SOCIAL NETWORKS AND EMPLOYEES' FREEDOM OF EXPRESSION

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The employees' freedom of expression has been recognized and protected by French labor and employment law since about 30 years, more specifically since the Law of August 4, 1982.[1]

Today, with the fast-growing use of social networks, judges have been led to consider the limits of the employees' freedom of expression when such employees post on social networks comments that disparage, denigrate or insult their company or even their supervisors / hierarchical superiors.

The so-called "Facebook dismissal" cases are good examples of this problematic situation.

Indeed, French courts have been asked to determine whether, depending on the circumstances of each case, a social network must be considered as a place of private discussion where people can fully exercise their freedom of expression or – on the contrary – as a place of public discussion where freedom of expression is restricted.

1. A public space where freedom of expression is restricted

In a judgment issued on June 9, 2010, the Reims Court of Appeals ruled that Facebook was to be considered as a public space. This position was subsequently endorsed by the Labor Court of Boulogne-Billancourt in a judgment dated November 19, 2010 and by the Besançon Court of Appeals in a judgment dated November 15, 2011.

Judges ruled that "as a network accessible through any Internet connection, [Facebook] does not guarantee the necessary level of confidentiality [and, as such,] must be considered as a public space due to its purpose and its organization".

Based on these judgments, when, as result of the user's privacy settings, the posted comments are no longer considered as private since the relevant Facebook page is accessible to all users, or at the very least to " friends" of "friends", any contentious statements against a company may lead to sanctions and eventually termination.

In this respect, in a series of five questions / answers on the necessity to control information published on social networks released on January 10, 2011, the Commission Nationale de l'Informatique et des Libertés (French Data Protection

Authority) confirmed the rationale of these judgments and specified that "the posted comments were no longer considered as private since they were accessible to people not concerned by the discussion".

In this case, defamatory, insulting or excessive comments posted on the "wall" of a social network are thus quite legitimately considered as wrongdoings and may constitute the offense of injure, defamation or disrespect under Article 29 of the Law of July 29, 1881 on the freedom of the press, and, therefore, lead to criminal sanctions.

As such, on January 17, 2012, the Criminal Chamber of the Paris First Instance Court condemned a staff representative and trade-union leader for public injure.

In that specific case, the judge considered that the comments posted on a public Facebook "wall" "clearly comprised outrageous expressions against the management of the firm", [and that] "the relevant expressions exceeded the limits of acceptable criticisms, including when expressed in an union context, because they contained insulting, offensive or even vexatious terms or words that, in themselves, showed the intention of doing harm and undermining people's dignity".

Clearly, there has been a surge in this type of litigation. Another recent example involves French

fast-food restaurant chain Quick whose management has indicated that it was considering the possibility of initiating criminal proceedings against one of its employees blamed for "spreading deceitful allegations": since November 2012, this employee has indeed been criticizing on his twitter account the working and hygiene conditions in the restaurant where he works…a matter to be followed up…

2. A private space with a broader freedom of expression

Conversely, however, the Court of Appeals of Rouen considered in two judgments handed down on November 15, 2011 that Facebook was a private space.

In these two cases, two employees were dismissed for serious misconduct because they had posted on their Facebook "wall" offensive and slanderous comments on their company and hierarchical superiors.

The Court held that both dismissals were without cause as the comments of the employees were to be considered as "private correspondence".

It specified that "it cannot be claimed with absolute certainty that the current case-law trend denies that Facebook has a private platform feature since this network can be either a private space or a public space, depending on the user's privacy settings".

By pointing out that the comments were posted by the employees "outside working hours and place of work and by technical means that are not claimed to have been available to them by the employer", the Rouen Court of Appeals seems to consider that Facebook is to be presumed as a private space, unless the employer can prove otherwise. Indeed, in this particular case, the comments posted by the employees were to benefit from the secrecy of private correspondence because the employer had failed to establish that these comments could have been read by people other than the employees' "friends".

French courts have thus adopted divergent positions. To date, the Cour de Cassation (French Supreme Court) has not yet ruled on this issue.

Quite recently, in a judgment dated December 16, 2012, the Court of Appeals of Douai, asked to adjudicate a case where an employer had withdrawn a promise of employment made to an employee working under a fixed-term contract, held that "defamatory or insulting comments [posted on Facebook] by an employee against the employer does not constitute an insurmountable or irresistible event impeding the continuation of the employment contract, and this termination was not either due to an event of force majeure". As such, the Court seemed to consider that insulting comments posted by an employee on a social network – the existence of such comments was not disputed in this matter – still did not justify the withdrawal of the promise of employment made to this employee by the employer.

We can only hope that the Cour de Cassation will eventually provide an adequate interpretative framework for all "Facebook dismissal" cases…

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[1] In collaboration with Mrs. Nisrin Kabssi, trainee lawyer

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