EUROPE

VII. FRANCE*

A. Current Legislation

Although France has no legislation that specifically addresses the access to or use of social media in the workplace, such activity implicates a number of important laws in this country. French law closely guards individual freedom and privacy, both in society at large and within the workplace.

1. Right to Privacy

Article 8 of the European Convention on Human Rights (ECHR) establishes a "right of respect" for one's private and family life, home, and communications, subject to certain restrictions.[1] Article 9 of the French Civil Code further provides that everyone has the "right of respect" for his or her private life, including but not limited to, a right of privacy in communications. Both protections apply to employees in the workplace and during working time.

Invasions of privacy and violation of communication privacy are also each criminal offenses in France.[2]

The Law on Data Protection[3] and the recommendations of the French Data Protection Authority[4] do not expressly deal with social media searches on applicants or employees. However, they provide guidance in this area by generally stating that any data collected by the employer must be relevant and justified by the employer's legitimate need. As a consequence, collecting information on an applicant or an employee's personal life via social media will generally be deemed irrelevant and therefore prohibited.

2. Freedom of Speech

The 1881 Act on Freedom of the Press protects the freedom of speech of journalists. This Act has also been applied to protect Internet users, including employees who post work-related comments and criticisms on blogs and via other social media. The 1881 Act provides that speech containing injurious or defamatory content is not protected under freedom of speech. Injurious comments may be either expressed in public or in private. Those made in public are more seriously sanctioned. It is therefore important to determine whether an Internet posting is made on a public or a private virtual space. As for allegedly defamatory comments, the author of such

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[1]The text of the ECHR is available from the Web site of the Council of Europe, at <http://conventions.coe.int>.

[2]See discussion in the chapter on France, at I.C.2., in Vol. IA, Part 1.

[3]Law No. 78-17 of Jan. 6, 1978, as amended by Law No. 2004-801, of Aug. 6, 2004. See the chapter on France, at I.C., in Vol. IA, Part 1.

[4]*See Guide pour les Employeurs et les Salariés* (Guide for Employers and Employees), *available at* <http://www.cnil.fr/fileadmin/documents/Guides_pratiques/CNIL_GuideTravail.pdf>.

comments can assert the "truthfulness defense," such that liability would not be triggered if he or she can prove the truth of the comments.

3. Labor Code

The Labor Code provides that all employees have the right to express themselves regarding the contents, the conditions, and the organization of their work.[5] The Labor Code provides that employees cannot be disciplined for opinions they express pursuant to their freedom of speech.[6]

4. Duty of Loyalty of Employees Towards Employers

The employment contract, like any contract, should be performed in good faith, and each party should refrain from any action that may cause damage to the other party.

5. Trade Secret Protection

Employers have the right to protect their trade secrets and their e-reputation.[7] The disclosure of a trade secret by an employee is a criminal offense.[8] However, an employer can only restrict employees' rights and freedom insofar as these restrictions are proportional and justified by their purpose.

B. Application of Principles

1. Reliance on Social Media Content in Recruiting

In terms of the recruiting process, a distinction should be made between information obtained by employers from private social networks, such as Facebook or Twitter, and information obtained from professional social networks, such as LinkedIn or Viadeo. Professional networks provide a recognized, legitimate source of job-related information for any recruiting process.

The question remains open in France as to what extent employers can or should use information obtained directly or indirectly from "pure" social networks, which are designed to connect with friends, family and relatives, and sometimes co-workers, in the recruiting process. This issue is all the more relevant in light of the concerns regarding the "right to be forgotten," which seems to be denied by social networks where it is often not possible for individuals to permanently remove or delete their personal data. The European Commission is currently focusing on the right of digital self-determination of individuals online.

In France, where potential invasions of privacy are closely watched, a code of conduct has been recently signed by various companies, providing guidance as to the use of the Internet

[5]Lab. Code art. L. 2281-1.
[6]*Id*.
[7]See the chapter on France, at I.D.2., in Vol. IA, Part 1.
[8]Lab. Code art. L. 1227-1.

and social networks in the recruiting process.[9] As examples, major headhunting firms such as People Search, People Expert, Robert Half, and Michael Page International have signed the code of conduct. The goal is to ensure that recruiting and hiring are based on job-related criteria and not on subjective considerations regarding the applicants—such as personal tastes, friends, and non-professional activities. The goal is also to avoid unlawful discrimination in the hiring process, for instance, based on information regarding the applicant's family status, age, pregnancy, or sexual orientation found online.[10]

This code of conduct sets forth that the selection of applicants must be based solely on their education and skills, to the exclusion of any criteria pertaining to their private lives. All signatories to the code declare that they will refrain from conducting searches regarding applicants using Internet search engines or social networks, even when the information is "publicly" available. However, the code of conduct allows companies to use any information provided by the applicant on Web pages created by the recruiters. Signatories to the code of conduct also commit to conducting online searches of applicants only on professional networks. They also agree to be subject to an annual audit by *A Compétence Egale* to ensure that they are in compliance with the code.

2. Employer Access to Employee Communications—Privacy Protections

As in many countries, technology outpaces French law, and so far, the law does not specifically address when employers are justified in accessing and acting based on information obtained from employee social media communications. However, as discussed below, the French Supreme Court has provided guidance regarding employee privacy rights in communications using company systems. In addition, a number of lower court cases, also discussed below, have addressed employee privacy rights in social media communications outside of work that could be viewed as "semi-private" or "semi-public" depending on the circumstances. The French Supreme Court has not yet issued any decisions on social media communications.

The cases arise notably in the context of challenges to disciplinary action or termination based on the communications. The failure to prove that an employee's dismissal is well-grounded exposes an employer to damages for unfair dismissal, which can be as much as two to three years of salary depending on the employee's level of seniority.[11] Thus, an employer that wishes to be able to terminate an employee for engaging in competitive or other disloyal activity, or for engaging in communications damaging to the business, using employer systems or via social media should understand the parameters of the privacy and other protections and develop strategies in advance for addressing such employee communications.

a. Employee Privacy Rights in Workplace Communications

In France, company-provided computers remain the company's property. However, information and data stored on and created using company systems, do not automatically qualify

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[9]*See Charte reseaux sociaux, Internet, Vie Privée et Recrutement* (Charter on Social Networks, Internet, Privacy and Recruiting), *available at* <http://www.acompetenceegale.com/upload/Charte%20réseaux%20sociaux,%20internet,%20vie%20privée%20et%20recrutement_7.pdf> (in French only).

[10]For a discussion of unlawful discrimination, see the discussion in the chapter on France, at VI., in Vol. IA, Part 1.

[11]See the discussion in the chapter on France, at I.B., in Vol. IA, Part 1.

as company property. French law recognizes and protects an employee's personal use of the company's computer systems provided that such use is reasonable and does not adversely affect the employee's work or the company's activity.

A series of decisions issued by the French Supreme Court provide particular guidance. A 2001 case involved an employee who, during working hours, while in his employer's office and using the tools put at his disposal by his employer, set up and operated a competing business and poached his employer's clients, thereby generating shadow revenues to his benefit. The company had a policy that prohibited any private use of the company computers. The employer became suspicious, searched the system, discovered volumes of digital data confirming the employee's disloyal behaviour, and terminated the employee. The employee challenged the termination and the admissibility of the evidence obtained via the employer's search of his communication. The French Supreme Court ruled that the employer had violated the privacy to which an employee is entitled even when working.[12] The fact that the employee's behavior violated the computer use policy was irrelevant. The employer was ordered to pay the employee (i) wages for what would have been the notice period prior to cessation of employment, (ii) wages for paid holidays, (iii) a severance indemnity, and (iv) damages for non-justified loss of employment.

In a 2005 decision, the French Supreme Court also found in favor of the employee but recognized an exception to its stringent 2001 precedent: the employer may access and use the private files of an employee if the company is facing particular risks.[13] In the 2005 case, the employer found erotic pictures in an employee's office drawer. The employer then searched the employee's work computer and opened a file flagged as "personal." The file contained erotic and pornographic material. The employee was terminated for gross misconduct for having stored non-professional data on the work computer. The French Supreme Court determined that the digital data was inadmissible evidence, relying on an earlier case involving the personal locker of an employee. The Court reasoned that the same privacy protection applies to personal computer files on a company computer as it does to a personal locker.[14] The Court determined that the erotic pictures found in the employee's drawer did not create a particular risk to the employer and thus did not justify the employer's search of the employee's personal files on the company computer.

In a 2006 decision, the French Supreme Court determined that e-mails and files stored on an employee's work computer or in the office are presumed to be work-related—and therefore accessible by the employer and admissible in court, unless the files are flagged as "personal" or "private."[15] With this new precedent, the Court further softened the effects of its 2001 ruling, which had been criticized as over-protective of disloyal employees.

As a consequence of the 2005 and 2006 rulings, any communication or document that is not labelled "personal" or "private"—either by title of the communication or document or of the file where it is stored—can be opened and used in court by the employer. Moreover, e-mails and documents that are flagged "personal" or "private" can be opened when the company is facing particular risks.

Whether a document is sufficiently designated as "personal" is determined by the courts on a case-by-case basis. For example, the French Supreme Court held, in 2009, that a file named

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[12]Cass. soc. (S. Ct., Labor Div.), Oct. 2, 2001, no. 99-42.942, JSL no. 88-2.

[13]Cass. soc., May 17, 2005, no. 03-40.017.

[14]Cass. soc., Dec. 11, 2001, Juris-Data no. 2001-012121; Bull. civ. 2001, V, no. 377.

[15]Cass. soc., Oct. 18, 2006, no. 04-48.025, F-P+B, Le Fur/SARL Technisoft, Juris-Data no. 2006-035418.

"JM" after an employee's initials (Jean-Marc) was not sufficiently labelled as "personal"; its content was therefore admissible evidence.[16]

A 2012 decision of the French Supreme Court reminded that data stored on work computers is presumed to be work-related. In this matter, the Court considered that a folder named "My documents" was not clearly labelled as a personal folder and could therefore be admitted as evidence of a termination for serious misbehaviour on the basis of its content (pornographic material and videos of colleagues shot against their will)[17]. This decision is quite perspicuous as one of the most frequently used operating systems provides a folder named "my documents" ("mes documents") which is actually pre-configured as default storage for user's (work-related) data.

Furthermore, the obviously bogus reasoning on privacy protection of an employee who simply renamed the entire hard disc of his work computer as "D:/*données personnelles*" (personal data) was rejected by the French Supreme Court considering that "*the appellation given to the hard disc itself cannot confer a personal nature to all data it contains*"[18]. Hence, the relevant data contained in the hard disc was admissible evidence in a wrongful termination case.

As a matter of consequence, only single folders, e-mails or data contained in a work computer might be effectively labelled as "private" or "personal" and therefore be protected, but not a work computer or its hard discs as a whole.

Opening a private communication is a criminal offense known as violation of private correspondence, which carries a sanction of one-year imprisonment and a €45,000 fine.[19] Employees seldom seek redress in the criminal court because the employment-law procedure—in which an employee may also seek damages—could be adjourned until the criminal judge rendered a final decision.

b. Best Practices for Lawful Access to Workplace Communications

Employers seeking to avoid privacy and also authenticity challenges to digital evidence, when inappropriate conduct is suspected, may request that the court appoints a bailiff who, with the assistance of an IT expert, collects relevant data from the employee's work computer. This process may be utilized for any type of inappropriate conduct by the employee, i.e., disloyal activity, pornography, or disclosure of trade secrets. The court precisely delineates, based on information provided by both the employee and the company, the bailiff's assignment to ensure that the employee's privacy is protected. The bailiff then accesses only the information and files delineated by the court and issues a certified report together with a copy of all relevant data.

c. Employee Privacy Rights in Communications Outside of Work

A French saying goes, "The friends of my friends are my friends." This may not be true on Facebook. In one case in particular, a journalist posted the following message on the Facebook wall of a "friend" who was a co-worker: "*By the way: our boss is really autistic, right? Do you happen to know a specialized center where they could cure him? Anyway, can stupidity be cured?*" A friend of the co-worker gave a copy of the post to the employer, and the employer

[16]Cass. soc., Oct. 18, 2009, no. 05-38.492.
[17] Cass. soc., May 10, 2012, no. 11-13.884.
[18] Cass. soc., July 4, 2012, no. 11-12.502.
[19]Penal Code art. 226-1.

issued a formal warning to the journalist based on the content of the post. The employee applied to the Labor Court to nullify the warning.

The issues before the court were:

- Did the post qualify as private correspondence or public communication? If the post was private correspondence, the employer violated the employee's right to privacy and freedom of speech, and the warning would be nullified.
- If the post was a public communication, was its content injurious and defamatory? If so, the warning would be confirmed.

The employee argued that Facebook constitutes a private space comparable to a personal e-mail account, and that his post was therefore protected as private correspondence. The Appellate Court of Reims determined the post to be a public communication.[20] The court reasoned that, because the message was posted on a friend's wall, the employee had no control whatsoever over its accessibility by third parties. Access to the post depended on the privacy settings of the co-worker "friend," not the employee. The co-worker could have had hundreds of friends and could also have allowed unlimited access to his profile and wall. Had the employee wished his post to remain private, he should have sent it to the Facebook personal e-mail box of his co-worker friend. The employer in this instance had also legitimately obtained a copy of the post as one of the "friends" had voluntarily given a copy to the employer.

Although the message was public and thus could be considered by the court, the court determined that the message was not injurious or defamatory because there was an ambiguity over the identity of the person targeted by the message. The reference to "boss" was not clear in the context and could have been a reference to someone outside the workplace. Therefore, the warning was nullified.

In another case, the court found similarly that employee postings on Facebook were not private communications. Three employees of the same company carried on a discussion on the Facebook wall of one of the employees. The discussion took place on a Saturday night from the employees' respective homes. Two of the employees welcomed the third to a "club" on Facebook, the purpose of which was to "make fun" of their boss. The privacy settings of the employee hosting the conversation enabled his friends and his friends' friends to have access to the wall. One of these individuals printed out the discussion and gave a copy to the employer, and the three employees who posted the disparaging remarks regarding the supervisor were terminated immediately.

The employees sought redress in an employment court and claimed that the employer had violated their privacy rights. They argued that the discussion was solely private, as confirmed by the use of slang language and the "smileys" posted in the messages. The Labor Court determined that the employee postings were public and thus admissible in the proceeding.[21] By granting access to his wall to multiple individuals, the employee hosting the conversation created a public or a semi-public conversation. In addition, the employer had legitimate access to the post, as one of the individuals voluntarily provided the employer with a copy. The court also determined that the content of the messages was abusive and therefore not protected under freedom of speech and upheld the dismissals. The employees appealed the Labor court decision, and the appellate

[20]CA soc. Reims, June 9, 2010, no. 09/03205.

[21]Mme S v. Sté Alten Sir, Labor Ct. Boulogne Billancourt, Nov. 19, 2010, Juris-Data no. 2010-021303.

court issued its ruling on February 22, 2012.[22] The appellate court found for the employees, citing a technicality: the employees had already been sanctioned once for the misconduct. The employees had been suspended without pay for several days, and the same misconduct could not trigger a second sanction, i.e., termination. To the disappointment of many, the appellate court did not comment on the use of social networking communications.

These cases deal with communications outside of work. All the more, these criteria might apply to the content of communications during working time. For instance, the Appellate Court of Lyon recently confirmed the termination of a private school's supervisor who, on a Facebook wall, named her employer and encouraged her students to cheat in an exam - at the very moment she was supervising this exam in class. The Court rejected her arguments on privacy and freedom of speech, as the employer supplied evidence that the Facebook wall was public and teachers of the school witnessed that they had access to it[23]. One might argue that even communications with privacy settings might have been used in Court, as they were addressed to students during working time, and related to the exam they were taking under the employee's supervision.

In each of the above cases, "friends" of "friends" were allowed access to the employee communications. It is possible that an employee whose privacy setting was more limited (for instance where access was limited to "friends" and not "friends of friends") could successfully argue that the postings on his or her Facebook wall should be considered private communications. In each of the above cases, the employer also had legitimate access to the employee post, without the use of force or underhanded behaviour. "Legitimate access" is a key issue in these cases. Had the employer gained access to the post by force or trickery, such as creating a false Facebook account or circumventing privacy settings, the result in the cases would have been different.[24] The cases above involving Facebook postings were widely reported in the media and created some confusion as to the standards that would be applied. As a consequence, the French Data Protection Authority (*Commission Informatique et Libertés* or *CNIL*) issued an opinion on January 10, 2011, regarding communications on social networks.[25] Recommendations issued by the *CNIL* are not binding but are usually taken into account by courts.

The recommendations released by the *CNIL* are as follows:

- Employees can be discharged because of communications made on social networks, according to recent case law from a lower court.[26] The court held that the Facebook conversation was public because it was accessible to "friends of friends," i.e., persons who were directly involved in the topic discussed.

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[22]CA Versailles, Feb. 22, 2012.

[23] CA Lyon, Nov. 22, 2012, Juris-Data no. 2012-027024.

[24]The same "legitimate access" test applies to e-mails. For example, the French Supreme Court found that an e-mail sent by an employee to a co-worker, in which he insulted his employer and announced that he would call in sick the next day, was admissible evidence when this e-mail was mistakenly copied by the employee . . . to the employer! In this case, the e-mail fell in the hands of the employer because of the employee's mistake, and the employer did not use force or trickery. The ruling would have been the same had the employee mistakenly copied a co-worker who then gave the e-mail to the employer. Cass. Soc., Feb. 2, 2011, no. 09-72.313.

[25]*CNIL* recommendation, *Maîtriser les informations publiées sur les réseaux sociaux* (Controlling the information posted on social networks), Jan. 10, 2011.

[26]CA soc. Reims, June 9, 2010, no. 09/03205.

- Facebook users should be extremely cautious as to the data they disclose online. Digital data is increasingly used for the purpose of disciplinary measures. Things that people would not say in the real world to their family, friends, co-workers or boss, should also not be said in the virtual world.
- Facebook enables one to create different lists of friends for family, close friends, co-workers, etc., and to adjust the privacy settings for each list. It is strongly recommended to make use of these privacy settings.

Three decisions subsequently issued by appellate courts on Facebook communications are instructive. In the first case, the company terminated a general manager for serious misconduct, i.e., misappropriation of company property. A saleswoman for the company, who was shocked by what she thought to be his unjustified termination, wrote on his Facebook wall: "*this company is disgusting. . . . . I'll just do my work but not too much and hope I will find something else soon and they can go to h**** *. . . all they deserve is that we burn down this sh**** place*." The saleswoman was terminated for serious misconduct. She filed a claim for wrongful termination, arguing that: (i) she was simply trying to cheer up her former colleague after his "unjustified" termination; (ii) she did not name the company in her post; and (iii) the Facebook conversation was private, accessible only to friends of her former colleague, and the employer did not have legitimate access to it.

Both the first instance court and the Appellate Court found for the employer because: (i) the saleswoman knew that her colleague's termination was based on misappropriation of company property; (ii) while she had not named the company specifically, someone else had done so in a later post; the saleswoman had been aware that this could take place; (iii) the very purpose of Facebook is to build an ever-growing network of friends.[27] Therefore, Facebook walls qualify as public spaces. Should a Facebook user wish to have a private conversation, he or she should send a private Facebook message, accessible only to its addressee, or make sure that access to the wall on which he or she posts has been limited by its owner.[28] In conclusion, the Facebook post was admissible evidence. Because the post contained abusive language, it was not protected by freedom of speech laws. The termination was found to have been based on serious misconduct.

Still, the Appellate Court of Rouen ruled on November 15, 2011 – the same day the Besançon Appellate Court grounded his decision on evidence provided by Facebook as an "*ever-growing network of friends*" - that the employer bears the entire burden of proof that the settings of a Facebook are public and not private. No such evidence being provided in this case by the employer, the Court presumed a Facebook communication to be entirely private, even when it implicated several colleagues bashing other staff members and the company as a whole (following the invitation by one of the employees to "*spill* [their] *hatred upon some broads at LECLERC and LECLERC itself*") in a way that would not have complied, if demonstrably expressed in public, with their rights to freedom of speech. Two of the employees terminated on these grounds successfully appealed lower Court decisions having rejected their claims against the employer, as the Appellate Court found that "*nothing allows to say that the Facebook account, as it was set up* [by each one of the appealing employees] *or by the other participants in the conversation would have allowed the sharing with "*friends*" of their "*friends*", or with any*

[27]CA soc. Besançon, Nov. 15, 2011, no. 10/02642

[28]Here, it is clear that the Court followed the recommendations expressed by the *CNIL* in its January 10, 2011 opinion (see above).

other undefined person, and hence removed the private nature of the correspondence in issue"[29].

In another case, a radio animator posted a message, in which he identified his employer and called his managers "pathetic losers" on his Facebook wall. He mentioned that he would be employed by the radio for another year [because of a fixed-term employment contract] and threatened: "You will feel the pain." His wall was accessible to 600 Facebook friends and fans of his radio shows. His fixed-term employment contract was terminated as a result of this posting. The Appellate Court of Douai found for the employee, reasoning that the posting did not constitute an "irresistible cause" forcing the employer to terminate the fixed-term employment contract.[30] This ruling, issued in the context of a fixed-term employment contract, may provide limited guidance. Fixed-term contracts, unlike indefinite term contracts, grant greater protection to the employee and, as the court pointed out, can only be terminated for "irresistible cause".

These three decisions currently define the outlines of privacy protection for social network use regarding "friends" of "friends", as long as the French Supreme Court has not rendered a decision on this issue.

3. *Employee Blogs and Other Public Social Media Communications—Freedom of Speech Protections*

Employees do not have privacy rights in communications on blogs and other truly public social media publications. However, freedom of speech protections are potentially implicated when employees communicate about their employers via blogs or social media. The provisions of the 1881 Act on Freedom of the Press apply to any blogger even though blogging was not anticipated at the time the law was enacted. Case law is still emerging to date, but a couple of lower court and appellate court rulings are already available.

In one decision rendered by a lower court,[31] a female employee with Nissan, a Mrs. G., was discharged for serious misconduct a few months after her return from maternity leave. Following her discharge, she created a blog that she called "maternityleaveNissan," on which she told her side of the story. In her blog, she maintained that she had been subject to discrimination because she had a child. Nissan brought an action against her seeking an order for the deletion of the title of the blog and of certain statements that Nissan claimed were injurious or defamatory. The statements included:

- The assertion in the title of the blog: "Being a mom at Nissan, forget about equal opportunity";
- The assertion that Nissan's works council had in reality no real power and dealt only with irrelevant issues;
- The assertion that there is no equal opportunity at Nissan, especially if you are in your 30s, a woman, and have a child, in which case your head will bump up against the glass ceiling or, even worse, you will be discharged for serious misconduct;
- The assertion that the HR department violated employment law;
- The assertion that she had been subject to discrimination.

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[29] CA soc. Rouen, Nov. 15, 2011, no.11/01827 (Juris-Data no. 2011-028442) and no. 11/01830.
[30]CA soc. Douai, Dec. 16, 2011, no. 10/02317
[31]T.G.I. Paris, Oct. 26, 2006.

The court found that Mrs. G. failed to prove the truth of the first four statements and thus ordered her to delete all four statements. As to the fifth assertion, the court held that Mrs. G. was expressing an opinion and that readers of her blog necessarily understood the opinion might not reflect the truth. Therefore the statement could remain on the blog. Mrs. G. was also condemned for injurious comments for her use of the words "conspiracy of felons" posted on her blog, and "manipulative and liar," directed at Nissan's HR manager. The court found that the injurious comments were held in a public space rather than in a private one, as it was a blog accessible to all. As a consequence, Mrs. G. was ordered to remove the injurious comments from her blog and to pay damages to Nissan and to Nissan's HR manager.

In another case, *Petite Anglaise*, Mrs. Sanderson, a British citizen and at the time an anonymous blogger, had a blog wherein she detailed the tribulations of her expat life in Paris with her three-year-old daughter. Well-written and humorous, her "Bridget Jones" blog quickly gained popularity. *Petite Anglaise* did not reveal her name or that of her employer, a British accounting firm, and rarely mentioned her work as a secretary. However, at some point, she mentioned that one of her bosses had hung a portrait of the Queen in his office and was addicted to tea. This comment could have targeted nearly any British firm in Paris. Her supervisor somehow came across the blog and, because *Petite Anglaise* had posted an old picture of herself, he identified the employee and dismissed her, despite her four years of seniority, for "bringing the firm into disrepute."

Once news of the dismissal broke, comments and support from prominent bloggers catapulted the story into the mainstream media, including the *Daily Telegraph* and *The Guardian*. The employer, Dixon Wilson, received unsolicited media attention and the dismissal was widely viewed as unfair. It was popularly agreed that the reputation of the employer was not really hurt by the candid posting of *Petite Anglaise*, and that she certainly did not deserve dismissal for such innocent blogs.

The Labor Court of Paris found that *Petite Anglaise*'s postings were protected by freedom of speech, and therefore that the dismissal was not justified, and awarded damages totalling a year's salary plus legal costs.[32] Dixon Wilson did not appeal, probably deciding the company had had enough exposure in the press. The court's decision sent out a reassuring message to the millions of bloggers in France that blogging about your boss will not necessarily trigger responsibility, especially when the employer is not clearly identified and when your comments are not damaging to the employer's reputation. On another note, blogging sometimes provides a way to recognize hidden talent. As a result of the publicity, Mrs. Sanderson earned a lucrative two-book deal from Penguin, and a happy ending for the *Petite Anglaise*, who still successfully blogs about her life in Paris.

More recently, the Appellate Court of Metz decided on a termination grounded, among other things, on an employee's participation in a Facebook discussion group[33]. The decision shows that such "discussion groups" might be located half-way between employee's communications outside of work as discussed above (VII. B. 2. c.) and public social media publications such as blogs.

In this matter, the court found that the employee "*has participated at the end of March 2009 in a Facebook discussion group which was called "the survivors of Erel Conseil, the island of depression"* ["les survivants d'Erel Conseil, île de la depression"] *and portrayed itself as a support group for people traumatised by their experience with Enel, which – even if* [the

[32]Labor Ct. Paris, Mar. 29, 2007.

[33] CA soc. Metz, Dec. 3, 2012, no. 10/03901.

employee] *has soon and on her own initiative left the group – does not show a loyal attitude towards her employer, as it is obvious that the presentation of the group is likely to prejudice the reputation of Erel Counsel*".

The decision has a limited scope on social media issues in labor law, as the court retained the belonging to the aforementioned Facebook group "*furthermore*" among other arguments of the employer grounding the employee's dismissal for "real and serious cause", such as repeated negligence toward customers. It is however interesting to see that the court simply pointed out the employee's belonging to a discussion group qualified as distractive in its entirety, but none of her communications or contributions to the discussion in particular. Indeed, the court mentioned her "*participation*" and it remains unclear whether she "*participated*" actively or not. In any case, communications within open Facebook groups might be considered as being public and therefore admitted as evidence.

Regarding "blogs" in a narrow sense, another ruling of the Besançon Appellate Court delivered on July 6, 2012, deserves consideration regarding possible evolutions on this issue.

An employee had been warned by the employer and then summoned to a pre-termination interview regarding reproaches of (i) unjustified absence from work, (ii) unauthorised use of a company vehicle for private purposes. After the summoning but before the interview, the employee created a blog on the issue entitled "*Abusive dismissal 'Spie Bavilliers' – Stop moral harassment*" which contained his criticism about the aforementioned reproaches and, at a more general level, the alleged degradation of his working conditions.

The employer then terminated the employee on the initial reproaches as well as on the blog and its content, considered detrimental to the company's image. The employee successfully claimed damages for wrongful termination.

The appellate court confirmed and enlarged the lower court ruling arguing firstly that the reproaches were ill-grounded because the absence had a medical cause and the company vehicle was borrowed with the approval of a senior colleague, as well as the warning was premature. The court found regarding the blog that "*Given the context in which the blog has been created, the words used do not constitute an abuse of freedom of speech as it is provided to any employee, and even less the will to damage the interests of the company in its relationship with customers and buyers.*"

In conclusion, the further evolution of case law regarding employees' freedom of speech on blogs or similar media remains open for the coming years but shall most probably be guided by the French concept of freedom of speech, as it derives from press law: truthfulness as the main defense.

4. Social Media Policies in France

Social media policies are designed to clearly define appropriate use of social media. These policies may seek to do any of the following:

- inform employees regarding new technologies and remind employees that they may be held liable for any damage caused in the virtual world just as they would in the real world;
- prohibit employees from making disparaging, discriminatory, or defamatory comments about their employer, co-workers, or competitors;

- emphasize the importance of the employee's duty of loyalty and protection of trade secrets, and remind employees that any leak of confidential information via a social network will trigger personal responsibility;
- limit the use of social networks during working time and/or allocate time periods during which employees are allowed to access specific Web sites or their personal e-mail messages;
- provide guidance as to work-related postings, including what type of information or material pertaining to the company the employee may release;
- reduce or eliminate the viewing of online videos which may result in slowing down the employer's network;
- reduce or disable activities, due to legal and network stability concerns, such as the downloading of software or the connection to discussion forums.

In addition, social media policies usually detail the sanctions that will be imposed in the event of any contravention of the rules.

Social media policies are just beginning to receive attention in France due to the U.S. influence. However, the concepts imported from the United States do not quite fit with the French way of thinking and hence such policies are only slowly making their way into the French workplace. According to a recent Manpower survey, 97 percent of the surveyed French employers indicated that their organizations had not yet implemented formal policies regarding social networking.[34]

Because the reach of social media goes beyond national borders, multinational companies will often try to coordinate their policies so that employees worldwide are bound by a single set of rules. Social media policies are thus often applied in the French subsidiaries of American companies. However, the policies are not always adapted to the French employment environment and may not be as effective as a U.S. employer would expect. In France, a policy such as a code of conduct can only be legally binding and enforceable against employees after the employer has informed and consulted the works council, provided the policy to the labor authorities, and individually informed each employee about it.[35]

As to the rules set by social media policies, this is a relatively new arena so it remains to be seen how enforceable such policies will be. It is already clear in France that a social media policy, stating, for example, that the use of social media during working time is grounds for immediate dismissal, will not be binding on a Labor Court. A judge will take into account the circumstances of the alleged violation of the social media policy to determine whether there is sufficient cause for dismissal. However, despite the policy, the court can always decide that the dismissal was not based on sufficient cause and award damages for wrongful termination to the terminated employee.

[34]Manpower Inc., Employer Perspectives on Social Networking Survey, 2011.
[35]See the chapter on France, at III.A.2., in Vol. IA, Part 1.