

EMPLOYEE PRIVACY: COMMENTS MADE IN A PRIVATE CAPACITY ON SOCIAL MEDIA SITES OR FORUMS

With social media increasingly becoming an integral part of the daily lives of thousands of people, one issue that employers face more often these days is that of employees who bad-mouth their managers, clients, colleagues or the work environment in general, on social media sites, such as *facebook* and *twitter*. Are employers entitled to take disciplinary action against employees who do this?

It may be argued that, provided it is done in the employee's own time and in a private capacity, participation by employees on social media sites falls outside of the employment relationship and that employers are barred from taking disciplinary action against them. However, the line between private activities and the work environment is sometimes a very thin one indeed, because just as the individual has a right to privacy, so does an employer have the right to protect its business interests. Because of this, employees are not free to do and say what they like when they are away from work: employees who, e.g., make derogatory remarks about their employer may, apart from possible civil liability, also be faced with legitimate disciplinary action. This can happen, e.g., where the employee's remarks have an actual or potential negative impact on the employment relationship, workplace relations, or the business of the employer in general. In other words, if the employer can prove that there is a causal link between the employee's conduct outside of the work environment and, e.g., the employer's business interests, the employee's conduct is no longer merely private but may lead to appropriate disciplinary measures.

Although the list below is not exhaustive, the following are generally regarded as creating a sufficient link entitling an employer to take disciplinary action:

- the employee who made the negative remark(s) holds a position of trust within the employer's business;
- an employee bad-mouthed a client of the employer, with the result that the client took (or threatened to take) its business elsewhere;
- the employee's conduct created a serious breach of trust between the employee and the employer, or his/her colleagues (i.e. the employee's comment(s) impacted negatively on the employment relationship); or
- the employee's statement(s) brought the company's name into disrepute in the eyes of its customers or members of the public.

What employees communicate to the outside world, outside of the work environment and outside of working hours, is therefore not necessarily a purely private matter as many people believe the case to be. Our advice is that employers amend their disciplinary policies to include a provision that any derogatory or negative statements made by employees outside of the work environment, e.g. such as on social media sites, could result in disciplinary action being instituted, which might, in appropriate circumstances, also lead to dismissal. A word of caution however: employers should keep in mind that some level of criticism of, and comment about, the employer or

work colleagues is part and parcel of the employee's right to privacy and freedom of speech and that not every negative statement will necessarily lead to action. As is the case with all instances of misconduct, each case must be evaluated on its own merits before action is taken.

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