulting and disrespectful to supervisors, the employer may have just cause for termination.

WHAT HAPPENED?

The employer operated an automotive detailing and accessory shop that had recently been unionized. The day after the union applied for certification, J.T., a detailer at the shop and one of the key inside union organizers, posted this comment on his Facebook:

Sometimes ya have good smooth days, when nobodys ***ing with your ability to earn a living....and sometimes accidents DO happen, its unfortunate, but thats why there called accidents right?²

J.T. and F.Y., his supervisor, were friends on Facebook. F.Y. had an application on his phone that enabled him to access Facebook and provided him with updates about his friends' comments. Concerned by J.T.'s comment, F.Y. began monitoring his Facebook. Over the next two weeks, J.T. posted a series of aggressive and hostile comments on Facebook. F.Y. read all of these comments and brought them to the attention of his supervisor, J.C. J.C. was not sure what to do, but they decided to continue monitoring J.T.'s Facebook. A few days later, J.T. removed F.Y. from his list of friends so he could no longer read J.T.'s comments. F.Y. used the Facebook account of a previous employee to read and print any comments that concerned him. On September 23, 2010, after receiving written discipline for disrupting a meeting, J.T. posted a comment on Facebook that read in part: "[...] All I Gotta say is they pissed off the WRONG GUYbig time."³ Over the next week, J.T. posted comments that referred to a manager using expletives and that alleged his male supervisors, including F.Y., were having a sexual relationship at work. J.T. also wrote that he was "feeling tactical, and vengefull, and retaliatory."⁴

On September 30, 2010, A.P., an installer at the shop and a known union supporter, was sent home early due to a lack of work. A.P. posted this comment on Facebook:

west coast detail and accessory is a *****ing joke....dont spend your money there as they are ***** crooks and are out to hose you... there a bunch of greedy ***** low life scumbags... wanna know how I really feel?????⁵



F.Y. read this comment. When A.P. was called in for work the next day, he apologized to F.Y. and later deleted his Facebook account.

On October 6, 2010, the employer met with J.T. and A.P. to investigate their potential misconduct. J.T. and A.P. denied making inappropriate comments about the employer's business or disrespectful comments about management. The next day, their employment was terminated for cause.

THE BOARD'S DECISION

The union filed an unfair labour practice complaint alleging that the employer did not have cause to terminate J.T. and A.P. and that the terminations were motivated by anti-union animus. The union argued that the Board must conclude that the terminations were motivated by anti-union animus when it considered the circumstantial evidence, including: i) the employer's treatment of similar misconduct, ii) the lack of any disciplinary record, iii) the employees' union activities, iv) the employer's knowledge of their activities, and v) the manner in which the investigation and termination were carried out. The Board agreed that the employer's knowledge of union activities and the absence of any disciplinary record supported the existence of anti-union animus.

The Board held that racist, sexist and otherwise inappropriate comments that were made on the shop floor without disciplinary consequences were not the same as the comments made on Facebook, which were insubordinate and damaging to the employer's business. Further, the Board found that A.P. and J.T. had no reasonable expectation of privacy in their comments as together they had over 400 Facebook friends, including current and former employees.

The union argued that J.T.'s original comment was not sufficiently serious to explain why the employer began monitoring his Facebook. The Board accepted F.Y.'s evidence that the first comment was sufficient to raise personal concerns for him and noted that if the employer were looking for cause to terminate J.T., it would have done so after he interrupted the meeting. The fact that the employer continued to monitor his Facebook and did not take any disciplinary action until further comments were posted supported its argument that it was not certain how to proceed so it monitored the situation until it became unbearable and then interviewed both employees. The Board found no evidence of anti-union animus in the investigation as both employees had union representation, heard the allegations against them, and had had the opportunity to review the Facebook posting and to offer any explanation.

The Board stated that the absence of disciplinary history for J.T. and A.P. and their role as key union supporters were outweighed by their misconduct and the careful manner in which the employer investigated. The Board concluded that the terminations were not motivated by anti-union animus and that the employer had just cause to terminate J.T. and A.P. In the Board's view, J.T.'s comments were egregious and made clear his contempt for management. The fact that A.P.'s comment was an isolated incident for which he apologized was outweighed by his dishonesty during the investigation and the potential damage his comment could have had on the employer's business. Accordingly, the Board dismissed the union's complaint.



WHAT IT MEANS FOR EMPLOYERS

An employer's ability to terminate an employee for online comments remains relatively untested in Canada. In the unionized context, arbitrators have upheld the discharge of employees who used the Internet to disclose confidential information and to make insulting or disrespectful comments about colleagues.⁶ *Lougheed* confirms that employees who make online comments that are damaging to the employer's business or offensive, insulting and disrespectful to supervisors may be subject to discharge. *Lougheed* also suggests that employees have no reasonable expectation of privacy in comments made on social networking sites; however, employers should be cautious when deciding to monitor these sites. Aside from concerns about surreptitiously surveilling social networking sites without employees' knowledge or consent, employer's may expose themselves to risk by acquiring certain information, for example learning of a previously unknown disability.

For further information on this decision or online misconduct generally, please contact one of the members of our Labour & Employment Group listed below.

¹ *Lougheed Imports Ltd. (West Coast Mazda) v. United Food and Commercial Workers International Union, Local 1518*, 2010 CanLII 62482 (B.C.L.R.B.). ["*Lougheed*"]

² *Lougheed* at para. 13.

³ *Lougheed* at para. 28.

⁴ *Lougheed* at para. 44.

⁵ *Lougheed* at para. 37.

⁶ See for example *Re Chatham-Kent (Municipality) and CAW-Canada, Local 127 (Clarke)* (2007), 159 L.A.C. (4th) 321 (Ontario) (Williamson) and *Re Alberta and A.U.P.E. ("R")* (2008), 174 L.A.C. (4th) 371 (Alberta) (Ponak).



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