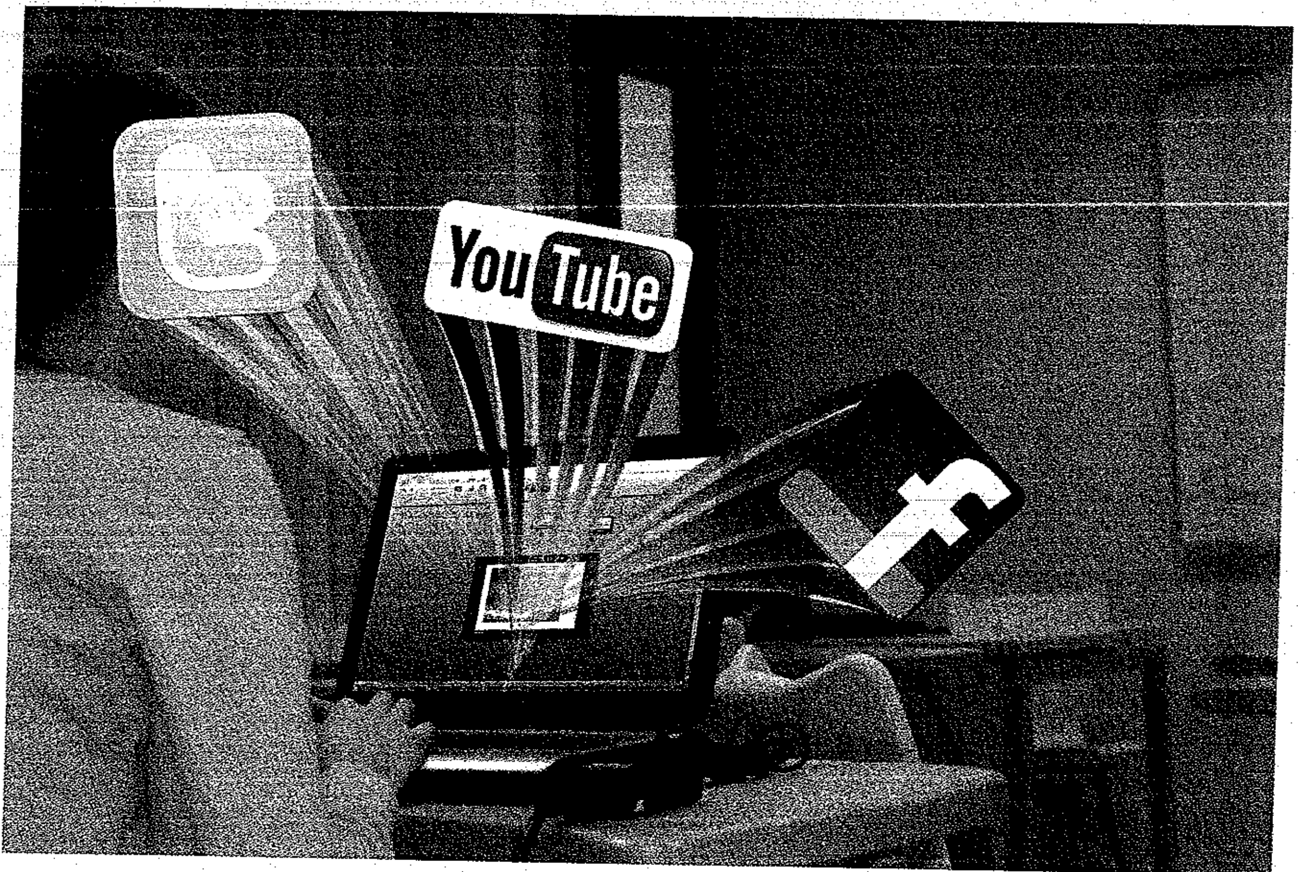
Does Misconduct Constitute A Breach Of Confidentiality?



The term "misconduct" is often understood in the common parlance as something related to a person who does not act in accordance with what is expected from him. It is a relative term wherein a person can be accused of misconduct in accordance with the situation.

The jargon is mostly used in the case of the employee-employer relationship, where the employer expects the employee to act according to a set of rules and regulations which binds the employment contract set out therein. A person, who is acting in a particular capacity, is expected to act within the framework of the rules and regulations that guide him in discharging his duties. Drawing parallel from

the Indian mythology, the employee is not expected to cross the *Lakshman Rekha*, if he crosses the same, the sanctions may follow. Therefore, what we need to understand is whether the term misconduct can include breach of confidentiality or not. My intention is to analyse the problem because in my view, breach of confidentiality, even though in generic terms, can include and can be brought in within the ambit of misconduct at all times, still, it shall not be termed as "misconduct."

However, breach of confidentiality by the employee not only empowers the employer to take severe action against the employee but also allows the employee and employer to claim punitive damages arising out of such breach. Whereas, in the case of misconduct, the employer often satisfies themselves with the action taken against the employee under its rules and regulations and may not claim punitive damages for the misconduct.

What is Misconduct?

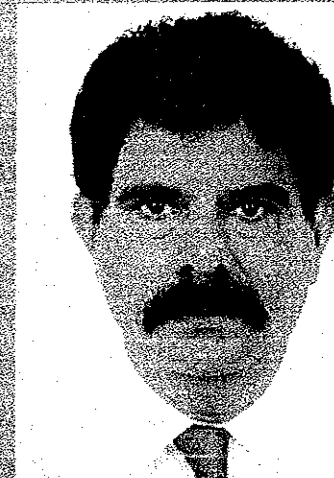
Misconduct is a legal term, meaning a wrongful, improper, or unlawful conduct motivated by premeditated or intentional purpose or by obstinate indifference to the consequences of one's acts.

The Society for Human Resource Management (SHRM) defines ethics, as follows: "Ethics is defined as rules of conduct or moral principles that [serve to] guide individual or group behaviours. The focus in business ethics is an awareness of organizational values, guidelines and codes, and behaving within those boundaries when faced with dilemmas in business or professional work."

As such, misconduct is not defined in any statue and depends upon facts and circumstances of each case. Black's Law dictionary defines misconduct as "dereliction of duty, unlawful or improper behaviour." It is usually the HR policy of the company, which describes what constitutes misconduct. Some of the instances of misconduct are unauthorized absence from work, negligence in performing duties, data theft, misrepresentation of facts, and willful disobedience of the instructions of the management or supervisor.

While the courts have also not defined "misconduct", the Supreme Court in the case of "State of U.P. Vs. Kaushal Shukla", considered the act of the respondent while conducting the audit as a gross misconduct because he was acting outside his authority along with his co-worker. Following an enquiry, the respondent was terminated from his position.

As discussed above, termination may occur due to several reasons which can either be employee-centric or organizational. Regardless of the cause,



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the manner in which the termination is effected, assumes great significance. Therefore, it is important for the employer to ensure that due process is followed before implementing termination.

Employees are usually under an obligation to protect confidential business information of the company, which they are exposed to during the course of employment, which, if abused, is capable of commercial exploitation in the hands of a competitor. Confidential information is usually industry-specific but typically includes customer/supplier list, formulas, know-how, knowledge of customer or prospective customers, methods, plans, processes, products, research, financial or personal data, techniques, and trade secrets.

Usually, "non-disclosure" or "confidentiality" clause in the employment contract obligates employees not to disclose such sensitive and confidential information to third parties, both, during the employment duration as well as for a reasonable period post termination. It also acts as deterrent for those who contemplate deliberate disclosure. The employer is entitled to terminate any employee who breaches such obligation prescribed in the contract.

What is Confidential?

This brings us to the important question i.e. the kind of information that may be protected vide confidentiality agreements. For deciding as to whether a particular information is capable of protection, the Court will take into consideration two factors viz. firstly, the nature of information sought to be protected and secondly, whether the employer impressed on the employee the confidential nature of the information. Thus, for information to be confidential, it must have the necessary quality of confidence about it and should also have been given under circumstances which imply a degree of confidentiality about it.

The term "confidential information" is generally used to describe information conveniently compiled throughout the years by an individual or a company, such as a clients list, a marketing strategy based on client's preferences, a supplier's list, pricing information or the financial position of a company which may partially become known on the market place by the mere fact of being in business. Not all information that is available to an employee in the course of his work is confidential in nature. Only those information which are in essence so confidential that they are assimilated to trade secrets and become part of the third category described in the Faccenda case, will enjoy a legal protection. In this context, in the case of Faccenda Chicken Ltd. Vs. Fowler ((1985) 1 All. E.R. 724), the foundation for the type of information that is accessible to an employee was laid down.

The first category includes things that are within the reach of any interested individual. Such information does not require any kind of protection. The next category consists of information that must remain confidential during the tenure of employment. This prohibits an employee from giving away privileged information to a competitor. However, once the employment is over, the use of skill and knowledge acquired while working with the former employer is allowed even when in direct competition. Finally, the only kind of information protected even after the termination of work with an enterprise is information that is likened to trade secrets, which are the property of the employer.

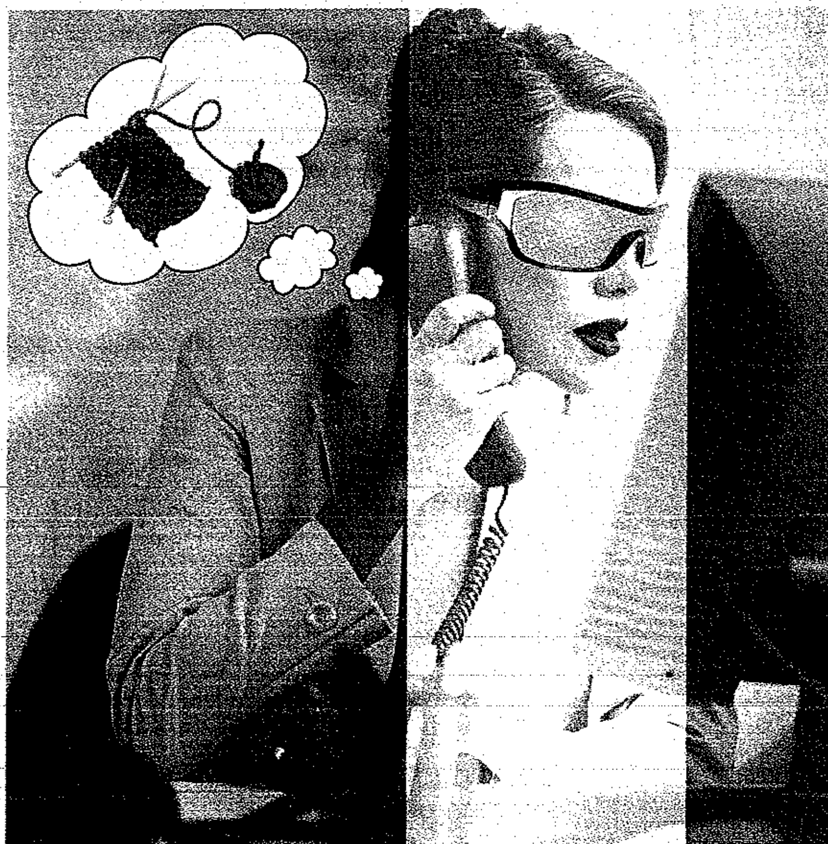
A duty of confidence is often confused with an employee's duty of fidelity. The two duties are related because confidential information is often disclosed in the workplace but they are distinct. Information remains confidential only so long as it is not in public domain. Once it comes into the public domain, it loses its confidential character. There are also a number of other circumstances in which the obligation of confidence will end.

The Indian perspective in this

aspect is based more on common law than on contractual law. The reason being that Indian law, which is essentially derived from English law, believes that the concept of confidentiality is more a concept of equity than of contract. Hence, there is a very strong reliance on English common law and English case laws. Another factor that points out the inadequacies of Indian law in matters relating to 'confidentiality' is that unlike the United States or the United Kingdom, there is no well defined law to that effect.

However, the concept of 'confidentiality' is well accepted in India and subsequent agreements for protection of confidential information are considered valid.

The principle that will be adopted by courts will be as to whether such restrain is reasonable or not. If the restraint is reasonable, then the agreement to that effect is held to be valid. When drafting and applying the clauses pertaining to confidentiality, it is essential to consider the factual circumstances relevant to the operation of the clause. If the courts are of the opinion that the purpose of the restraint is to inhibit the employee from leaving his employment or to prevent legitimate competition, then the clause in question will not be upheld. There is always an implied duty of fidelity to the employer that would prevent an employee from using his skill for the benefit of a rival company in cases relating to confidential information. Even in the absence of an agreement or even a clause in an agreement, which restrains a person from breach of confidential information, there is an implied duty of fidelity towards the employer, which prevents breach of confidential information.



Confidential Information and Law

The Indian Contract Act(1872) provides that a non-compete agreement will not be enforced to the extent that it restrains a person from exercising a lawful profession, trade or business. Judicial precedent under Indian law indicates, however, that an Indian court will enforce a restrictive covenant if it meets what is known as a "reasonableness" test. For example, a restrictive covenant imposed during the period of the subject's employment is more likely to be upheld than is a covenant operating after the termination of employment.

In recent years, the subsistence of companies has depended largely upon the influx of 'innovative ideas and suggestions' and hence their protection has acquired paramount importance which sometimes entails placing specific restrictions on when, where, how and with whom the employees work. This has, in turn, resulted in a boost in the concept of

making employees enter into agreements consisting of non-competition and non-disclosure clauses, as a precondition to employment.

Today, a company's most valuable assets are its trade secrets and employees. But how does one retain them? Agreements consisting of non-competition and non-disclosure clauses can help prevent employees from:
(i) Starting a competing business,
(ii) Working for a competitor,
(iii) Soliciting one's custom ers,
(iv) Recruiting ones current employees, and
(v) Disclosing trade secrets or confidential information.

Non-competition clauses originated in the 1950s, when owners made attempts to protect themselves from unfair competition. In the 1980s and 1990s, non-competition clauses became more prominent as a means for protection of clientele from 'solicitation' by former employees. Most recently, the technical workforce shortage, especially in dotcoms and other high-tech endeavours, has led to an increase in the usage of non-competition and non-disclosure agreements and in their enforcement and legal action.

Non-disclosure clauses are essentially used to maintain confidentiality of private information, which range from trade secrets to personal details of customers. Sometimes, information that is not a trade secret can be even more valuable or potentially damaging. Companies also look for ways to protect information about their inner working that could be leaked by former employees.

Non-competition clauses and non-disclosure clauses are not a means to dissuade competition, thereby restraining a person from refraining from practicing a lawful trade or profession. No person has an abstract right to be protected against competition *per se* in his trade or business. Section 27 of the Indian Contract Act, 1872 states that agreements in restraint of trade are void.

The only exception being in the case of sale of goodwill of a business whereby the buyer may be refrained from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided such local limits are reasonable.

Whistleblower and Breach of Confidentiality

In conclusion, I would like to state that another larger question to be looked into is whether an employee in the larger interest of the company uses certain information which is confidential in nature when he turns a whistleblower can be construed as a breach or not. Normally, a whistleblower passes on certain information not only to the same organization but he may pass it on to a third party, say a regulator, tax authorities or police.

Some see whistleblowers as selfless martyrs for public interest and organizational accountability. Whistle blowing is sometimes like climbing a mountain with a heavy load on one's back. Whistleblowers may well encounter difficulties in their path, most of the time. Be prepared to lose something while you keep your self-esteem.

It is said that "the system is unfairly biased against those who simply want to do what's proper." Even with legal protection, they may face retaliation in subtle ways – being shunned by co-workers, being closely supervised, or just feeling alienated. Needless to point out in this context, the employer may wreck vengeance against the whistleblower under the guise of a breach of the confidentiality agreement. This is more so in the absence of any specific law or judgment to the effect that any such breach for the overall good of the company shall not fall under the purview of a breach of confidentiality. The law needs to be more clear and specific on this point.

* The views expressed are personal and may not represent that of the employer.