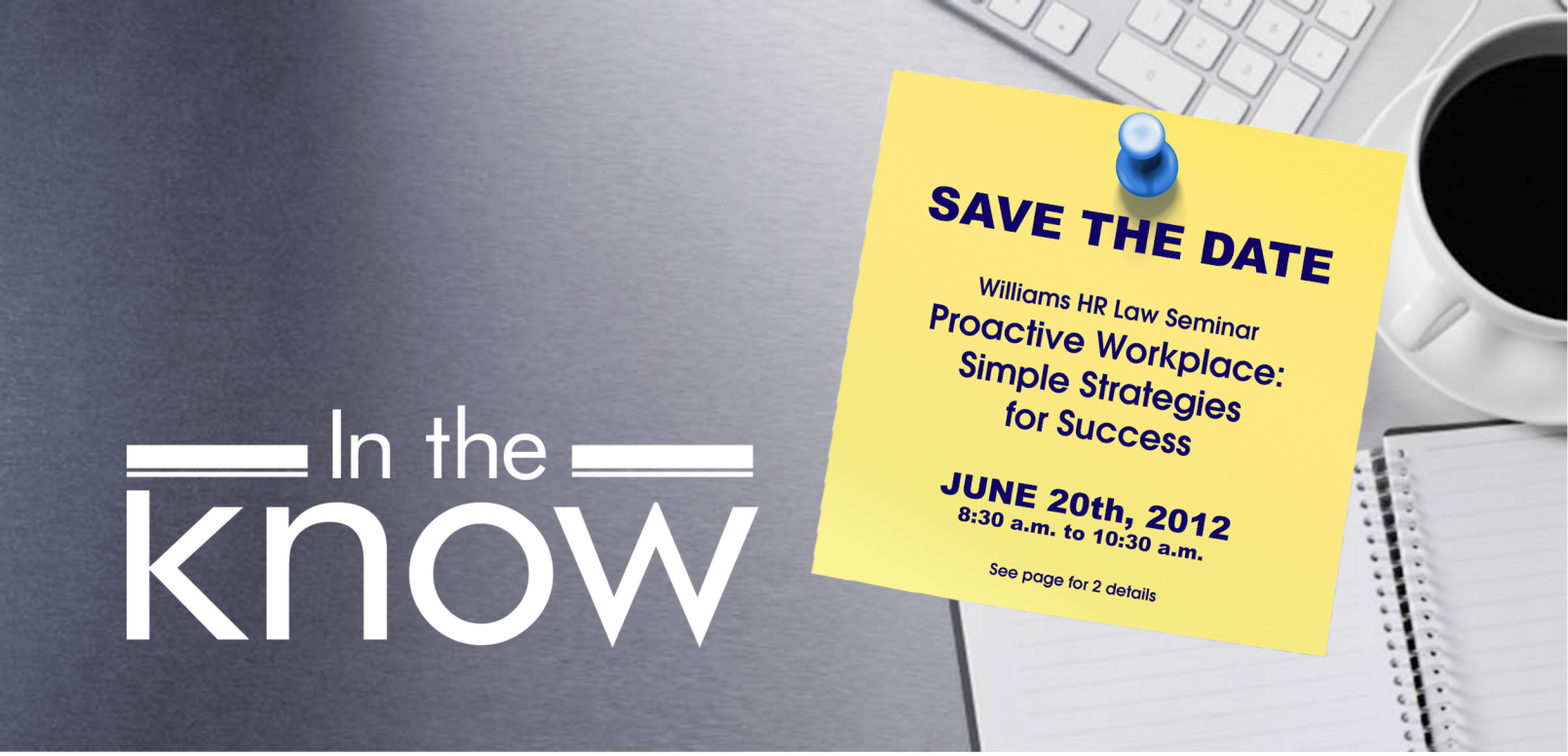

In the know

WILLIAMS HR LAW
LEGAL EXPERTISE AT WORK

Issue No. 5 – May 2012

Employee **Facebook** Passwords: Save 'Face' and Just Don't Ask

The rapid growth in popularity of social media has resulted in many employers seeking to utilize various social media sites to obtain publicly available information about candidates when making their hiring decisions. Recently, there has been considerable discussion in the news about employers requesting access to potential candidates' Facebook profiles, including asking for account passwords in order to view their personal information. According to Facebook's Chief Privacy Officer, this is a trend that is becoming increasingly common.

For employers, accessing this information may result in problems of compliance with anti-discrimination legislation. Any employer who permits this kind of search should carefully consider the potential legal and non-legal risks and exercise significant caution. (con't next page)

In this issue

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Presently, while there are no laws that prevent an employer from requesting access to a candidate's Facebook profile, it nonetheless exposes the employer to potential discrimination claims under the Human Rights Code. Our firm frequently advises clients conducting job interviews to steer clear of any questions requiring candidates to divulge information that could be perceived as grounds for a discrimination claim.

A failure to do so may allow a candidate to claim that they were not hired because they were a particular age, race, sexual orientation etc. Facebook often highlights such information and much more, leaving the employer in the position of having to defend a legitimate hiring decision.

If an employer insists on accessing such information, there are several ways in which they can manage the legal risks associated with conducting social media background checks. Employers can conduct their searches at the end of the hiring process; search only when there is a demonstrable need; search based on objective criteria; have someone other than the decision-maker search; and seek an explanation and validation from the potential candidate employee for any negative information which was found.

Aside from the potential legal exposures that arise when requesting a Facebook password, employers should be mindful also of how the practice may be perceived by job candidates. These requests are generally seen as offside and at odds with societal norms and as such, could possibly deter highly qualified candidates who object purely out of principle.

To put it simply, save 'face' and just don't ask.

SAVE THE DATE

Business owners, managers and HR professionals: Join Williams HR Law for an interactive workshop to learn proactive tactics to avoid costly workplace legal issues, enhance employee engagement and boost your bottom line. Topics will include:

- How to manage social media at work
- How to conduct in-house investigations
- How to manage costly employee terminations
- How to minimize and manage attendance issues

When: Wednesday, June 20, 2012, 8:30 a.m. to 10:30 a.m. (Registration at 8 a.m.)

Where: Richmond Hill Country Club, 8905 Bathurst St., Richmond Hill, ON L4C 0H4

Register and learn more at **www.williamshrlaw.com**

WSIAT Clarifies Traumatic Mental Stress Entitlement

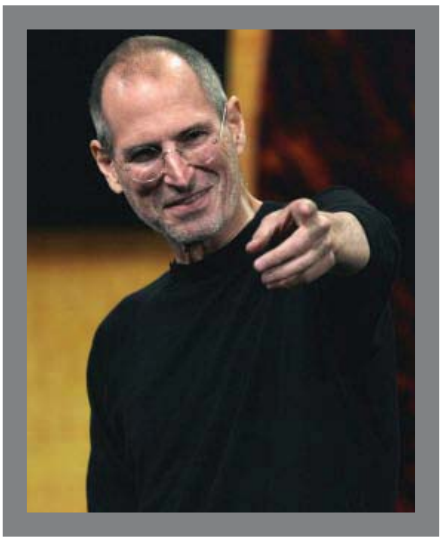
A recent decision of the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") has arguably expanded the scope of entitlement for traumatic mental stress ("TMS"). Previously, in order to be successful in obtaining entitlement for TMS, workers were required to show that their TMS was a result of a traumatic event that posed a threat to their physical well-being. In Decision 483/11, the WSIAT has clarified that there does not necessarily need to be a link between a physical threat and TMS for a claim to be successful.

In this case, a 51 year old educational assistant ("EA") with decades of experience in the classroom was accused of assault by a grade five student. The EA knew that the established School Board protocol following this serious allegation would be a suspension followed by an investigation. After the worker was ultimately cleared of all wrongdoing, she made a claim for TMS benefits stating that she was diagnosed with major depression and was unable to work in a classroom setting. The worker was originally denied benefits by the WSIB Appeals Resolution Officer, however, the WSIAT granted entitlement to TMS benefits. The WSIAT held that her medical documentation supported that she suffered an acute response (major depressive disorder) to a traumatic event which they defined as the allegation by the student and that therefore her claim fit squarely within the required definitions in the Workplace Safety and Insurance Act, 1997.

The WSIAT also considered what mental diagnoses will qualify as psychological conditions for which entitlements will be granted and found that various conditions, if they fall within Axis I of the DSM-IV and are properly diagnosed by a psychiatrist or psychologist, will be considered sufficient. Employers should note that this clarification may result in an increase in TMS claims as a result of this decision; however, workers still bear the burden of proof to demonstrate that their claim falls within the TMS definition. Further, employers should take this opportunity to ensure that they have transparent internal dispute mechanisms, meaningful resolution processes and trained investigators to deal with complaint intake and processing to effetively deal with workplace issues.

The CEO: Who? What? Where? and How Much?

The late Steve Jobs was the modern day example of the iconic CEO. He was often regarded as the genius that fueled the engines of innovation at Apple, a company that is arguably the most successful of the modern era, with a market capitalization of almost half a trillion dollars. It is open for debate - and is certainly debated - just how much credit the man in the black turtle-neck deserves for the meteoric rise of Apple witnessed over the last decade. It is also hotly contested as to just what kind of impact, if any, his absence will have on the tech giant. At the heart of both of these debates is the question of just how important a CEO is to a company. The notion of the super-star CEO has certainly become increasingly prevalent in the business world and raises some interesting questions: Just how much do CEOs really matter when it comes to corporate performance? Who makes a good CEO? And are the trending compensation increases for CEOs justified?



Regardless of where you stand on how much a company's fortune is determined by its executive leadership, what is obvious is that you want the right person for the job. Research out of the Massachusetts Institute of Technology has demonstrated that the difference in the performance of a given job between individuals grows exponentially the more complex the job is. While a star worker on an assembly line may be up to 40% more productive than a typical worker, a talented computer programmer has a performance advantage of more than 1000% over her typical programming peers. Given the complexity of a CEO's responsibilities, it is therefore easy to understand that executives will have a large spread when it comes to performance. So how does a company get the right person in place?

As it turns out, the best CEOs are usually homegrown both on a performance and value scale. An international study conducted by Global Management Consulting Company AT Kearny examined the performance of the S&P 500 non-financial companies over a period of 20 years, and found that CEOs promoted within the company outperformed others across a number of measurable metrics. What's more is that external candidates tend to be significantly more costly to the companies that recruit them, with compensation being 65% higher on average than those promoted from within. While there are many legitimate reasons to seek external candidates, for example, the oft-cited cultural overhaul, contrary to what many might believe, executive talent is not fully transferable between companies. The reason for this not surprising: performance is improved to a significant degree by an individual's vast accumulation of company-specific knowledge gained through years of experience. What about compensation? Does a slightly sweeter deal result in a healthier bottom line?

The best CEO's tend to be homegrown both on a performance and value scale.

Well, no, not exactly. In fact, available data indicates that the impact of compensation systems for CEOs in achieving higher performance appears to be limited at best. It turns out that for CEOs, external incentives ride shotgun to internal ones. To put it simply, no amount of money will turn the wrong candidate into the right one. Nonetheless, evidence on the limited

impact of compensation on performance hasn't cooled the markets on executive compensation. According to figures generated by the Canadian Centre for Policy Alternatives, the 100 highest paid chief executives from companies listed on the S&P/TSX composite index made an average of $8.38 million in 2010, a figure that is over 188 times higher than that of the average full-time working Canadian who earned just over $44,000 in that same year. To put this into (slightly painful) perspective, a top Canadian CEO will earn the average Canadian's annual income in just four hours.

A top CEO in Canada will earn the average Canadian's annual income in just four hours.

The disparity is such that there have been some who support the implementation of a maximum ratio when comparing a CEO's salary to that of the lowest earner or the median salary within the company to effectively cap CEO salaries. The rationale is straightforward; in Canada, all provincial governments have set wage-floors because the markets can't be relied upon to acceptably regulate wages at the low end of the spectrum and yet, on the high end, there is no ceiling, relative or otherwise. Meanwhile, the chasm widens: while the top 100 Canadian CEOs received a 27% pay increase in 2010, the average Canadian saw an increase of only 1.1%. According to an article published in the Harvard Business Review by Charles Elson and Craig Ferrere, the primary causal factor driving the compensation gap is a compensation setting process that is too heavily reliant on peer comparisons rather than prudent discretion as to what is merited.

In summary, prevailing practices seem to be paying little heed to the insight generated by the voluminous research in the area. Who you pay is more important than how much and finding a quality candidate internally who possess company specific knowledge can be a valuable asset. As for the exorbitant compensation packages, they have no real bearing on CEO or corporate performance.

The Case of **Jones v. Tsige** and Ontario's Shiny New Tort

In the recent decision of *Jones v. Tsige*, the Ontario Court of Appeal became the first appellate level court to recognize the tort of invasion of privacy in the province of Ontario. Traditionally, it had generally been held that there was no right to an independent claim based on an invasion of privacy.

In *Jones v. Tsige*, both parties were employees of the Bank of Montreal, although they did not know one another. After Tsige became involved with Jones' ex-husband, she began to use her workplace computer to access Jones' bank account on at least 174 separate occasions for the purpose of snooping via Jones' banking transactions. Upon learning of the unauthorized access, Jones commenced an action against Tsige in the Ontario Superior Court of Justice for an invasion of privacy. The action was initially dismissed on the grounds that the tort of invasion of privacy did not exist at common law in Ontario. However, upon appeal by Jones, the Court of Appeal overturned the initial decision. The Court of Appeal reasoned that the internet and digital technology have accelerated the pace of technological change, causing personal data to be particularly vulnerable, and that an evolution of the law was necessary to properly address novel threats to privacy.

Adopting the American definition of the tort of intrusion upon seclusion, the Court of Appeal identified the key elements that are required to sustain a cause of action for the new tort:

(1) The intrusion must be intentional and unauthorized;

(2) The defendant must have invaded, without lawful justification, the plaintiffs private affairs or concerns; and

(3) A reasonable person would regard the intrusion as highly offensive, causing distress, humiliation or anguish.

As it was expressed, the new tort is quite limited in its application to situations involving a deliberate and significant invasion of personal privacy. For example, in a subsequent arbitral decision *(Complex Services Inc. and OPSEU, Local 278)*, interpretive guidance was provided by arbitrator George Surdykowki who stated that it still remains the case that an employer is entitled to request and receive an employee's confidential medical or other information to the extent necessary to answer legitimate employment related concerns or to fulfill its obligations under the collective agreement or legislation, including human rights and safety legislation.

Nonetheless, prudent employers should exercise a degree of caution in the wake of the *Jones v. Tsige* decision. Those in a position to access sensitive employee information should always ensure that they have a clear business reason for doing so. Given that the Court expressed its opinion that damages for a breach of the new tort not exceed $20,000 in most circumstances, employers will most likely see employees adding an alleged breach of privacy in applicable wrongful dismissal claims where litigation costs are already being expended.

Elgert v. Home Hardware:
Fallout of a Flawed Investigation

Many employers understand the importance of conducting a proper workplace investigation in the context of a for cause dismissal. What may not always be apparent however, are the consequences that can arise when an investigation is not conducted in a thorough, objective and fair manner. A recent case that is a glaring example of the liability exposures for employers who conduct shoddy investigations is *Elgert v. Home Hardware Stores Limited*.

Elgert was a 17-year employee working as a supervisor at a Home Hardware Distribution Centre who was terminated following an investigation for allegedly harassing a female employee. The investigation was conducted by a Head Office manager at Home Hardware with no prior training on dealing with sexual harassment complaints. He was also known to be friends with the manager of the Distribution Centre who was the father of the female employee making the allegations.

Elgert responded to the termination of his employment with a lawsuit against Home Hardware for wrongful dismissal and defamation. During the trial considerable evidence was admitted that brought into question the validity of the female employees allegations against Elgert, including the testimony of two employees who had heard the female employee comment, prior to making the sexual harassment allegations, that she would "get even" with Elgert after he had transferred her to a department away from her boyfriend.

The jury trial ended with the verdict that Elgert had not committed the alleged sexual assault. Home Hardware's conduct during the course of the dismissal was deemed to have amounted to bad faith and was "harsh, vindictive, reprehensible, malicious and extreme in nature". Elgert was awarded 24 months' salary in lieu of notice as well as damages in the amounts of $60,000 for defamation, $200,000 in aggravated damages and $300,000 in punitive damages. Following an appeal by Home Hardware the aggravated damages were set aside and the punitive damages were reduced to $75,000 however, the notice award and defamation damages in the amount of $60,000 were upheld.

When it comes to workplace investigations there is not a specific procedure employers must follow. As the court stated in the Home Hardware case, the requirements will vary depending on the employer's policies, sophistication, experience and the nature of the workplace. However, employers must always ensure they respond with a requisite degree of objectivity and procedural rigor to ensure that they protect themselves against an investigation that could be seen as "inept or unfair" as in Home Hardware, ultimately resulting in excessive damage awards levied against the employer.

WILLIAMS HR LAW Brings A New Approach To Human Resources Law.

We are focused on practical, customized legal solutions that are sustainable and in touch with your business realities.

A Proactive Approach Defines Us:

Client-service is paramount. We are always available to our clients to provide timely advice. As our client you can trust that we will deliver service that not only resolves the legal issues you face today but anticipates where improvements can be made to avoid legal trouble tomorrow.

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Our Team Loves What We Do:

Passion breeds success. We practice HR law because it's what we want to do. We enjoy servicing our clients and delivering the results they rely on to successfully meet business objectives.

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