Preserving the Evidence:
Employment Litigation 2.0 - Evidence in the Age of Social Media

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Employment Litigation 2.0:
Evidence in the Age of Social Media

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I. **INTRODUCTION**

“My employee who has called in sick for the last three days just “Tweeted” that she is “Loving Las Vegas!”

“One of our employees posted on Facebook that our new management is incompetent and our profits are going to collapse! What if our investors see that?”

“A number of my employees work at home. While our company policy prohibits the use of YouTube during work hours, one of my employees, whose productivity has plummeted, regularly goes on YouTube during the workday.”

“I thought my employee was taking notes during our staff meeting, but apparently, he was updating his blog to say that his boss is the biggest moron on the planet and he can’t believe he works in such a hellhole.”

“My employee leaked confidential information about our marketing strategy on Facebook! Some of her Facebook Friends work for our direct competition! Our presentation to bid for the project is three days away. What do I do?”

A lawyer practising in the field of employment law can no longer afford to blithely dismiss social media sites as an adolescent preoccupation. Social media websites, such as Facebook and Twitter, YouTube, and blogs have introduced many new challenges for effectively managing the workplace.

When sites like Facebook and MySpace and blogs appeared on the scene, one of the first questions that emerged for employment lawyers was whether employees could be disciplined or terminated as a result of what they posted on the internet. Now that this question has been answered in the affirmative\(^1\), and the potential relevance of content posted on social media sites to workplace litigation becomes increasingly evident, employment lawyers need to understand how to preserve evidence derived from sites, and avoid the foibles and pitfalls unique to this type of evidence.

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\(^1\) For two recent examples where employees were discharged for Facebook postings, see: **Canada Post Corp and C.U.P.W.** (2012) 216 L.A.C. (4th) 207; and **Loughheed Imports Ltd. v. UFCW, Local 1518**, 2010 CLB 26395. See also **Alberta v. A.U.P.E.** 174 L.A.C. (4th) 371, where the grievor’s discharge was upheld as a result of the insubordination demonstrated on her blog posts. Although this case was remitted to the panel because in the grievor’s union representation rights were breached, on reconsideration the panel confirmed its conclusion that because of the blog posts, reinstatement was not viable: 213 L.A.C. (4th) 299. Although **A.U.P.E.** involved a blog rather than a social media site, the concepts discussed in this paper in terms of relevance and preservation are also applicable to blogs.
The first part of the paper, entitled “Social Media 101,” provides a brief overview of which social media sites employment lawyers should have a working knowledge of, and explores the nature of potentially relevant evidence that could be found on such sites. The second part of the paper provides a detailed discussion of how to preserve social media evidence before and throughout the litigation process by providing a discussion of spoliation and preservation orders so that counsel are aware of the tools at their disposal to ensure this often valuable evidence does not disappear into cyberspace. Indeed, the ephemeral nature of social media evidence presents a significant challenge as unlike a computer hard drive, which can be forensically examined to discern whether a record has been altered or deleted, content on social media websites can be indelibly removed from the site with ease. Finally, the third part of the paper addresses how lawyers must “click with caution” when gathering and working with social media evidence as a result of the privacy and ethical concerns that can arise, and discusses the admissibility of social media evidence that is obtained through improper means.

II. SOCIAL MEDIA 101

A working knowledge of how social media websites operate is crucial not only to source relevant information, but also to effectively convey the significance of this evidence to adjudicators who may be less conversant with the technology. For instance, if counsel explains to an adjudicator that every time a user posts an offensive comment about her workplace on her Facebook wall this message is instantly disseminated to all her Facebook Friends, and, depending on her privacy settings, could be accessed by any of Facebook’s 955 million users, such background will ensure a judge is alive to the potential implications and impact arising from dissemination.

A. Facebook

Facebook was launched in 2004. As of June, 2012, the site had over 955 million active users, making it the most used social networking service worldwide².

To use Facebook, a user must create an account, and there is no charge to do so. Once a user has created an account, he can post messages on his “wall,” which is essentially a digital bulletin board, post photographs, make status updates, and send private messages to other Facebook users.