

# THE COMMON LAWYER

## How do dealerships deal with improper, off-duty social media conduct by employees?



By Justin M. Jakubiak

**SOCIAL MEDIA USE** is at an all-time high and is increasing daily. This presents both business opportunities and risks to your dealership and its management team. In my role as the ever-cautious conservative lawyer, I will use this article to focus on those risks and what you can do about them.



It is not uncommon for individuals to have multiple online personalities which they check frequently throughout the day – a dating

app, Facebook, Instagram, Snapchat, WeChat and more. What's more, is that for some people, their on-line or digital personality is markedly different from their in-person self. Your top

salesperson may be an absolute star on the sales floor, charming both customers and management alike. Online he may be a Mr. Hyde – a hideous personality without compassion or remorse – the antithesis to the sales star that you see and deal with daily.

Without putting into place protections and safe guards, a dealership's reputation and business can easily be damaged in the social media age.

Consider the following example: a top-performing salesperson is the face of your dealership. Customers love her, your staff love her and she presents really well on both radio and television. However, after a quick online search, you come across this individual's Facebook and Twitter accounts. You are devastated to discover several posts and tweets made by this person which promote alt-right views. If your customers discovered this, your dealership's standing and reputation as a long-time family owned and friendly business could be devastated. Can you terminate this person's employment with the dealership? What about discipline... would it even work?

Generally, an employee's conduct while he or she is off-duty is none of the employer's concern. The exception to this rule is where there is a real and material connection between the off-duty conduct and the workplace. An employer may be legally allowed to discipline or terminate an employee for cause for off-duty conduct where this connection is established. These

principles and those discussed below have been applied in both unionized and non-unionized workplaces.

### A Real and Material Connection

There are five factors that are used to determine whether a real and material connection exists:

1. The employee's conduct harms the company's reputation or product;
2. The employee's behaviour renders the employee unable to perform his or her duties in a satisfactory manner;
3. The employee's behaviour leads to other employees refusing or being unable to work with him or her;
4. The employee is guilty of a serious breach of the Criminal Code or the applicable human rights legislation. This renders the employee's conduct harmful to the general reputation of the company and its employees; or
5. The employee's conduct places difficulty in the way of the company's ability to carry out its function of efficiently managing its resources and directing its employees.

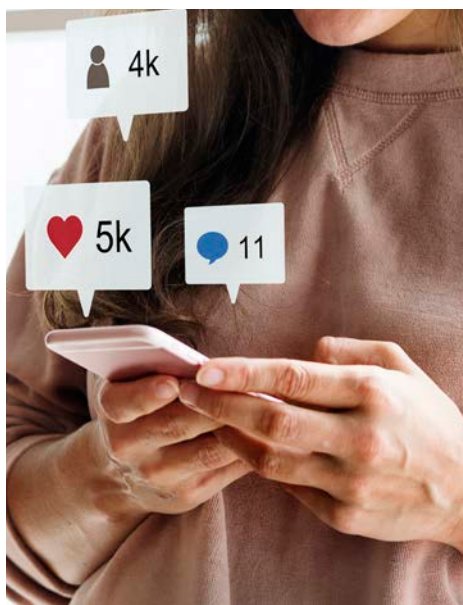
These factors were set out in *Millhaven Fibres Ltd. v O.C.A.W., Local 9-670* and have been applied by adjudicators in subsequent arbitration and court cases. In order to be successful, an employer must establish at least one of the five factors before it can discipline or terminate an employee for off-duty conduct. Given we are dealing with off-duty conduct, which has historically

been outside of an employer's reach for discipline and termination purposes, there is a very high threshold to meet to establish one of the factors.

Employers must conduct a thorough investigation to substantiate the claims under any of the five factors. In determining whether there is a real and material connection, the employee's interests in the autonomy of their private life is to be balanced against the employer's desire to protect its reputation and business. Given the delicate nature of the investigation, and the balancing act which must take place, it is wise for dealerships to consider getting outside assistance to provide advice and conduct the investigation.

The analysis for whether an established real and material connection merits discipline or is just cause for dismissal is contextual. Some of the factors in determining whether there is just cause for dismissal include:

- the employee's service time with the company;
- the seriousness of the employee's actions and whether the actions were repetitive, provoked or premeditated;
- the employee's disciplinary history and whether the employer engaged in progressive discipline before the dismissal; and
- the employer's policies and whether the dismissal was in accordance with those policies.



Some of the factors for determining whether discipline for improper, off-duty social media usage is warranted include:

- the number and frequency of the comments and whether they were deliberate;
- whether the comments disparaged the employer, its customers, its management or employees;
- whether the comments identified the employer and could reasonably have affected its reputation or business interests;
- the nature of the comments and whether they were hateful, racist or threatening; and
- the impact of the comments on colleagues or the workplace generally and whether the comments were motivated by hatred.

### Social Media Examples of a Real and Material Connection

What does it look like when a real and material connection has been found to exist in the context of an employee's social media conduct? The following are some real-life examples of litigation where off-duty social media usage was found to have a real and material connection to the workplace:

- In *ATU, Local 508 v Halifax (Regional Municipality) (McQuarrie)*, an employee's colleagues were upset by the employee's social media posts. These posts led to disruptions at the workplace and conflicts between employees;
- In *York University Staff Association v York University*, an employee used his Facebook account to associate himself with the University as an employee and to make anti-Semitic posts and comments;
- In *Chatham-Kent (Municipality) v CAW-Canada, Local 127*, an employee identified their workplace, co-workers and managers in their social media posts;
- In *Tenaris Algoma Tubes Inc. and USWA, Local 9548 (D), Re*, an employee posted

to his Facebook account that violent and humiliating sexual acts should be performed on a particular female colleague who he identified in the post by describing a distinctive physical feature of hers;

- In *Maxam Bulk Services v International Union of Operating Engineers, Local 115*, an employee made disparaging comments about the employer's main client on Facebook; and
- In *IUEC, Local 50 v ThyssenKrupp Elevator (Canada) Ltd.*, a YouTube video was circulated of an employee exposing his genitals and stapling them to a wooden plank.

While the above examples arose in the context of a unionized workplace, similar fact patterns also regularly occur in the context of non-unionized workplaces. There are fewer published cases involving non-unionized workplaces as most of these types of matters are settled outside of Court through mediation or arbitration.

In conclusion, an employer is not powerless when an employee engages in improper, off-duty social media conduct. A wide variety of social media behaviours can merit discipline or constitute just cause for dismissal.

### Implications for Employers

Dealerships, big and small, should take the time to implement (or review their existing) social media conduct policies. A well-written social media policy will allow a dealership and its management to protect the dealer's reputation against any improper, off-duty social media usage by employees. The policy should be distributed to all employees for their review and acknowledgement of receipt.

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