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## **FACEBOOK PASSWORDS AND HUMAN RIGHTS**

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*By Barry W. Kwasniewski\**

### **A. INTRODUCTION**

The Ontario Human Rights Commission (the “Commission”) has recently weighed in on the legality of prospective employers asking job applicants for their Facebook passwords, a practice that has garnered media attention after the Toronto Star published an article on March 20, 2012, entitled “Would You Reveal Your Facebook Password for a Job?”<sup>1</sup> The article detailed how a job applicant had become a finalist for a job with a police service and was asked by the interviewer to reveal his Facebook password. Though the applicant initially refused, he ended up capitulating out of fear that he would not seem interested in the job if he did not reveal the password. The article further noted that the practice of asking job applicants for Facebook passwords is gaining popularity in the U.S., where unemployment rates are high in many areas and individual job-seekers may feel particularly vulnerable.

The legality of such a practice in Ontario is uncertain. Though the Toronto Star article states that there are no laws in Ontario prohibiting employers from asking job applicants for their Facebook passwords, others disagree. The Commission communicated its position on the issues, somewhat ironically, through its own Facebook page.<sup>2</sup>

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<sup>1</sup> Morgan Campbell, “Would You Reveal Your Facebook Password for a Job?”, *The Toronto Star* (20 March 2012) online: The Star <<http://www.thestar.com/business/article/1148973--would-you-reveal-your-facebook-password-for-a-job>>.

<sup>2</sup> See <https://www.facebook.com/the.ohrc/posts/320570581329371> [Commission Post].

In this age of digital communication, charities and not-for-profits, as employers, need to be aware of the laws, as they develop with respect to social media issues. What information employers may and may not request from job applicants is and will continue to be a relevant issue.

## **B. THE POSITION OF THE ONTARIO HUMAN RIGHTS COMMISSION**

The Commission takes the position that in asking job applicants for their Facebook passwords, employers could be exposing themselves to claims of discrimination under the Ontario *Human Rights Code* (the Code).<sup>3</sup> This liability arises from subsections 5(1) and 23(2) of the Code, which provide as follows:

**5.** (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

**23.** (2) The right under section 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

The Commission's position is that a Facebook profile could potentially contain very personal information on any of the prohibited grounds of discrimination in employment listed under subsection 5(1). As such, in asking for a job applicant's Facebook password, an employer is asking a question that potentially "directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination". This is the case even if the employer did not intend to discriminate, as inappropriate interview questions that relate to prohibited grounds under the Code can give rise to an inference of discrimination.

## **C. CONCLUSION**

Although the Commission has taken a position on whether asking a job applicant for his or her Facebook password, it is important to note that this position is influential but not binding on the Ontario Human Rights Tribunal or the courts. Therefore, the Tribunal or the courts may not necessarily agree with the position taken by the Commission on this issue. Nevertheless, it seems more prudent for employers to refrain from asking such questions, if not for fear of violating the rights the job applicants, then at least out of respect for

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<sup>3</sup> RSO 1990, c H.19.

their privacy. Interestingly, Facebook has also weighed in on this issue and has urged employers not to demand passwords because it violates applicants' privacy and may give rise to claims of discrimination.<sup>4</sup>

From the perspective of job applicants, this issue serves as a familiar warning to be careful about what you post on Facebook and what information you make available to the general public through such social media sites. The Commission reminds applicants that the "information that they make available to the general public on-line may reveal details about themselves that could be used for discriminatory purposes. Prospective employers and others (prospective landlords, educators, etc.) will also have access to online information."<sup>5</sup>

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<sup>4</sup> "Facebook Warns Employers not to Demand Passwords from Job Applicants", *The Toronto Star* (23 March 2012) online: The Star <<http://www.thestar.com/business/article/1150871--facebook-warns-employers-not-to-demand-passwords-from-job-applicants?bn=1>>.

<sup>5</sup> Commission Post, *supra* note 2.