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The growing threat of vicarious liability

Courts drawing up rules on social media in the workplace

By Brent Kettes

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Social media has created boundless opportunities for individuals and corporations to communicate information anywhere at any time. However, in the employment context, social media presents a specific risk to employers who may be obligated to prevent their employees from disseminating defamatory, confidential or unlawful information connected with their employment.

The question of whether an employer may be held liable for statements made by their employees on social media is, as yet, untested in Canada. However, the doctrine of vicarious liability, as developed in other areas, suggests that employers may well be liable for certain statements made by employees on social media.

Under the doctrine of vicarious liability, one person may be held liable for the misconduct of another because of the relationship between them on the theory that the risks inherent in the enterprise of this person materialize in wrongful conduct by another person: K.L.B. v. British Columbia [2003] S.C.J. No. 51.

It is well established that an employer may be vicariously liable for breaches of confidentiality obligations owed by its employees: Apotex Fermentation Inc. v. Novopharm Ltd. [1998] M.J. No. 297. Employers have also been found liable for defamatory statements made by employees in the course of their employment. In addition, courts have held employers vicariously liable for statements which constitute harassment or discrimination under provincial human rights codes and for statements which constitute criminal conduct.

Although there are no Canadian cases where an employer has been found vicariously liable for an employee statement on social media, some analogous Canadian and foreign cases have considered these problems.
In Inform Cycle Ltd. v. Rebound Inc. (c.o.b. Rebound Cycle) [2006] A.J. No. 1430, a disgruntled former employee registered his former employer's name as a website and then linked that website to a gay pornographic site. He did so using his new employer's Internet wireless connection. The court dismissed the claim against the new employers on the basis that a single unauthorized act of an employee was incidental, and not essential, to the employment relationship.

In Jane Doe v. XYC Corporation, 887 A.2d 1156 (N.J. Super. 2005), the appellate division of the Superior Court of New Jersey considered whether a corporation could be held vicariously liable for the conduct of one of its employees in using his workplace computer to download, upload and store child pornography he had produced. The trial judge found that the employer had monitoring capabilities and an e-mail policy that could have led it to easily identify these activities if the employer had chosen to do so. Ultimately, the company was held to be vicariously liable and to have caused proximate damages to the child in the pornographic works.

In Otomewo v. Carphone Warehouse Ltd., [2012] EqLR 724, the U.K. Employment Tribunal considered a case where two employees harassed another employee by accessing his Facebook page without his knowledge and posting, "Finally came out of the closet. I am gay and proud." The tribunal found the employer vicariously liable for the harassment on the basis that the actions were done by other employees at work, during working hours and involved dealings between staff and a manager.

When determining an employer's ultimate responsibility for the statements of its employees, courts will have regard for the relationship between the employer on the one hand, and the statement and media through which it is published on the other.

Essentially, courts must determine the degree to which an inappropriate statement relates to the employee's assigned tasks and the employer's control of social media. The more closely linked an improper statement is to the employee's job, the more likely the employer is to be liable for it. Similarly, an employer is more likely to be held liable where it can be said to have facilitated or otherwise provided an opportunity for the improper statement to be published on social media.

This may seem somewhat paradoxical, insofar as greater efforts by an employer to control and regulate employee use of social media can result in a greater risk of liability. However, seen through the prism of vicarious liability, it is unavoidable that exerting a greater degree of control over social media will strengthen the nexus between the employee's conduct and the employer's enterprise.

This is not to suggest that employers should not regulate, control or even assert ownership of social media profiles and content created by employees. Rather, the best practice for an employer is to adopt a clear policy on employee use of social media and to rigorously monitor and enforce compliance. Having a clear policy will clearly delineate what social media activity is on behalf of the employer and what social media activity is solely for the employee's own account. Where an employee's social media conduct is non-compliant with an employer's policy, the employer will have a stronger argument that the conduct was not in the course of employment. Effective
monitoring and enforcement of the policy will deter and prevent breaches and will serve to reduce the severity of those that occur.

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