

Can employees be disciplined for their Facebook comments?

31 October 2018 | Contributed by [Coblence & Associés](#)

Introduction

Facebook

Comments on Facebook Messenger

Comments on Facebook walls

Comments made in Facebook groups

Comment

Introduction

Although web anonymity is a thing of the past, many people do not seem to mind, often sharing intimate secrets online.

However, although everyone is entitled to privacy, what happens when an employer discovers that an employee has criticised, mocked or insulted the company, other employees or management on Facebook?

Even though such comments are made outside the workplace, they may constitute grounds for dismissal if they amount to an abuse of the freedom of expression or a breach of the duty of loyalty inherent in employment contracts.

The courts must therefore focus on whether statements made by an employee fall within the scope of their private life. If so, any penalty should be invalidated based on the employee's right to privacy (Article 9 of the Civil Code).

Facebook

Each Facebook user has:

- a profile page whose privacy settings can be adjusted. Profile pages contain a so-called 'wall' on which content can be shared and commented on by other users;
- a private messaging system known as Facebook Messenger; and
- the ability to create and join pages or groups, which bring together users who are eager to share, for example, their common love of raclette, word games or tennis or their hatred for their employer. Groups can be open to all users or closed (ie, members must be accepted by the administrator).

In France, Facebook-related litigation is gradually increasing in the context of both labour law and so-called 'press offences' (ie, libel and insults).

In recent years, the Court of Cassation and the courts of appeal have ruled in several in cases relating to inappropriate or offensive Facebook comments made by employees against their colleagues, managers or employers. However, an analysis of the rulings shows that the courts remain hesitant to establish a legal framework to govern the various, fast-changing facets of this particular social network.

AUTHORS

[Laurent Guardelli](#)



[Léa Fonseca](#)



Comments on Facebook Messenger

Personal messaging on Facebook is visible only by the issuer and recipients of the messages. As such, the legal framework governing private correspondence applies.⁽¹⁾

Thus, if an employer is not the recipient of an insulting private message written by an employee, it cannot penalise said employee. The same applies if the employer learns of an insulting message through another employee's Facebook account.

Nonetheless, it has been (logically) ruled that an employee who voluntarily leaves their messaging screen open on their computer when they leave their workstation, providing their colleagues with an opportunity to read insulting messages, may be dismissed for misconduct.⁽²⁾

If an employee who writes such insulting messages decides to display them, they cannot invoke the rules which apply to private correspondence.

Comments on Facebook walls

Various decisions of recent years reveal that an analysis of comments posted on an employee's Facebook wall will vary depending on whether said employee's Facebook profile is private.

The following situations may arise.

Employee applies no privacy settings to Facebook account

Where an employee applies no privacy settings to their Facebook account, comments posted on their wall will be accessible by anyone who searches for said employee's profile. Such comments are thus considered to be and treated as public communications.

Employers may penalise employees if, in such cases, comments posted to their wall regarding the company exceed employee freedom of expression. Employers may also institute proceedings against employees for press offences (ie, public insults or libel).

However, in such cases, employers should take care to impose an appropriate penalty. For example, in a 2014 Lyon Court of Appeal case, an employee published insulting remarks about his company on his open Facebook wall and was dismissed without prior notice for misconduct. The court ruled that the dismissal was fair but overruled the dismissal without notice on the grounds that the employer had not proved that its customers had known of the insulting remarks, as they would have needed the employee's full name to access his Facebook wall.⁽³⁾

Employee's Facebook account is partly private

Where an employee's Facebook account is partly private, their Facebook friends and so-called 'friends of friends' can access the content displayed on their Facebook wall. In such cases, the legal framework seems to be the same as that which would apply if the Facebook profile had been fully displayed to everyone. If the employee chooses to give such access, comments and posts displayed on the wall exceed the private sphere. As such, the employer can legitimately dismiss the employee for misconduct if insulting remarks are posted on their wall.⁽⁴⁾

Employee's Facebook account is completely private

Where an employee's Facebook account is completely private, posts and comments on their Facebook wall will be accessible only to their Facebook friends. Court decisions in such cases have diverged since the 2010s.

Some courts have ruled that the legal framework applicable to private correspondence should apply. For example, the Douai Court of Appeal convicted an employer for having withdrawn its employment offer after reading the applicant's comments on her Facebook wall on the basis that the employee had displayed her comments only to her Facebook friends.⁽⁵⁾

In a similar case, the Rouen Court of Appeal considered that an employer should not be convicted for having unfair access to a private Facebook wall as screenshots of the wall had "spontaneously" been transmitted to the employer by a Facebook friend of the employee.⁽⁶⁾

However, the Reims Court of Appeal ruled that, in principle, a Facebook wall is public insofar as "the internet connection does not guarantee the necessary confidentiality".(7)

The Besancon Court of Appeal agreed, holding that "the aim of Facebook is to create a relational network between its different members intended to grow exponentially by applying a 'contacts of my contacts become my contacts' principle".(8)

The Court of Cassation seems to apply the following principles:

- The First Civil Chamber ruled that Facebook walls constitute a private space if they are set to be accessible to a limited number of people.(9)
- The Social Chamber seems to align with the First Civil Chamber. It recently convicted an employer for a disproportionate breach of its employee's privacy by accessing comments on the employee's Facebook account from the mobile phone of another employee. The court reiterated that the comments had been displayed to only a limited number of authorised persons.(10)

Although the courts appear to be moving towards employee protection regarding comments on a private Facebook wall, questions remain as to what constitutes a 'limited' number of people. Indeed, can something really be considered to be private when it is posted on the Facebook wall of someone who has thousands of Facebook friends?

Comments made in Facebook groups

The Court of Cassation recently ruled on the issue of comments made in Facebook groups and found that if an employee insults their employer in a closed Facebook group with few members, this will not constitute a fair ground for dismissal.(11) In this case, the employer discovered that an employee had become a member of a closed Facebook group with 14 members entitled "Extermination of pissing managers".

This decision endorsed a 3 December 2015 judgment of the Eighth Social Chamber of the Paris Court of Appeal, which had held that the dismissal had been unfair.(12) However, it is difficult to ascertain from these decisions whether the employee had only participated in the group or had also commented on its wall.

On the same day, the Ninth Chamber of the Paris Court of Appeal ruled in a similar case, albeit in a different way.(13) The court held that a teacher who had made fun of their students in a Facebook group could be fairly dismissed even though the group had been closed and accessible only to authorised members

Comment

These conflicting decisions from the same court hint that the case law concerning employee behaviour on social media is still being developed. This raises some tricky questions, particularly since employers, judges – and even employees – may not be able to master all of the technical aspects of these ever-changing social networks.

For further information on this topic please contact [Laurent Guardelli](#) or [Léa Fonseca](#) at Coblenca & Associés by telephone (+33 1 53 67 24 24) or email (lg@coblenca-avocat.com or lf@coblenca-avocat.com). The Coblenca & Associés website can be accessed at www.coblenca-avocat.com.

Endnotes

(1) *Nikon*, Cass Soc, 2 October 2011, 99-42.942.

(2) Court of Appeal of Toulouse, 2 February 2018, 16/04882.

(3) 24 March 2014, 13-03.463.

(4) Boulogne-Billancourt Tribunal of Industry, 19 November 2010, 09/00316 and 09/00343.

(5) 16 December 2011.

(6) Rouen Court of Appeal, 26 April 2014, 14/03517.

(7) 9 June 2010, 09-3209.

(8) 15 November 2011, 10/2642.

(9) 10 April 2013, 11-19.530.

(10) 12 December 2017, 16-19609.

(11) Social Chamber, 12 September 2018, 16-11.690.

(12) 13/01716.

(13) 15/04533.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).