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Fired Over Facebook: The Consequences of Discussing Work Online

Abstract

This paper examines the Canadian and American legal approaches to assessing employee's claims of unfair discipline over allegedly egregious comments on social media, and argues that the Canadian approach is more flexible and better suited to handle these claims in the social media context. Both countries apply traditional labour law frameworks to manage employee conduct online, despite the fact that Facebook, et al, represent a novel form of communication. However, the two systems are quite different. While American triers of fact examine whether an employee's social media communications constitute protected concerted activity, Canadian triers of fact apply the doctrine of just cause dismissal. The American framework is problematic, as it cannot always distinguish between employees who use Facebook to advance their workplace interests from those who use it for other purposes. Consequently, American employers may be forced to tolerate an employee's social media posts, regardless of how malicious they might be.

FIRED OVER FACEBOOK: THE CONSEQUENCES OF DISCUSSING WORK ONLINE

BY JARED TEITEL*

INTRODUCTION

“National Labour Relations Board Announces Another Settlement Protecting Employee Facebook Complaints.” This was the title of a 2011 client alert notice sent by the American law firm Womble Carlyle LLP to clients in its labour and employment practice. Sent in response to a highly publicized settlement agreement, the notice informed clients that “complaints about your boss on Facebook could be protected speech.”¹ In that case, the claimant alleged she was wrongly terminated for calling her employer, ambulance service provider American Medical Response of Connecticut (“AMR”), a ‘mental patient’ on the Internet.² Heralded as a groundbreaking decision, the AMR settlement emphasizes the changing nature of the employment relationship in the social networking era.

The issue of employees posting remarks about their employers on Facebook is at the forefront of labour law in the United States and Canada. In both countries, triers of fact must determine when discipline is justified. However, the two countries manage legal disputes that arise from Facebook communications by applying 20th century frameworks for workplace discipline.³ The two frameworks are distinct. While the American focus is on whether an employee’s Facebook communications constitute protected concerted activity, the methodology used in Canada is the doctrine of just cause dismissal. As will be explained, the American approach is fundamentally flawed. Unlike its Canadian counterpart, it often fails to distinguish employees who use Facebook to advance workplace interests (such as wages or working conditions), from those who use the website as a forum to whine, berate and complain.

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“I would like to thank the two most extraordinary people I know, Mom and Dad. Thank you for your unconditional love, support and laughter.”

¹ Womble Carlyle, NLRB Announces Another Settlement Protecting Employee “Facebook Complaints” (4 May 2011), online: <<http://www.wcsr.com/client-alerts/nlr-announces-another-settlement-protecting-employee-facebook-complaints>>.

² Kimberly Bielan, “All A-‘Twitter’: The Buzz Surrounding Ranting On Social-Networking Sites and Its Ramification on the Employment Relationship” (2011) 46 New Eng L Rev 155 at 156.

³ Susy Hassan, “The NLRB’S Evolving Stance on Regulating Employee Social Media Use”, online: (2011) Business Law Today 1 at 2 <<http://apps.americanbar.org/buslaw/blt/index.shtml>>.

Consequently, American employers may be forced to tolerate an employee's posts regardless of how offensive they might be. This paper argues that the Canadian approach is the more flexible of the two, and is therefore better suited to handle employment-related claims in the social media context.

Part I of this paper discusses the nature of social media, as well as the relationship between Facebook and the workplace. Parts II and III explore American and Canadian approaches to Facebook-related claims, with a detailed analysis of the seminal decisions in both countries. Part IV examines and contrasts the approaches of each country's labour regime, and the Canadian framework is established as the preferable system. Finally, the importance of effective social media policies in workplaces is also reviewed in this section.

I. FACEBOOK & THE WORKPLACE

Employees have always complained about their jobs. In the past, such complaints involved describing "trials and tribulations...to their spouse, over coffee with a friend or to a friendly bartender."⁴ Generally, employers lacked opportunities to become aware of employee concerns. Even if an employer became aware of a complaint, it was often difficult to prove what was actually said. The advent of the Internet, and social media websites in particular, has had a significant impact on workplace relations and the ability of employees to discuss their employer with others.⁵ The Internet is pervasive, unregulated, and a powerful molder of opinion, and information posted online can be shared on websites that almost anyone can read.⁶ In this context, individual employees can use specific websites for the purpose of communicating and sharing information online—this is known as a social network.⁷ With more than 1 billion active monthly users as of October 2012, Facebook (www.facebook.com) is the largest social networking website.⁸ Facebook allows users to send friend requests to one another, acceptance of which enables the friends to share information on their personal profile pages. This involves making 'posts' (i.e. short messages) on one another's Facebook 'timeline' (their profile page). If a friend request is denied, users can only view limited profile information.⁹

⁴ Ann Scheer, "Employer Rights and Responsibilities for Employee Facebook, MySpace, Twitter, Blogs, and Other Social Networking Postings", *Dateline NH* (10 March 2010) 10 online: Dateline NH <<http://www.devinemillimet.com/uploads/docs/dateline-annescheer.pdf>>.

⁵ *Ibid.*

⁶ *US v Wilcox*, 66 MJ 442 US Armed Forces, 2008 at 29.

⁷ *Oxford Dictionaries*, *sub verbo* "social network".

⁸ Facebook Newsroom, *Key Facts - Statistics*, online: Facebook <<http://newsroom.fb.com/content/default.aspx?NewsAreaId=22>> (in addition to its formidable membership numbers, the site has remarkable activity with more than 50% of users logging on to Facebook daily).

⁹ Facebook Newsroom, *Products*, online: Facebook <<https://www.facebook.com/about/timeline>>. In addition, some Facebook users may have "public" profile page settings, allowing all users, whether friends or not, to view their entire profile. There is the further possibility of having specific friends on a "limited profile" setting, which would only allow for partial access to the profile page. See Understanding Your Settings, *How Sharing Works*, online:

As an increasing number of employees sign up for Facebook, this novel form of communication is changing workplace dynamics. Employees use the website to manage their social lives, upload pictures, share information, and lament about their days—which may include mention of their jobs. Even posts on websites with restricted access, like Facebook, can still be forwarded to a wider audience by those who do have access. Comments often remain accessible and discoverable by an employer, despite an employee’s efforts to remove or limit access. Complaints about work that were once spoken in private to another individual are thus now potentially available for millions to see. Further, online complaints can create negative consequences for employers. Although such complaints may be based on nothing more than personal animosities, they can still include crude and vulgar language—as well as false and defamatory statements about their workplace or employer. This is potentially damaging to the employer’s business and profits, as well as their professional reputation. Staying abreast of Facebook communications is thus an essential task for modern employers. Organizations that do not track such activity will likely fail to address false or defamatory statements in a timely manner, and in turn there may be damaging repercussions to the company’s earnings and public image.¹⁰ Further, employers should be able to reprimand employees for this conduct by ordering them to remove their Facebook posts, with the option for further discipline if they do not comply. Canadian employers have the ability to respond in this manner, while American employers face greater restrictions, largely due to the constraints of their labour relations legislation.

II. THE AMERICAN APPROACH

The *National Labor Relations Act* (“*NLRA*”)¹¹ is a federal statute that regulates the rights and obligations of employees, employers, and unions in the private sector.¹² It applies to both unionized and non-unionized workplaces, and is implemented by the National Labor Relations Board (“*NLRB*”), an independent government agency. The *NLRB*’s main functions are to conduct elections for labour union representation, and investigate and remedy unfair labour practices per section 8 of the *NLRA*.¹³

Section 7 of the *NLRA* provides employees with the following rights: (1) the right to organize, join, or assist labour organizations, (2) the right to bargain collectively via representatives of their choosing, and (3) the right “to engage in other concerted activities for the

Facebook <<http://www.facebook.com/>>; Facebook Newsroom, *Safety and Privacy*, online: Facebook <<http://newsroom.fb.com/>>.

¹⁰ Bielan, *supra* note 2 at 180.

¹¹ 29 USC § 157 [*NLRA*].

¹² Bielan, *supra* note 2 at 159.

¹³ Douglas Ray, Calvin William Sharpe & Robert Strassfeld, *Understanding Labor Law*, 3d ed (San Francisco: Lexus Nexus, 2011) at 13.

purpose of...mutual aid or protection".¹⁴ The third right, commonly known as the right to engage in protected concerted activity, allows employees to undertake certain actions without risking employer retaliation.¹⁵ This means that American triers of fact must determine whether an employee's Facebook posts qualify as protected concerted activity. If they do, the posts are protected by section 7 and the employee cannot be disciplined or terminated.

Assessing Protected Concerted Activity

The framework applied by American triers of fact to determine whether an activity is protected under section 7 of the *NLRA* requires satisfying three conditions.¹⁶ An employee's activity must satisfy:

- (1) the concerted factor (i.e. it must promote a collective and not an individual interest);
- (2) the legitimate ends/interest factor, (i.e. it must be directed at a term or condition of employment); and,
- (3) the legitimate means factor (i.e. it must not be pursued in an unlawful or improper way).

If these three conditions are met, an employee is deemed to be exercising his or her right to engage in protected concerted activity.

The first condition, the concerted factor, requires an activity to be undertaken by two or more individuals in order to advance a group interest. Activity commenced by one person is thus excluded from the *NLRA*, even if others share that individual's concern(s).¹⁷ However, an employee acting alone may fulfill the concerted requirement if the employee acts with the authority of a co-worker, or brings a group complaint to the employer's attention, or tries to induce group action.¹⁸ The second condition, the legitimate interest factor, traditionally required that an activity involve a term or condition present in an employment contract, such as hours or wages. However, in *Eastex v NLRB*, the American Supreme Court expanded this factor's scope to include any activity that affects employees' interests.¹⁹ The third condition, the legitimate

¹⁴ *NLRA*, *supra* note 11.

¹⁵ Jill Rosenberg, "How Social Networking Is Changing The Face Of Employment" [2011] *Employment Discrimination Law and Litigation* 487 at 490 (This section thus limits an employer's ability to discipline or terminate an employee. In turn, this softens the impact of the American 'employment-at-will' doctrine, which, subject to restrictions, allows employers to terminate employees at any time for any reason).

¹⁶ Ray, Sharpe & Strassfeld, *supra* note 13 at 344-348.

¹⁷ *International Transportations Service v NLRB*, 449 F 3d 160 (DC Cir 2006).

¹⁸ See e.g. *Anchortank v NLRB*, 618 F 2d 1153 (5th Cir 1980) at paras 18-25 (For a discussion of the concerted requirement).

¹⁹ 437 US 556 (1978) at paras 569-570.

means factor, focuses on the manner in which employees pursue their interests. Thus, if employees are otherwise engaged in protected concerted activity, having satisfied the other requirements of section 7, they may forfeit the protection of section 7 if they act unlawfully or improperly.²⁰ In general, behaviour that is disobedient or illegal will fall outside the ambit of section 7 and can result in employee discipline.²¹

Unprotected Employee Conduct

Courts have generally held that complaining is not a protected activity.²² Activities that do not contemplate a future goal have traditionally been defined as complaints or ‘gripes’, even if they are undertaken collectively.²³ For example, in *Media General Operations v NLRB*, an employee called his supervisor a “bastard” and a “redneck son-of-a-bitch.”²⁴ The Fourth Circuit held that this language represented griping and was not an exercise of his section 7 rights because his comments were “devoid of substantive content and of meaningful value.”²⁵ *Media* is particularly relevant to claims arising from Facebook since employees who use the website to express their frustrations are more likely engaged in griping than in protected concerted activity. At the same time, if an employee’s Facebook gripes are phrased in such a way as to contemplate a legitimate interest *and* prompt group action, they may very well receive *NLRA* protection.²⁶

Three Key Legal Developments

Three significant developments occurred in 2011 to assist triers of fact with the task of ascertaining whether an employee’s Facebook posts amount to protected concerted activity. First, Lafe Solomon, the Acting General Counsel for the NLRB, released a report entitled “Report of Acting General Counsel Concerning Social Media Cases.”²⁷ The report discussed the outcomes of fourteen cases involving social networking. Although most cases were settled, or are still in the early stages of investigation or litigation, Solomon’s report confirmed that the three-part framework for protected concerted activity should be applied in the social networking context.²⁸

²⁰ *NLRB v Local 1229, IBEW [Jefferson Standard Broadcasting]*, 346 US 464 (1953).

²¹ *NLRB v Knuth Bros*, 537 F 2d 950 at 953 (7th Cir 1976).

²² *Hugh H Wilson v NLRB*, 414 F 2d 1345 at 1345 and 1348 (3rd Cir 1969).

²³ *Mushroom Transport v NLRB*, 330 F 2d 683 at 685 (3rd Cir 1964) [*Mushroom*].

²⁴ 394 F 3d 207 at 211 (4th Cir 2005) [*Media*].

²⁵ *Ibid.*

²⁶ Bielan, *supra* note 2 at 178.

²⁷ United States, National Labour Relations Board Office of the General Counsel, *Report of the Acting General Counsel Concerning Social Media*, (General Counsel Memorandum OM 11-74, 2011) [Solomon Report].

²⁸ *Ibid.*

The second and third developments were the decisions *Hispanics United of Buffalo v Ortiz*²⁹ and *NLRB v Knauz BMW*.³⁰ In both cases the judges did not devise new law but rather applied established NLRB precedents to resolve Facebook-related claims. These cases serve as reminders that although the communication medium is new, much of the substantive analysis of section 7 rights remains the same.³¹

National Labor Relations Board–Office of Advice

Six of the fourteen decisions in Solomon’s report focused squarely on the issue of when an employee’s Facebook posts are protected by the *NLRA*. In each, the various triers of fact applied the three-part framework for protected concerted activity to determine if the employee’s posts were protected. All three conditions were implicated in the various decisions.

The concerted factor is more likely to be satisfied if a Facebook post is directed at another employee or is an extension of a prior conversation amongst co-workers.³² To analyse this, the NLRB examined (a) whether a Facebook post appealed to co-workers for assistance, (b) whether co-workers actually responded to it, and (c) whether the reasons for a post had been previously discussed at work. For instance, it was determined that a bartender who publicized his frustrations over his employer’s tipping policy on Facebook was not engaging in protected concerted activity because the concerted factor was not met. Although his post mentioned tipping, which, as a term of his employment satisfied the legitimate interest factor, he did not “discuss the posting with his co-workers, and none of them responded to it.”³³

The legitimate interest factor will typically be met if a post contemplates a term or condition of employment, or addresses an issue affecting one’s interests as an employee. For example, in one case an employee called his Assistant Manager a ‘super mega *puta*’ on Facebook.³⁴ This was not protected concerted activity as it failed to meet the legitimate interest factor. His post did not address a term of his employment but rather “expressed his frustration regarding his individual dispute with the Assistant Manager.”³⁵

Finally, as regards the legitimate means factor, Solomon’s report suggests that the NLRB will tolerate a high degree of misrepresentation, profanity, and obscene language, so that activity

²⁹ (2011) Case No. 3-CA-27872 [*Hispanics United*].

³⁰ (2011) Case No. 13-CA-46452 [*Knauz*].

³¹ Hassan, *supra* note 3 at 2.

³² *Ibid.*

³³ Solomon Report, *supra* note 27 at 14.

³⁴ *Ibid* at 17.

³⁵ *Ibid.*

otherwise protected does not lose the *NLRA*'s safeguard. Regardless, actual threats made on social networking sites are not protected.³⁶

In summary, if the three conditions for protected concerted activity are met then an employee's Facebook communications are covered by the *NLRA* and the employee is immune from discipline. However, if any of the three are not met, an employee's posts will not be protected, and American employers are free to impose discipline at-will—including termination.

Hispanics United of Buffalo v Ortiz

The second and third developments of 2011, *Hispanics United* and *Knauz*, further developed the thresholds for each of the conditions of protected concerted activity. In *Hispanics United*, five employees were terminated as a result of Facebook communications. The employees claimed that their terminations were unlawful because they were engaging in protected concerted activity. After reviewing the Facebook communications, the judge held in favour of the employees and ordered their reinstatement.³⁷ Similar to the triers of fact in Solomon's report, the judge did not introduce any new law but relied on existing jurisprudence to reach his holding.³⁸

In *Hispanics United*, one employee had an altercation with a co-worker and subsequently posted on Facebook that "a co-worker feels that we don't help our clients enough...I about had it! My fellow co-workers how do u [sic] feel?"³⁹ Four other employees commented on the post and all five were terminated after the correspondence was brought to the employer's attention.⁴⁰

On these facts, the concerted factor of the three-part test for protected concerted activity is not met. The employee who made the initial posts asked for her co-workers' opinions about an issue, without knowing if they were aware such an issue existed, (or assuming they were, without knowing whether they wanted to take action). However, the judge held that the concerted factor was in fact satisfied, relying on the proposition that an individual activity will be concerted if it is undertaken with "the object of initiating or inducing group action."⁴¹ By specifically asking how the other employees felt about the issue, Groves evidently intended for her co-workers to respond. Further, the judge noted that the "object of inducing group action need not be expressed."⁴² This suggests that the threshold for the concerted factor is relatively low: to meet it, an employee need not explicitly enlist a co-worker's support in a Facebook post.

³⁶ Beilan, *supra* note 2 at 166.

³⁷ *Hispanics United*, *supra* note 29 at 11 para 5.

³⁸ Hassan, *supra* note 3 at 2.

³⁹ *Hispanics United*, *supra* note 29 at 4 para 40.

⁴⁰ *Ibid* at 7 para 10.

⁴¹ *Mushroom*, *supra* note 23 at para 8.

⁴² *Hispanics United*, *supra* note 29 at 7 para 35.

Although these communications do not strictly relate to a term or condition of employment, the judge found that maintaining one's job performance is protected to the same extent as seeking changes in wages, hours or working conditions.⁴³ Thus the legitimate interests factor was satisfied. For the third and final factor, lawful means, the judge held that the profanities contained in the employees' posts were not sufficiently egregious to lose the *NLRA*'s protection.⁴⁴

Ultimately, this case is significant for two reasons. First, it continues the trend of utilizing existing authority in the social media context. Second, by upholding the reasoning in *Mushroom*, the case stands for the proposition that the concerted factor can be implied from an employee's Facebook posts. This is important, as the majority of employees' Facebook communications, including those in this case, do not explicitly contemplate collective action.⁴⁵

NLRB v Knauz BMW

As in *Hispanics United*, *Knauz* relied on established NLRB precedent instead of introducing new law. In *Knauz*, the employer (a BMW dealership) hosted a promotional event to launch one of its new vehicles. It catered the event with a hot-dog cart and other inexpensive foods and beverages. Several employees were upset by the choice of catering because they felt it was inappropriate for the event, and would negatively impact their commissions.⁴⁶ One employee voiced his concerns on Facebook by posting a picture of the hot-dog cart and sarcastically noting that his employer went "all out" for the dealership's "most important launch...in years."⁴⁷ The employee was subsequently terminated.

The judge found that this post constituted protected concerted activity. The concerted factor was satisfied because the employee had previously discussed the promotional event with his co-workers, and his post was thus a "logical outgrowth of prior concerted activity".⁴⁸ Further, the legitimate interest factor was met because the post pertained to his commission, which was clearly a term of his employment. Finally, for the legitimate means factor, the judge cited *Timekeeping Systems Inc v Lawrence LeinWeber* for the notion that "unpleasantries uttered in the course of otherwise protected concerted activity [do] not strip away the [*NLRA*'s] protection".⁴⁹

⁴³ *Ibid* at 8 para 25, citing *Five Star Transportation v NLRB* 349 NLRB 42 (1st Cir 2007) at 59.

⁴⁴ *Ibid* at 9 para 30.

⁴⁵ Beilan, *supra* note 2 at 172 and 173.

⁴⁶ *Knauz*, *supra* note 30 at 2 para 20.

⁴⁷ *Ibid* at 3 para 30.

⁴⁸ *Ibid* at 8 para 10.

⁴⁹ 323 NLRB 244, 49 (1997).

Therefore, despite the “sarcastic” and “mocking” tone of the post, it was not sufficiently egregious to fall outside the ambit of section 7.⁵⁰

Although this post qualified as protected concerted activity, the employee was nonetheless terminated as a result of another Facebook post that was not covered by section 7. During the same promotional event, a luxury SUV drove into a pond, which the employee photographed and subsequently uploaded to Facebook. The judge described this post as a “lark” and found it did not address a legitimate employee interest and thus the second factor was not satisfied. This second post alone formed the basis of the employee’s lawful termination.⁵¹

Summary

The employment-at-will doctrine allows American employers to terminate employees for Facebook communications. However, if an employee’s post represents protected concerted activity, their conduct is protected by the *NLRA* and the employee is immune from discipline. As demonstrated by Solomon’s report, *Hispanics United*, and *Knauz*, American triers of fact have not introduced new law but rather applied established NLRB precedents to handle the claims that have arisen from employees’ use of social media. As will be demonstrated in the following section, this is similar to the Canadian approach in which an existing doctrine is also applied to related claims.

III. THE CANADIAN APPROACH

In the United States, all private sector employees are subject to one federal statute regardless of whether they are unionized. This is not the case in Canada, where both the provincial and federal governments have jurisdiction over the country’s private sector. Both unionized and non-unionized workplaces under provincial jurisdiction are governed by labour relations statutes that oversee unionization, as well as employment standards statutes, which establish minimum wage and benefit standards. In contrast, federally regulated workplaces are subject to the *Canada Labour Code*.⁵² This section focuses on unionized workplaces that are within provincial jurisdictions.

Although the *Canada Labour Code* and the various provincial labour relations statutes grant rights to employees, none provide employees with a right to engage in protected concerted activity. Further, the doctrine of employment-at-will is not part of Canadian labour law. As a result of these fundamental differences, Canadian triers of fact rely on the doctrine of just cause dismissal to assess claims arising from employees’ Facebook communications.

⁵⁰ *Knauz*, *supra* note 30 at 9 para 5.

⁵¹ *Ibid* at 9 para 10.

⁵² RSC 1985, c L-2.

Just Cause Dismissal

Just cause dismissal involves situations where an employer is legally allowed to terminate an employee for reasons the law or public policy deem acceptable.⁵³ If an employee is dismissed for cause, the employer is not required to provide them with reasonable notice nor payment in lieu of notice. The seminal case on this doctrine in unionized workplaces is *William Scott & Company Ltd v Canadian Food and Allied Workers Union, Local P-162*⁵⁴ in which the trier of fact outlined a three-part framework to determine if an employer can justly dismiss an employee. First, it must be determined whether the employee engaged in conduct that merited discipline. If so, the judge will then examine whether the employee's conduct justified his or her dismissal. To assess this, the following factors should be taken into consideration:

- (1) the seriousness of the employee's offence;
- (2) whether the employee's conduct was premeditated, repetitive or provoked;
- (3) the length of the employee's record of service;
- (4) whether the employer engaged in progressive forms of discipline prior to dismissal;
- and,
- (5) whether the employee's dismissal is in line with the employer's policies and past record.

Finally, if the dismissal *was* an excessive reprimand, the judge will examine what alternative form(s) of discipline, if any, should be imposed.⁵⁵

Lougheed Imports Ltd (cob West Coast Mazda) v United Food and Commercial Workers International Union

Background

The doctrine of just cause dismissal was first applied in relation to an employee's Facebook posts in *Lougheed Imports Ltd (cob West Coast Mazda) v United Food and Commercial Workers International Union [Mazda]*.⁵⁶ Similar to the approach taken in the United

⁵³ Arturo Bronstein, *International and Comparative Labour Law: Current Challenges* (New York: Palgrave MacMillan, 2009) at 70-74.

⁵⁴ [1977] 1 Can LRBR 1 [*William Scott*].

⁵⁵ *Ibid* at paras 13-14.

⁵⁶ [2010] CLRBR (2d) 82 [*Mazda*].

States, the Board in *Mazda* did not introduce any new legal principles, but rather applied existing authority to the social media context.

In *Mazda*, two employees (who had been rallying employee support for a union) were terminated shortly after the union's certification. The employer claimed these dismissals were a result of the employees' Facebook posts, which stated that "my Boss...[is] A COMPLETE JACK-ASS not just Half-a Tard" and "[the employer] is a fuckin joke...dont spend your money there as they are fuckin crooks and are out to hose you."⁵⁷ In response, the employees claimed these were wrongful dismissals that were motivated by the employer's alleged anti-union sentiment.⁵⁸ The two employees were friends on Facebook with one of their managers, meaning that the manager had access to their posts.

Just Cause Dismissal

The Board spent most of its analysis on the threshold issue of whether the employer was motivated by any anti-union sentiment. To determine whether such a sentiment existed, it applied the test from *ETL Environmental Technology Ltd and Construction v General Workers' Union, Local No 602*.⁵⁹ The test includes seven factors, five of which are identical to the factors under the second branch of the *William Scott* test for just cause dismissal. Accordingly, although the *William Scott* test was cited, its application was limited. However, because of the functionally similar nature between the *ETL* and *William Scott* tests, this case can be analysed using the *William Scott* framework.

The first branch of the *William Scott* test (cause for discipline) was satisfied because the employees' posts were offensive and egregious and expressed contempt for their employer.⁶⁰ Cause for dismissal, the second branch of the test, was satisfied by the Union's failure to show sufficient evidence of any anti-union motivation by the employer.⁶¹

Termination of the employees was upheld even though neither was involved in any prior disciplinary incidents, and both had long records of service.⁶² The presence of these two factors was insufficient to outweigh the factors that supported the employer: the employees' insubordination and the employer's use of a progressive discipline system.

For the first factor, seriousness of the offence, it was found that the employees' posts constituted insubordination as they represented wilful and oppressive conduct against their

⁵⁷ *Ibid* at paras 35 and 37.

⁵⁸ *Ibid*.

⁵⁹ [1993] BCLRBD No 216 [*ETL*].

⁶⁰ *Mazda*, *supra* note 56 at para 112.

⁶¹ *Ibid* at paras 94, 109-110.

⁶² *Ibid* at para 110.

employer.⁶³ In general, one instance of insubordination is insufficient for a just cause dismissal, but the Board held that in this case dismissal was justified since the posts were “a verbal weapon to degrade a supervisor in front of others.”⁶⁴ The Union argued that the posts, although inappropriate, were similar to comments regularly spoken and tolerated in the employer’s workplace, and thus the employees could not be terminated for them.⁶⁵ The Board rejected this argument on the basis that the comments were in fact made online and not in-person.⁶⁶ Further, the Board reasoned that, unlike comments made face-to-face that are only heard by those in the immediate vicinity, comments on Facebook have the potential to reach a vast number of people—which in turn distinguished this situation.⁶⁷

In terms of the fourth factor, the employer had progressively disciplined the employees by conducting several investigative meetings prior to terminating them.⁶⁸ The fifth factor was not found on these facts because the employer had never before encountered this situation—thus the Board had no policies or past practices to draw from. Regardless, the Board held that an employer is not required to have a formal rule in place prohibiting insubordinate conduct in order to impose discipline.⁶⁹ Finally, there was no need for the Board to examine the third branch of the *William Scott* test (alternative forms of discipline if dismissal is too severe) since the employee’s terminations were upheld.⁷⁰

Implications

Mazda raised three key points to guide future triers of fact faced with claims arising from employees denigrating their employers online. First, the Board specifically noted that Facebook posts are not identical to face-to-face communication, because the audiences are of vastly different sizes. Second, the Board cited *Alberta v Alberta Union of Provincial Employees*,⁷¹ a case outside the social media context, for the proposition that “displaying [one’s] opinion about work related issues [online] may have consequences within the employment relationship.”⁷² Third, citing *Leduc v Roman*,⁷³ a non-labour law case, the Board held that employees do not have

⁶³ *Ibid* at para 98.

⁶⁴ *Ibid*.

⁶⁵ *Ibid* at para 80.

⁶⁶ *Ibid* at para 97.

⁶⁷ *Ibid* at paras 97-98.

⁶⁸ *Ibid* at para 23.

⁶⁹ *Ibid* at paras 61 and 62.

⁷⁰ *Ibid* at paras 115-116.

⁷¹ (2008), 174 LAC (4th) 371 (AB GAA).

⁷² *Ibid* at para 97.

⁷³ (2009), 308 DLR (4th) 353 at paras 25, 35-36 [*Leduc*].

a reasonable expectation of privacy to their Facebook profiles from their employers.⁷⁴ Arguably, the Board was only comfortable with citing *Leduc* for this proposition because the employees were Facebook “friends” with one of their supervisors. The issue of an employer terminating an employee for Facebook communications in which the two parties were not “friends” was addressed in *Groves v Cargojet Holdings Ltd.*⁷⁵

Groves v Cargojet Holdings Ltd

Background

In *Groves*, an employee was dismissed as a result of her Facebook posts, which included threats against a co-worker, which included stating “this guy at work is a fag. I hate him.” After one of her Facebook friends replied to her post by telling her to punch this co-worker in the groin, she posted “I have steel toes...Kicking would work better.”⁷⁶ These posts violated her employer’s workplace violence policy.⁷⁷ Significantly, other Cargojet employees and suppliers were Facebook friends with Groves and could thus see her profile and posts.⁷⁸

Just Cause Dismissal

Canada’s labour and employment communities closely watched this decision because it was the first case since *Mazda* to raise the issue of whether an employee can be terminated for comments made off-duty. Unlike the Board in *Mazda*, the arbitrator in *Groves* found that the employer lacked sufficient grounds for termination after applying the *William Scott* test for just cause dismissal.⁷⁹ Further, the arbitrator’s analysis for the first factor under the second branch of the *William Scott* test, the seriousness of an employee’s conduct, raised two key distinctions from *Mazda*.

The first distinction involved whether threatening someone over the Internet is a more or less serious offence than threatening someone in person. Both *Mazda* and *Groves* found that in-

⁷⁴ *Mazda*, *supra* note 56 at para 97.

⁷⁵ *Groves v Cargojet Holdings Ltd*, [2011] CLAD No 257 [*Groves*].

⁷⁶ *Ibid* at para 22.

⁷⁷ *Ibid* at para 2.

⁷⁸ *Ibid* at paras 28, 34.

⁷⁹ *Ibid* at para 124.

person communications differ from online communications; however, *Mazda* held that threats posted online were more serious, whereas *Groves* came to the opposite conclusion.⁸⁰ The rationale behind the decision in *Groves* was that threats leave a greater and more severe impact upon a person if made face-to-face.⁸¹ No evidentiary support was cited for this proposition, although the arbitrator held that the employee's threats, "though offensive and disrespectful, [did not] have the same impacts as [threats] made in a face-to-face altercation."⁸²

The second inconsistency between the two decisions concerned whether employees have a reasonable expectation of privacy regarding the contents of their Facebook profiles, even if they write Facebook posts only while off-duty. The Board in *Mazda* found that the two employees had no privacy expectations from their employer in regards to their Facebook profiles.⁸³ Their employer could thus view their posts and discipline them in response. Conversely, the arbitrator in *Groves* did not discuss whether the employee had a right to privacy. In fact, the word privacy is mentioned just three times in the entire judgment, and only in reference to Facebook's privacy *settings*, rather than a person's privacy *interests*.⁸⁴ Instead, the arbitrator stated that an employee's off-duty conduct must have a "real and material connection" to his or her workplace, in order to provide grounds for discipline and discharge.⁸⁵ The arbitrator then analyzed five factors from *Re Millhaven Fibres Ltd, Millhaven Works, and Oil, Chemical & Atomic Workers Int'l Union, Local 9-670*⁸⁶ to determine if such a connection existed. None was found as the employee's Facebook posts did not pose a significant concern to the employer's business "which depends much more on...timeliness and accuracy of service."⁸⁷ Consequently, the employee's conduct was not sufficiently serious to warrant just cause dismissal. The arbitrator thus examined alternate forms of discipline, holding that *Groves* was entitled to one month's salary, as reinstatement was not recommended under the circumstances.⁸⁸

⁸⁰ *Ibid* at paras 85 and 86.

⁸¹ *Ibid*.

⁸² *Ibid* at para 85.

⁸³ *Mazda*, *supra* note 56 at para 97.

⁸⁴ *Groves*, *supra* note 75 at paras 77 and 78.

⁸⁵ *Ibid* at para 92, citing *Ottawa-Carleton District School Board v Ontario Secondary School Teachers' Federation, District 25 (Plant Support Staff) (Cobb Grievance)* [2006] OLAA No. 597 at para 17.

⁸⁶ [1967] OLAA No 4 at para 24 [*Millhaven*] (The five factors are: (1) the conduct of the grievor harms the Company's reputation or product, (2) the grievous behaviour renders the employee unable to perform his duties satisfactorily, (3) the grievor's behaviour leads to refusal, reluctance or inability of other employees to work with him, (4) the grievor has been guilty of a serious breach of the Criminal Code and, thus rendering his conduct injurious to the general reputation of the Company and its employees, (5) places difficulty in the way of the company properly carrying out its function of efficiently managing its works and efficiently directing its work forces).

⁸⁷ *Groves*, *supra* note 75 at para 94.

⁸⁸ *Ibid* at paras 124-127.

Implications

There are now two inconsistencies on the issue of Facebook in the workplace as a result of *Groves*. The first involves whether threatening someone online is a more or less serious offence than threatening someone in person. The second concerns whether employees have a reasonable expectation of privacy to their Facebook profiles from their employers.

Mazda stands for the principle that threatening another over the Internet is a more serious offence than doing so in person, whereas *Groves* came to the opposite conclusion. This issue has not been addressed in Canadian jurisprudence since these two cases, and it therefore remains open for future triers of fact to apply either interpretation. As for the second inconsistency regarding privacy expectations, it is unclear why *Groves* did not follow *Mazda* and assess whether the employee had a reasonable expectation of privacy in the contents of her Facebook profile from her employer. One possible explanation is that the arbitrator in *Groves* phrased this issue differently. Rather than asking if the employees' off-duty conduct is subject to employer discipline, as occurred in *Mazda*, the arbitrator in *Groves* asked the slightly different question of whether the employee's off-duty conduct breached the employer's workplace policies.⁸⁹ The issue could not have been phrased this way in *Mazda*, since that employer did not have a workplace policy in place. Regardless, this does not explain why *Groves* followed *Millhaven*, which was by no means dependant on the existence of a workplace policy.

A more plausible explanation is that the employees in *Mazda*, unlike the employee in *Groves*, were Facebook friends with one of their managers. Due to this key factual distinction, their employer could view their profiles without concern for the employees' privacy. In contrast, the employer in *Groves* could not view the employee's profile, which suggests that the employee indeed had an expectation of privacy. As a consequence of this, the arbitrator needed a mechanism to determine if the employee's posts (her off-duty conduct) constituted grounds for discipline. This explains the use of *Millhaven*. Ultimately, future triers of fact will likely be guided by this factual distinction and only apply *Millhaven* if an employer cannot lawfully view its employees' Facebook profiles, either because the posts are made off-duty or the employer is not a Facebook "friend" of the employee.

Summary

Like American triers of fact, Canadian labour boards and arbitrators have not introduced new law to handle the claims that have arisen as a result of employees posting about their employers on Facebook. Rather, the doctrine for just cause dismissal, which has been in use for

⁸⁹ *Ibid* at para 86.

several decades, is applied. Like the American approach, this doctrine serves as a reminder that while the mode of communication has changed, the substantive analysis remains very much the same.

IV. PRESCRIPTIVE ANALYSIS

Both American and Canadian triers of fact maintain that consequences may arise for employees who criticize their employers on Facebook. However, the two countries differ in their approaches to this issue. In the United States, employers are generally free to terminate employees through the employment-at-will doctrine—unless an employee’s Facebook posts constitute protected concerted activity. If the posts are concerted, advance legitimate interests, and do so by legitimate means, section 7 of the *NRLA* is satisfied and the employee will be immune from discipline. In Canada, employers can only terminate employees if they meet the *William Scott* test for just cause dismissal. This too is assessed with a three-part framework, which involves establishing cause for discipline and cause for termination, and, if necessary, exploring alternate forms of discipline.

Neither the American nor the Canadian approaches are particularly new. Both frameworks have been in place for decades, and they continue to be applied in spite of the fact that Facebook represents a novel form of communication. While continued use of both approaches might suggest that they are sufficiently flexible to handle the claims that have arisen from Facebook’s use in the workplace, only the Canadian approach is truly adaptive.

The principle flaw with the American approach is that it asks the wrong question. In American jurisprudence, triers of fact ask whether an employee’s Facebook communications constitute protected concerted activity. However, this ignores the reality of *why* employees use Facebook—which rarely involves advancing their section 7 rights.⁹⁰ Instead, employees use the site to manage their social lives and to share information, as well as complain about their jobs. Nonetheless, posts that amount to nothing more than mere gripes about work receive *NLRA* protection under the guise of concerted activity, because the American framework is not always capable of distinguishing between employees who use Facebook to promote their workplace interests from those who use it for other purposes.

Conversely, the Canadian framework can properly differentiate between employees who use Facebook to advance workplace interests from employees who use it for other purposes. This is because it asks the right question—whether an employee’s posts constitute grounds for discipline. This is simply a variation of the central question raised by the doctrine of just cause dismissal, which asks whether an employee’s conduct justifies disciplinary action. Since only a slight change in the test is necessary, this doctrine is flexible enough to handle the claims that

⁹⁰ Ray, Sharpe & Strassfeld, *supra* note 13 at 344-348.

have arisen from employee use of Facebook. Therefore, it is recommended over the American approach.

A Flawed Framework

More often than not, the American approach will not grant protection to complaints. Take the example of an employee who posts “My boss is a bastard. I wish he’d go to hell!” According to the American test, this post is outside the scope of section 7—it was not brought collectively nor does it contemplate any workplace interests. Even if this post was based on a legitimate concern (to otherwise satisfy the legitimate ends factor), it is likely that the employee’s co-workers would be unable to grasp the basis for the complaint without additional information. All things being equal, in this situation the employee could be terminated for publically insulting his employer and not raising his complaint, legitimate or not, through the proper channels.

Assuming that this same employee had instead posted “My boss is a bastard. I wish he’d go to hell for keeping the factory so damn cold!” and that several of the employee’s co-workers responded to the post. This complaint *would* satisfy the three-part framework for protected concerted activity, and thus the employee would be immune from discipline. It would qualify as concerted activity because the post represents the first step to bringing a collective grievance, since several co-workers responded to the post, (regardless if the grievance is actually brought or not). Further, the legitimate ends factor is satisfied because this post advances an employee interest: the temperature of the workplace. It is arguable that this post fails on the third factor, legitimate means, because of the profanities. However, according to *Hispanics United*, profanities are not sufficiently improper to lose *NLRA* protection.⁹¹ Ultimately, since the test for protected concerted activity is likely to be satisfied, this post would be covered by the *NLRA*. The *NLRA* has effectively allowed this employee to publically berate his employer.

This example illustrates the flaw in the American approach. If a complaint satisfies the concerted factor and contemplates a workplace interest, it will likely satisfy the requirements of protected concerted activity. This occurs because of a faulty assumption within the legitimate ends factor—it assumes that if an employee’s post *mentions* a workplace interest, the employee intends to *address* it. An employee’s elaboration of their complaint, such as explaining why one’s boss is a ‘bastard,’ will be definitive when distinguishing protected from unprotected activity.⁹²

This flaw is not limited to hypothetical examples. For instance, it was held that the employee in *Knauz* was engaged in protected concerted activity for mocking his employer’s event on Facebook. The three-part framework was satisfied because his post was an outgrowth of

⁹¹ *Hispanics United*, *supra* note 29 at para 30.

⁹² Rosenberg, *supra* note 15 at 492.

a previous conversation amongst co-workers, and it contemplated a term of his employment,(his commission). However, the employee never intended to prompt group action. His Facebook post inadvertently happened to pass the test for protected concerted activity. If this employee truly meant to address his complaint, it is more likely that he would have raised it privately with his employer through the workplace's internal complaint channels. The employee would not have displayed it in public before his employer had a chance to respond. This employee was ultimately terminated as a result of another, unrelated post. However, had the other post not been made, the employee's dismissal would have constituted an unfair labour practice contrary to section 8(a)(1) of the *NLRA*—essentially enabling him to recover damages from his employer for publically ridiculing its event.

The above examples are not meant to suggest that employees *never* use Facebook to advance their section 7 rights. In *Hispanics United*, the employee sought to initiate group action and address a workplace grievance by asking her co-workers to respond to an accusation on Facebook. The framework rightfully overturned the employees' terminations because they were attempting to rectify a grievance. However, *Hispanics United* is somewhat of a rarity because the majority of employees do not use Facebook for the same purpose as the employees in this case.⁹³

The drawbacks of the American approach are also evident if one applies it to *Mazda*. Arguably, had *Mazda* occurred in the United States it would have satisfied the first two factors for protected concerted activity. The two employees acted together, their posts concerned the employer's management, and in turn this affected their interests as employees. However, it does not appear that these employees had any intention of changing their workplace: they only sought to malign their employer in a public forum by using extreme profanities and homophobic remarks. Although this claim would have failed on the legitimate means factors, as their posts included threats, the fact that these employees' conduct would otherwise have constituted protected concerted activity demonstrates that the American approach is not well suited to handle claims in the social networking context.

The NLRB's Flawed Categorization of Facebook

A central problem with the American system is that the NLRB describes communications over Facebook as analogous to 'talking at the water cooler.'⁹⁴ This comparison is flawed. Talking in-person requires a listener to hear and immediately react to a speaker's statement, even if that reaction is to walk away without responding. Accordingly, the concerted factor can almost always be verified in face-to-face communication, because it is generally apparent whether the employees will act together and further a collective interest. In contrast, on Facebook co-workers

⁹³ Beilan, *supra* note 2 at 172 and 173.

⁹⁴ Rosenberg, *supra* note 15 at 492.

may respond to an employee's work-related post simply because they find it interesting or humorous. This does not imply that they actually agree with the statement or intend to act upon it—and yet their responses can be misconstrued to fulfill the concerted factor. Thus, while the three-part American framework may lend itself to face-to-face conversations, communicating over Facebook is so fundamentally different that the current framework is simply inadequate. As technology progresses and employee complaints more resemble workplace concerns, the three-part framework is less able to distinguish between one employee's legitimate interests from another's individual complaints.

Resolving Canadian Inconsistencies

The Canadian approach does not suffer from the same flaw as its American counterpart because the doctrine of just cause dismissal can distinguish between employees who use Facebook to address workplace interests from those who use it to complain. However, the *Mazda* and *Groves* decisions are problematic in that they created two inconsistencies regarding the assessment of Facebook related claims, which need to be reconciled.

First, *Mazda* held that threatening someone online was a more serious offence than threatening someone in-person, whereas *Groves* came to the reverse conclusion. Between the two decisions, the *Mazda* interpretation should be preferred. Posting a threat online has the potential for creating greater consequences, due to the vast number of people who might view the post, including co-workers, managers, clients and the general public. As a result, more people may change their perception of the affected employer. The arbitrator in *Groves* instead held that threatening another face-to-face was more serious because doing so leaves a greater impact upon the person. While this is true, it fails to recognize that when a threat is made online it is not necessarily made to intimidate another *per se*, but rather to *broadcast* the threat to a large number of people. Future triers of fact should thus apply the interpretation in *Mazda* and hold that threatening someone online increases the seriousness of the offence.

This is not to suggest that *Groves* was wrongly decided. *Mazda* was cited in *Groves* and distinguished on the basis that the employee's Facebook comments differed in "number and nature" from the posts in *Mazda*.⁹⁵ This was appropriate since the arbitrator held that cases involving Facebook should be decided on an *ad-hoc* basis.⁹⁶

In terms of the second inconsistency, regarding whether an employee's off-duty conduct allows for discipline, both *Mazda* and *Groves* concluded that their respective employers could discipline their employees. In reaching this conclusion, *Mazda* assessed the employees' expectations of privacy, while *Groves* applied the test from *Millhaven*. The different approaches

⁹⁵ *Groves*, *supra* note 75 at para 121.

⁹⁶ *Ibid* at para 87.

do not constitute any real inconsistency because there is a logical explanation for why *Mazda* declined to apply *Millhaven*. The employer in *Mazda* could view its employees' Facebook profiles and therefore no privacy concerns arose. The employer in *Groves*, however, could not—thus the arbitrator needed a mechanism to enable the employer to discipline the employee. Accordingly, future triers of fact should apply *Millhaven* in situations in which an employer cannot lawfully view an employee's Facebook profile.

Employer Social Media Policies

Although the Canadian approach is more flexible than the American approach, it is still not the most effective means to resolve claims that arise from employees' Facebook posts. This is because the Canadian doctrine is reactive, rather than proactive—it is triggered only after an employee *publicises* their workplace grievances. To address this issue before it becomes a problem, employers should implement social media policies, which have the potential to be used as powerful tools for establishing guidelines that balance the needs of employers with the rights of employees.⁹⁷

Despite the massive surge of Facebook users, almost 75% of employers worldwide do not have a social media policy.⁹⁸ This is surprising, considering that an effective policy mitigates most of the risks associated with employees' social networking habits. Through the use of such policies, employers can enforce rules, establish unambiguous limits, decide what activity is permissible, and address employees' privacy expectations.⁹⁹

To a certain extent, a social media policy has the potential to shield American employers from the flawed framework for protected concerted activity—and its detrimental results. This is because of the longstanding principle that an employee's "refusal to obey instructions constitute[s] reasonable grounds for discipline...and discharge for insubordination or refusal to obey instructions is perfectly lawful."¹⁰⁰ An effective policy thus provides American employers with increased protection from NLRB charges: if an employee violates a social media policy, the employer need not tolerate what would otherwise be concerted activity.¹⁰¹ Of course, this is only applicable if the employer's policy itself does not conflict with any statutes or common law.¹⁰²

Both American and Canadian employers must ensure their policies do not infringe upon any employee rights listed in their respective statutes, including section 7 of the *NLRA*. In his 2011 report, Solomon offered guidance for employers on how to draft social media policies. He

⁹⁷ Bielan, *supra* note 2 at 181.

⁹⁸ *Ibid* at 180.

⁹⁹ *Ibid* at 181.

¹⁰⁰ *Media*, *supra* note 24 at 212.

¹⁰¹ *Hagopian & Sons Inc v National Labor Relations Board*, 395 F (2d) 947 at 953 (6th Cir 1968).

¹⁰² Bielan, *supra* note 2 at 181-182.

suggested that, in general, policies that are overly broad or ambiguous would not be enforced.¹⁰³ For example, a policy that prohibited “inappropriate discussions” was too broad because it indirectly limited protected concerted activity.¹⁰⁴ In contrast, a policy stating, “a bad attitude creates a difficult working environment and prevents [one] from providing quality service” was deemed valid.¹⁰⁵ Though this policy intruded on employees’ section 7 rights, this intrusion was minimal in relation to the protection the policy granted to the employer’s customers.¹⁰⁶

V. CONCLUSION

Complaints about work are not going away. In the past, this was not a serious issue for employers because employee gripes were generally restricted to private conversations. This has significantly changed with the advent of social media websites, and in particular, Facebook. Today, employee posts reach far greater audiences than ever before, and often this occurs at the employer’s expense. The employer may suffer permanent damages to its business, bottom line and professional reputation, particularly if the post contains profanities, or defamatory language.

Triers of fact in both the United States and Canada apply existing doctrines to employment claims raised by Facebook. Americans apply the three-part framework for protected concerted activity, whereas Canadians apply the doctrine of just cause dismissal. However, the Canadian approach is better suited to handle these claims because, unlike the American approach, it correctly distinguishes between those few employees who use Facebook to further workplace interests from all the rest who use it to complain. As a consequence, American employers may be forced to tolerate an employee’s complaints because they are protected by the *NLRA* under the guise of protected concerted activity. By not condemning this behaviour, the *NLRA* is effectively condoning it. Although the Canadian approach is thus preferable, ultimately neither approach is a substitute for a comprehensive social media policy that can mitigate against most of the risks associated with employees’ Facebook usage.

This raises the question as to whether the *NLRA* will be amended to better handle the claims that have arisen from social media. Unfortunately, the prospect of an amendment is unlikely in light of the fact that the *NLRA* has remained unchanged for over half a century, despite numerous attempts to improve the legislation. This stagnation is primarily due to a powerful minority in the American Congress that has consistently blocked numerous attempts at reform.¹⁰⁷ In his article “The Silicon Bullet: Will the Internet Kill the NLRA?” Professor Jeffrey Hirsh argues that a disruptive technology, a technology so radically different from the status quo,

¹⁰³ Hassan, *supra* note 3 at 3.

¹⁰⁴ *Ibid.*

¹⁰⁵ Knauz, *supra* note 30 at para 35.

¹⁰⁶ *Ibid* at para 45.

¹⁰⁷ Cynthia Estlund, “The Ossification of American Labor Law” (2002) 102 Columbia Law Review 1527.

could potentially “jolt the *NLRA* [so that] it finally adapts to modern workplace[s].”¹⁰⁸ It is unclear whether the social networking phenomenon will provide the much-needed impetus to reform the *NLRA*. One thing is certain: if the *NLRA* is not amended soon, it will continue to allow employee tirades at employers’ expense.

¹⁰⁸ Jeffrey Hirsh, “The Silicon Bullet: Will the Internet Kill the *NLRA*?” (2008) 76 *Geo Wash L Rev* 262 at 264.