“ Don't work here! ”: Employers' denigration may prove very costly

March 28, 2019

The Québec Superior Court has ordered a former employee to pay her employer $11,000 in moral and punitive damages because she posted defamatory comments about the company on Ratemyemployer.ca [1]. In doing so, the employee contravened her loyalty obligations and the confidentiality and non-disparagement undertakings that she had subscribed to when her employment was terminated.

Expressing dissatisfaction on social media has become commonplace. People can now publicly decry situations that upset them, and, in some cases, doing so can attract unexpected media attention.

Hence, employers feel vulnerable to comments that their employees or former employees may publish on social media. It is therefore prudent for them to include clear and precise non-disparagement clauses in employment contracts and termination agreements, and to remind employees of these obligations in internal company policies.

Background

The employee's position was abolished in January 2012, and, as part of her termination conditions, the employer, Digital Shape Technologies Inc. (hereinafter “DST”), offered her severance pay in consideration for signing a termination and release agreement that included a confidentiality clause and a non-disparagement clause with respect to DST.

However, between April 15 and 17, 2012, the employee posted three comments on RateMyEmployer.ca. In these comments, she, among other things, described a toxic work environment with a turnover rate of about 80% where social interaction was discouraged, as well as an employer that did not provide the necessary tools to do the work, repeatedly dismissed employees without just cause, hired private investigators to uncover what was said in meetings between employees and former employees, and accessed employees' personal social media accounts.

After reviewing these posts and discovering the identity of the author, Digital Shape Technologies Inc. (“DST”) and its CEO filed a lawsuit against the employee claiming $150,000.

Loyalty and contractual undertakings

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In its analysis, the Court reiterated the obligations of loyalty and discretion provided for in the *Civil Code of Québec* in matters of employment contracts.

An employee's obligation of loyalty to his or her employer persists after the employment relationship ends and includes a prohibition on injuring an employer's reputation, which inevitably leads to a certain limitation of the right to freedom of expression.

In this case, this limitation on freedom of expression had to be taken into account to an even greater extent as the employee had contractually undertaken not to make comments that could harm DST's reputation or to disparage its management, services or products.

Although the employee claimed that the non disparagement clause violated her freedom of expression - a fundamental right protected under the *Charter of Human Rights and Freedoms* – the Court determined that she had validly waived her freedom of expression with respect to her former employer. In this case, the non disparagement clause was unambiguous, using clear and precise terms to define the scope of the undertaking.

Considering the legal and contractual obligations that bound the employee to Digital Shape Technologies Inc. ("DST"), the Court found her contractually at fault and liable.

Defamation

The Court also reviewed the employer's recourse under the defamation [2] rules and concluded, after a thorough analysis of the evidence, that even if the employee had not signed a non disparagement undertaking, she had made factual statements that were false, unfounded, distorted or exaggerated. She thus wrongfully injured the employer's reputation.

Damages

The Court pointed to the difficulty in quantifying damages in a defamation situation, Digital Shape Technologies Inc. ("DST") being unable to directly prove financial losses, missed business opportunities or missed candidates that may have been put off by the reading the employee's comments.

Based on jurisprudential parameters, which establish a range between $10,000 and $30,000 in the case of a legal person, the Superior Court believed that a sum of $10,000 in moral damages was appropriate given the gravity of the acts and their intentional nature, as well as the amount of time the posts could be read, the fact that they were only minimally viewed and the employee's cooperation after being served with a formal demand.

The Court was also of the view that awarding punitive damages was justified as the evidence revealed that the employee had intentionally harmed DST's reputation. In light of the employee's financial situation, she was ordered to pay $1,000 in punitive damages.

What employers should do

The publication of defamatory content against an employer or former employer may constitute a civil fault giving rise to the right to compensation for the damages suffered.

The decision in *Digital Shape Technologies*, however, shows that it would be prudent for employers to require that employees agree to be bound by non disparagement covenants, particularly in

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employment contracts, termination employment/release agreements upon termination of employment, as well as internal policies regarding the use of technology and the internet, and so forth. Doing so may not only discourage the publication of defamatory remarks, but also make it easier for employers to seek compensation in the event of breaches.

A few clicks can be expensive and cause all kind of inconvenience. A good reason to think twice before hitting “send”.

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1. *Digital Shape Technologies inc. c. Walker*, 2018 QCCS 4374
2. Defamation consists in the communication of spoken or written remarks that cause someone to lose in estimation or consideration, or that prompt unfavourable or unpleasant feelings towards him or her. For a court to conclude that defamatory statements constitute a fault for which the person who disseminated them is legally liable, it must find that the person: 1) knew that the unpleasant or unfavourable statements about the other were false, or 2) communicated unpleasant or unfavourable information about the other that he or she ought to have known to be false, or 3) made unfavourable but true comments about the other without any valid reason for doing so.

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