



Do's + Don'ts of Social Media

Presented By

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Introduction



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Agenda

1. Areas of Conflict on Social Media

- (a) Inappropriate Statements
- (b) Criticism of Board and Management
- (c) Controversial Statement
- (d) Criticism of Colleagues and Students
- (e) Union Communications

2. How to Manage Social Media Use

- (a) Social Media Policies
- (b) Investigating Social Media Misconduct
- (c) Determining Appropriate Discipline



Introduction



Introduction

Balancing Online Freedom of Expression with Boards' Rights and Duties

- **Trustees and employees** are entitled to have a private life outside of work, including on social media
 - Expressing political opinions in posts, attending community meetings and rallies, etc.
- But school boards must **balance** freedom of expression with students' (and others') right to a **positive educational environment** and **workplace free from discrimination and harassment**
 - And trustees and employees have standards of conduct that they must uphold in their dealings with the public

Kempling v. British Columbia College of Teachers, 2005 BCCA 327 at para. 79; *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 at para. 40; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at para. 37.

Rights and Duties of School Boards

- Education of students (*Education Act*)
- Management rights under the collective agreement
 - A school board has the right to manage its own operations
- Creating a safe workplace (*OHSA*)
- Preserving the board's reputation in the community
- Ensuring an educational environment and workplace free of discrimination and harassment
 - *Charter* s. 15(1) (Equality Rights)
 - *Human Rights Code* ss. 1 and 5
 - *Education Act* s. 169.1(1)(a.1)



Areas of Conflict on Social Media

(a) Inappropriate Statements

Inappropriate Statements

When Does Expression Cross the Line?

- Repeats or relies on **harmful stereotypes** about members of protected groups
- **Demonstrates or incites contempt** about members of protected groups
- Uses **offensive slurs, dehumanizing language or other derogatory terms** about members of protected groups
- **Threatens or advocates violence**
- Constitutes **nudity or pornography**
- Discloses the **personal information** of others
- **Attacks the Board, administration or colleagues** in a manner that offends basic expectations, affects reputations and goes beyond legitimate political discourse

Inappropriate Statements

Factors to Consider

- When does a post cross the line?
 - Can the poster be identified as a Board employee?
 - Target of the statements:
 - *Students*
 - *Co-workers*
 - *Trustees*
 - Nature of the statements:
 - *Fair comment?*
 - *Or does it cross over into defamation, harassment or bullying?*

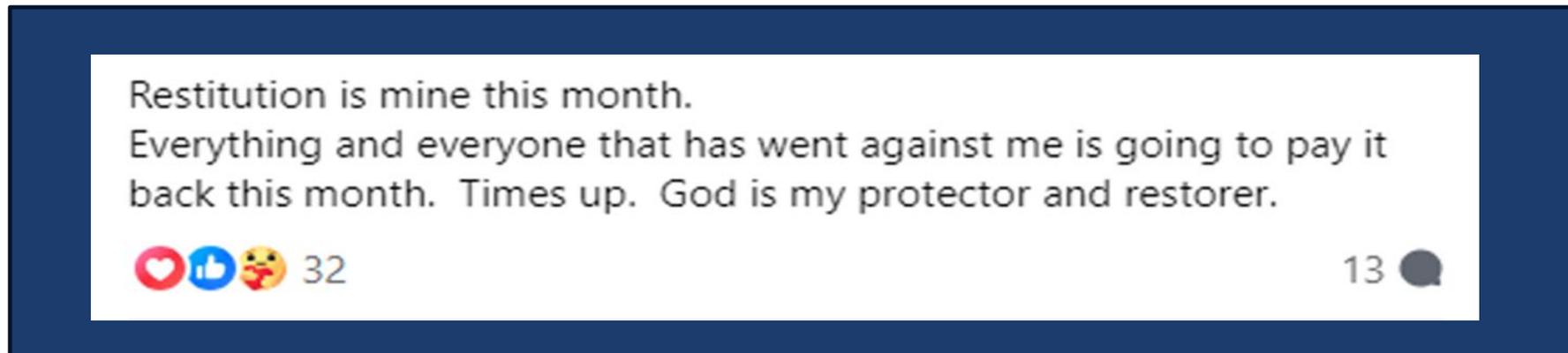
Inappropriate Statements

Examples of Prohibited Teacher Expression

- Antisemitic remarks in books, pamphlets, letters to local newspaper: *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825
- Participation in white supremacist and antisemitic conferences and publication of racist websites: *Peel Board of Education and O.S.S.T.F. (Fromm) (Re)*, 2002 CanLII 78937 (ON LA) (Burkett)
- Homophobic Tweets and blog posts: *Ontario College of Teachers v Le Blanc*, 2022 ONOCT 108
- Principal liked, shared, reposted and commented on anti-Muslim and anti-refugee articles and videos on her Facebook page over 2 years: *Ontario College of Teachers v. Sadaka*, 2019 ONOCT 60
- **Retweeting** anti-Muslim immigration and anti-Trans tweets: *Ontario College of Teachers v. McDonald*, 2019 CanLII 145136 (ON OCT)

Inappropriate Statements

Case Study: Threatening Message on Facebook



- Disgruntled employee posted this on Facebook because he was not successful in obtaining his preferred position in an elementary school
- Another employee at the school saw the Facebook post and reported to the school
- Board Response:
 - Employee asked to take down the post
 - Conducted a wellness check with police
 - Mandatory meeting with HR



(b) Criticism of the Board and Management

Criticism of the Board and Management

Statements about Employer on Social Media

- Implied condition of employment: employee must be in a position to perform their duties duly and faithfully
- Off-duty misconduct, including social media use, may be cause for dismissal
- But some nexus is required between the employee's misconduct and the character of employment or the employer's legitimate business interests
 - Mere disagreement or dissatisfaction with the employee's conduct is not enough
 - Mere uncomplimentary statements about one's employer are not generally grounds for dismissal, in the absence of damage to the employer's interest or reputation

Criticism of the Board and Management

Contrast: Political Speech Against the Employer or the Crown

- Public statements about one's employer can breach the duty of loyalty, and personal attacks are unacceptable
- However, school boards and the Ministry of Education (which funds school boards) operate in the political sphere, so some legitimate political commentary can be warranted
 - More funding for kids
 - The Board needs to change its approach to x...
- Generally, criticism of provincial education policies by a teacher employed by a school board can be political messaging

(c) Controversial Statements

Toronto Catholic District School Board v OECTA, 2023 CanLII 70469 (ON LA)

- Teacher discharged after getting in an altercation with another patron at a Starbucks after the patron called out the teacher for failing to wear a mask during the COVID-19 pandemic
- “The grievor clearly challenged the restrictions Starbucks was imposing and made critical comments about the state of pandemic regulation” (para 38)
- Within a day, a TikTok video purporting to show the events was posted online
 - Tipped off the Board but also generated notoriety
 - Identified the teacher by name, photo, Instagram contact info and email address: encouraged viewers to mass spam the teacher: “You know what to do tik tok”
- Discharge ordered replaced with a one-month suspension, after arbitrator determined that the TikTok exaggerated the severity of the altercation



(d) Criticism of Colleagues
and Students

Criticism of Colleagues and Students

“The fact is, whatever the Grievors’ intent, at least some of their comments came to the attention of Ms. A in the workplace. **Given the nature of social media... this was hardly surprising.** The employees who participated in the chat were free to, and did, forward the message to other employees. **Wherever it originated, the impugned conduct made its way into the workplace and, to that extent at least, became a workplace issue.**”

Criticism of Colleagues, Co-Workers, or Students

Metrolinx v. Amalgamated Transit Union, Local 1587, 2024 ONSC 1900

- Metrolinx dismissed five bus drivers with 7-10 years of service for sending inappropriate messages in their WhatsApp group chat
 - The employees did not communicate on-line at the workplace or during work hours
 - Referred to female employees obtaining advantages in return for sexual favours
- Arbitrator ordered the drivers reinstated, based on communications taking place on private, encrypted app
- The Divisional Court disagreed, finding the messages plausibly constituted workplace sexual harassment, even without a formal complaint
 - Though intended to be private, the messages did in fact come to Ms. A's attention
 - Remitted the matter to a different arbitrator for reconsideration, in accordance with the Divisional Court's reasons



(e) Union Communications

Union Communications

- To what extent can union representatives criticize the Board and its trustees?
- Arbitrators generally afford wide latitude to union officials' manner of carrying out their duties, so they can challenge management without fear of discipline
 - Intemperate or insulting language concerning management may be found not to be insubordinate if it arises in the course of their union responsibilities
 - Criticism of public employers often constitutes protected political speech
 - Even union duties performed in a dishonest and manipulative way will not be grounds for discipline unless there is a connection to the union official's job duties for the employer
- But union officials can be subject to discipline, like any other employee, for statements that are malicious, knowingly or recklessly false, intimidate or constitute inappropriate public attacks against their employers, or which harm students

BC School Employers Association, School District No. 73 v. BCTF, 2011 CanLII 22936 (BC LA) (Burke)

- BC Teachers' Federation and members engaged in a prolonged campaign against Foundational Skills Assessments ("FSA"), a standardized test for elementary students
- **Teachers wore black armbands** at school as a “silent protest”
- A principal directed the teachers to remove them and to refrain from speaking about the standardized tests with students
- Arbitrator found employer properly restricted teachers from expressing their views on the FSA in a way that would harm students engaging in a mandated educational program
- But teachers would not be prevented from voicing their objection in many other forums, including parent/teacher interviews, media outlets and parent advisory committee meetings

Union Communications

Stelco Inc. v United Steelworkers, Local 8782, 2023 CanLII 91510 (ON LA)

- Example of employer over-reach on social media
- Grievor narrowly lost election for Local President; he protested the election, posting his protest on Facebook for 3 days
- Four union executives immediately made harassment complaints against him, and employer terminated him
- **Grievor ordered reinstated, with punitive damages**
 - Facebook post merely stated “his view of the way the election was handled and how particular supporters of his opponent acted.”
 - “That was a legitimate response and not one which the Employer, **absent any impact on the workplace**, should be interfering with, and certainly not by way of discipline.”

Council of Trustees' Associations v CUPE, 2019 CanLII 117773 (ON LRB)

- Freedom of association does not extend to a call for an unlawful strike
- CUPE officials called for their members to refuse to cross a lawful picket line announced by the OSSTF, including via messages on Twitter
- The Ontario Labour Relations Board directed CUPE to “communicate publicly using its Twitter account (using #CUPE) within one hour of the issuance of this decision, a PDF and/or photo of the attached Notice to Employees containing the following message”:
 - “CUPE members at all school boards scheduled for work on December 4, 2019 are expected to report to work in the usual manner regardless of any picket lines. If you don’t report to work, you may be participating in an illegal strike contrary to the Labour Relations Act and may be subject to discipline, fines, penalties and prosecution.”



How to Manage Social Media Use



(a) Social Media Policies

Social Media Policies

- GECDSB Administrative Procedure AP-AD-73: Use of social media by Employees (September 9, 2019)

- GECDSB Reg. R-IT-03: Digital Responsibility
 - 12.1. Represent and conduct themselves, including when off duty, in accordance with the law and in accordance with the relevant standards of conduct expected of the employee group or profession as they would in any other environment where they represent the Board, their school or department.



(b) Investigating Social Media Misconduct

Investigating Social Media Misconduct

○ Starting the Investigation

- Expectation that the Board will conduct adequate investigation into allegations of wrongdoing before imposing discipline
- Be wary of accepting posts at “face-value” without conducting investigation
 - *need to confirm ownership and control of account*

○ Conducting the Investigation

- Conduct an impartial fact-finding process
- Capture all evidence that will be relied upon
- Ensure employee, trustee, etc. is provided with full opportunity to respond and address the blogging/posts
- Come to objective finding



(c) Determining
Appropriate Discipline

Determining Appropriate Discipline

- **Determining the appropriate degree of discipline requires an assessment of the seriousness of the misconduct**
- **Consider these factors:**
 - **The nature of the allegations** (*is the social media post defamatory?*)
 - **The danger of the message** (*potential damage?*)
 - **What is the nature of the employee's position?**
 - (*Communications person? Teacher occupying a role of trust within society?*)
 - **What audience did the post reach?**
 - *What social media platform was used?*
 - *What were the details of the platform (e.g. number of followers, privacy settings)?*
 - **How long was the employee making posts?**
 - *Did the employee continue to make posts during investigation/following termination?*

Determining Appropriate Discipline

- **Consider these factors (continued)...**
 - What was the employee's response to discovery of the posts?
 - *Remorseful? Accountable?*
 - What was the employee's explanation for posts?
 - *Was social media potentially compromised? Was employee aware post was public? Were they under stress in other areas of their life?*
 - Were the posts in contravention of any workplace policies?
 - Consider mitigating factors (*lengthy service, clean record, remorse, etc.*)
 - The appropriateness or history of using corrective discipline

***Discipline must be a proportional response to the misconduct**

Current Events

Current Events: Lawsuits Against Social Media Companies by Four School Boards

- **March 28, 2024:** TDSB, TCDSB, PDSB, and OCDSB commence a claim against Meta (Facebook and Instagram), Snap Inc. (SnapChat), and ByteDance (TikTok) for disruption to the education system
- Boards allege that these companies have negligently designed and marketed addictive products that have disrupted the Boards' mandate to enhance student achievement and well-being
- Educators are spending increased classroom time monitoring issues caused by social media; allegation that social media specifically causes concerns with attention, focus, and mental health



Questions?

Thank You

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