

Loyalty vs. Freedom of Expression: Who Wins the Battle in the Social Media Ring

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It can be a real challenge for employers to roll with the punches when it comes to competing values and interests involving their employees' use of social media.

It can no longer be ignored that social media is here to stay. It has deeply embedded itself into human interactions and the workplace has definitely not been spared. Whether before, during, or after working hours, the impact of a simple touch to a smart phone screen can significantly impact the employment relationship.

It can be a real challenge for employers to roll with the punches when it comes to competing values and interests involving their employees' use of social media.

Competing values

On one hand, the employee owes the employer a duty of loyalty,¹ following which he or she is bound to act faithfully and honestly in the course of the employment, and **permanently thereafter when it concerns the employer's reputation and privacy.** Thus, employers have the right to expect that employees refrain from posting or commenting in ways that would harm the employer's standing, or be contrary to its business interests.

On the other hand, employees have a right to freedom of expression² which employers **must respect, even when it relates to employees' behaviour on social media.** While this value is a cornerstone of a democratic society, its assertion may have a real impact. This can be acceptable, and even desirable, in the context of social and political debate, but it is not necessarily so in the context of the employment relationship, namely in consideration of business, reputational and profitability concerns common to most employers.

What our courts and tribunals have to say

Recently, many employees were disciplined for having used social media to express views which contravened their duty of loyalty:

A casino worker was suspended for two months after having criticized his union on Facebook. His claim in damages related to the suspension was dismissed.³

An administrative worker in the Human Resources department of the City of Montréal was terminated for having posted negative comments on Facebook relating to the decision of the borough director to euthanize a pit bull after it attacked citizens. His termination was reduced to a six-month suspension.⁴

A city worker was terminated for having posted a video of an offensive self-composed song on Facebook, of which the lyrics were not so subtly aimed at the director of technical services and the mayor. The video ended with a degrading gesture. His termination was reduced to a six-month suspension.⁵

A book store clerk was suspended for having posted defamatory comments, damaging **the employer's reputation on his blog, accessible through Facebook. The posts invited readers to lodge complaints about his employer online, and criticized the organization's values.** His three-day suspension was confirmed.⁶

A train driver who overtly criticized his employer's management of an accident involving passengers was suspended for a week without pay.⁷

Employers should keep in mind, as evidenced by these cases, that the capital punishment in the context of the employment relationship, termination, is not always the appropriate sentence where it relates to employee indiscretions on social media. However, every situation deserves a detailed, fact-sensitive analysis.

Is freedom of expression on the ropes?

One could wonder, given the reprehensible aspect related to employees expressing certain views regarding their employer online, if the obligation to act loyally trumps the right to freely express such views, thereby entitling employers to crack down on all public message related to the employment indiscriminately.

These two competing ideals are not at their first round, and it has long been recognized by Canadian courts that freedom of expression comes in second place after the **employee's duty of loyalty.**⁸ This constitutional right, as all others, is not an absolute and **unqualified value. It must be balanced against other principles, such as the employee's** duty of loyalty and the correlating right of the employer to be the object of this loyalty.

If the message broadcasted on social media is job-related, especially if the criticism of the employer is harmful, defamatory or derogatory, it will not be sufficient for the employee to invoke freedom of expression to win this fight.

In fact, employers' imposition of discipline as a result of social media actions, even when this is done off-the-clock, may be well-founded. However, human rights considerations must be at the forefront of their minds in their assessment of a social media post.

We encourage employers to ascertain that they have sound loyalty provisions in their employment contracts as well as a detailed social media policy to help minimize **potential issues. Additionally, any disciplinary decisions stemming from an employee's** action on social media should be carefully assessed and considered before being administered.

BLG's Labour & Employment Group is in your corner for any questions relating to your rights as an employer with respect to your employees' use of social media.

¹ Pursuant to section 2088 of the Civil Code of Québec, and often reiterated in employment agreements.

² Charter of Human Rights and Freedoms, C-12, s. 3.

³ Roy c. Société des casinos du Québec inc., 2018 QCCQ 1752.

⁴ Syndicat des fonctionnaires municipaux de Montréal (SCFP- 429) c. Montréal (Ville de), 2014 QCTA 902.

⁵ Le syndicat des travailleuses et travailleurs de la municipalité de Weedon - CSN c. La municipalité de Weedon, 2016 QCTA 165.

⁶ Le syndicat des employées et employés professionnels-les et de bureau, section locale 574 c. Librairie Renaud-Bray inc., 2017 CanLII 1695 (QC SAT).

⁷ Transport ferroviaire Tshiuetin inc c. Syndicat des Métallos, section locale 7065-75, 2014 CanLII 51503 (CA SA).

⁸ See namely Fraser c. Commission des relations de travail dans la Fonction publique,[1985] 2 R.C.S. 455. Although this case did not arise before the Canadian Charter of Human Rights and Freedoms came into force, it was recognized by the Federal Court in Haydon v. Canada, [2001] 2 F.C. 82, at para. 89, that "[...] the duty of loyalty as articulated in Fraser sufficiently accommodates the freedom of expression as guaranteed by the Charter, and therefore constitutes a reasonable limit within the meaning of section 1 of the Charter

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