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RESEARCH ARTICLE

Social Media in Disciplinary Proceedings According to the Turkish Employment Law

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Abstract

The aim of this article is to present a descriptive view on the current developments in Turkish employment law regarding the impact of social media activities, which has gained significant attention due to the effect of digitalisation, on disciplinary processes, more specifically, on the termination of the employment contract. To this end, this review is structured around three headings. First, the content of the social media activities will be presented as an overview. Second, the relationship between the use of social media and the obligation to work (performance) will be examined. Finally, the relationship between the duty of loyalty and the employees' social media activities will be discussed in connection with the termination, since disciplinary processes are closely related to it, which is the most serious and severe disciplinary sanction. Within this framework, the most challenging part of the conflict of interests is the determination of the limits of the employee's freedom of expression and the employer's right to manage. In this vein, the article aims to clarify the existing approach of doctrine and judicial decisions while highlighting the primary challenges faced in this issue.

Keywords

Termination of employment contracts, Freedom of speech, Duty of loyalty, Social media, Disciplinary proceedings

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Introduction

As we are in the midst of a digital transformation, employment relations are also transforming. In addition to protecting the employee side of the contract, which is the core idea of the employment law, there is also a concerted effort to strike a delicate balance and maintain stable employment relations in the face of challenging transformations, including digitalisation[1]. As admitted by ETUC[2], many aspects of the ongoing digitalisation process are not yet clear or understood. However, it is possible to say that certain key issues emerge as particularly challenging in terms of employment relationships. One of them is the "social media in disciplinary proceedings" since one of the most critical issues surrounding digitalisation is the protection of employees against dismissal[3].

In this article, the impact of social media activities and related disciplinary proceedings will be highlighted in the context of Turkish employment law. Within the purpose of our study, disciplinary proceedings due to social media activity will be investigated in relation to termination, as the applicable disciplinary procedures are typically brought before the judiciary when they result in a termination sanction.

On the one hand, the matter of termination is a sensitive issue, and in particular, the employer's right to terminate is confined by comprehensive legal regulations. On the other hand, the employment security system in Turkish law will not be comprehensively evaluated here[4]. As a brief description, it should be noted that certain groups of employees are covered by employment security, and the employer's right to terminate employment in these cases is more confined in terms of procedure and valid grounds for termination. Therefore, the discussion below on whether social media activity is considered a valid reason will only be relevant for employees covered by the employment security system. In terms of Turkish law, reinstatement due to invalid termination will not be possible for the employees excluded from the employment security system. However, the principles reached regarding the limits of the employee's freedom of expression undoubtedly apply to all employment relationships.

1 Ömer Ekmekçi, Refik Korkusuz and Ömer Uğur, *Turkish Individual Labour Law* (2nd edn, On İki Levha 2023) 4-5; Sarper Süzek and Süleyman Başterzi, *İş Hukuku* (24th edn, Beta 2024) 20.

2 'The Key to Fair Digitalisation' <https://www.etuc.org/en/key-fair-digitalisation>. See also, ETUC resolution on digitalisation: "towards fair digital work", adopted by the Executive Committee on 8-9 June 2016, <https://www.etuc.org/en/issue/digitalisation> (accessed 15.11.2024).

3 Also see Ricardo Del Punta, 'Social Media and Worker's Rights: What is at Stake?' (2019) 35(1) International Journal of Comparative Labour Law and Industrial Relations 93 ff.; Virginia Mantouvalou, '"I Lost My Job over a Facebook Post: Was that Fair?" Discipline and Dismissal for Social Media Activity' (2019) 35(1) International Journal of Comparative Labour Law and Industrial Relations 101 ff.

4 For further explanations in English, see Ekmekçi, Korkusuz and Uğur (n 1) 144 ff.; Tankut Centel, *Introduction to Turkish Labour Law* (Springer 2017) 177 ff.; Toker Dereli, Pınar Soykut Sarıca and Aslı Taşbaşı, *Labour Law in Turkey* (Kluwer Law International 2023) 217 ff.; Şebnem Kılıç, 'Employment Law', *Introduction to Turkish Business Law* (Peter Lang 2022) 222 ff.

On this basis, an overview of the social media activity will be presented. The question of what is considered in this context should be answered first. Then, the use of social media will be outlined through two issues that are frequently raised during the termination phase: The relationship between the use of social media and the obligation to work (performance), and the duty of loyalty of the employees. According to one view, the old image of the 'silent employee (worker)', whose personality remains hidden to the employer, is gradually fading due to the increase in social media activities. As social media activity increased and diversified, employee revelations about their personality increased. This transformation raises important concerns about employees' fundamental rights, particularly in balancing the freedom of expression with the employer's expectations of loyalty and performance[5]. In addressing this, the profound conflict between the employee's freedom of expression and the contractual duty of loyalty (also between the employee's fundamental rights and the employer's right to manage) should be emphasised in the following sections.

I. Overview

In essence, the issue is worth discussing not only at the termination stage but also during the conclusion of the contract. Employers may use data analysis systems to monitor employees' social media data footprints to identify relatively problematic patterns[6]. Such cases, where employers consider the past social media activity of prospective employees during the recruitment process, also pose serious legal problems. However, there is no employment contract yet during this process. Therefore, its impact is relatively limited, as a rule[7], and here we examine the use of social media in disciplinary processes rather than its impact on recruitment.

In this vein, when evaluating the impact of employees' social media activities on the employment relationship, the impact on the contractual rights and obligations of the parties should be emphasised. A distinction should be made here. On the one hand, excessive use of social media can prevent employees from fulfilling their obligation to work properly, and these behaviours, which are in some way related to performance, can pave the way for disciplinary proceedings. On the other hand, the

5 Del Punta (n 3) 99-100.

6 Also see 'Report on Promoting fair and ethical recruitment in a digital world: Lessons and policy options' (International Labour Organization and the International Organization for Migration 2020).

7 However, using artificial intelligence as a recruiting tool is also on the agenda in Turkish doctrine. Nevertheless, it is difficult to say that this use has become widespread. For a limited number of reviews in the doctrine, see Gülsevil Alpagut and Aybüke Karaca Yağcı, 'İşyerinde Yapay Zeka Uygulaması ve Ayrımcılık' (2023) 49 Sicil İş Hukuku Dergisi; Murat Engin and Başak Ozan Özparlak, 'İşe Girişte Yapay Zeka ve Ayrımcılık', *Hukuk Perspektifinden Yapay Zeka* (On İki Levha 2022); Vuslat Özyurt, 'İşçinin İfade Özgürlüğü' (Doctoral dissertation, İstanbul University 2024) 383 ff.
On the other hand, the right to information recognised by the Act on Personal Data Protection, despite the lack of a specific regulation for the recruitment process, also covers this circumstance. In other words, a potential employee has the right to request information from the employer who uses an artificial intelligence system in the recruitment process (Alpagut and Karaca Yağcı 27.). See also Sevil Doğan, 'İşverenin İş Sözleşmesinin Kurulmasından Önce Sosyal Medya Araştırması', *Dijital İş Hukuku Uygulamaları* (Adalet 2024) 207 ff.

use of social media may impact some disciplinary procedures due to the content of the posts.

People use social media for various purposes and in different ways. While some use it only for socialising and interacting with acquaintances, others use it to express their opinions, to engage in discussions with other opinion holders to whom they have access, or to conduct political debates[8]. In any case, it shows that it is difficult to draw clear boundaries between personal/private and professional use[9]. Therefore, Article 26 of the Constitution, which is the fundamental guarantee regarding the issue, should also be addressed. It is necessary to determine the limits of the freedom of expression guaranteed by the Constitution within the employment relationship. For this purpose, the issue is discussed below in the light of the individual application decisions of the Constitutional Court.

Before that, it should first be explained what is intended to say by the term of social media activity. It is worthy of note that the social media activity does not only mean producing content. All aspects of social media use such as liking, posting, reposting, commenting on sharing, and sending a message to a specific person or a group should also be considered as social media activity[10].

At this point, the effect of "liking" the content should be discussed separately. According to one view in the doctrine, clicking on the "Like" button below the content carries the same weight as saying, "I like what you said"[11]. In terms of the approach of the judiciary in Türkiye, the Court of Cassation also concluded that sharing an insulting post about the employer and clicking on the "Like" button below this content does not have the same weight as a direct insult, but by considering this as a show of sympathy for the content. However, the Court of Cassation ruled that the employee's act of "clicking Like button" is also a breach of the duty of loyalty and there is a valid reason for termination, although it cannot be subject to immediate termination for just cause[12].

8 Mantouvalou (n 3) 102; Efe Yamakoğlu, *Bilişim Teknolojilerinin Kullanımının İş Sözleşmesi Taraflarının Fesih Hakkına Etkisi* (On İki Levha 2020) 105.

9 Mantouvalou (n 3) 102. For further discussions, also see Özyurt (n 7) 269 ff.

10 Aslı Çalışkan Yıldırım and Ömer Uğur, 'İşveren Bakımından Fesih Sebebi Olarak İşçinin Sosyal Medya Kullanımları' (2022) 80 İstanbul Hukuk Mecmuası 1173. See also Özyurt (n 7) 271 ff.

11 Çalışkan Yıldırım and Uğur (n 10) 1203; Hediye Ergin, 'Sosyal Medya Paylaşımlarıyla İşverenin İtibarını Zedeleyen İşçinin İş Sözleşmesinin Feshi' (2023) 49 Sicil İş Hukuku Dergisi 50.

12 See, the Court of Cassation, 9th Chamber, 18603/26061, 17.9.2015. Also see Hande Heper, 'Düşünceyi Açıklama Hakkının Çalışma Yaşamındaki Görünümü: İşçinin İfade Özgürlüğü' (2022) 3 Çalışma ve Toplum 1912.
Undoubtedly, the content that is liked must be contrary to the duty of loyalty. On the other hand, the approach of the criminal courts is also different. The 4th Criminal Chamber of the Court of Cassation ruled that the mere act of "liking" an insulting social media post does not constitute the crime of insult. See, the Court of Cassation, 4th Criminal Chamber, 5598/33171, 17.11.2014.

On the other hand, the ECtHR decision in Selma Melike v. Turkey is of importance in this regard[13]. According to this judgment, clicking on the "Like" button merely expresses sympathy for the content published, and not an active desire to disseminate it. In our view, parallel to the ECtHR decision, a "Like" should not necessarily be interpreted as an endorsement. This tool can also be used as a marker (save button) for the users despite the speed of social media streams[14].

In this respect, the decision of the Court of Cassation is open to criticism. Moreover, considering the speed of the social media streams, posts are often the result of impulsive and spontaneous actions and can spread very quickly and be viewed by thousands of people, regardless of the user's intentions[15]. It should also be noted that freedom of expression undeniably protects not only valuable and substantive expressions but also more trivial ones[16]. Therefore, in order to initiate disciplinary processes, at least the existence of an active sharing that has meaning within a certain context should be sought. In addition, according to the approach of the Constitutional Court, the expressions used by individuals should be evaluated as a whole in a certain context with other expressions[17]. Based on this, in our opinion, those presumptions reduce the impact of a single activity of "Liking". From our point of view, actions that do not carry an active intention of dissemination should not be attributed a meaning beyond the meaning given by the users[18].

II. The relationship between the use of social media and the obligation to work of employees

There is no specific regulation in Turkish law regarding the use of the Internet for private purposes at work and the use of social media during working hours. Therefore, the parties can limit the use of the Internet for private purposes with the aid of the contractual arrangements. In this respect, the procedure for the use of social media in the workplace can be regulated collectively or individually.

13 ECtHR, Selma Melike v. Turkey, Apl. 35786/19, 15.6.2021, para. 51. Also see CC, Oğuz Kurumlu Apl., 2019/12167, 11.1.2023, para. 23.

14 For a similar view, see Özyurt (n 7) 291 ff.

15 Mantouvalou (n 3) 106.

16 Mantouvalou (n 3) 103.

17 Also see the decision of the Constitutional Court, CC, İlter Nur Apl., 2013/6829, 14.4.2016, para. 37-39.

18 For a similar view, see Özyurt (n 7) 292. Also see the decision of the Constitutional Court, CC, Kadri Eroğul Apl., 2019/976, 11.5.2022, para. 26. Otherwise, as the Constitutional Court has correctly pointed out in this decision, the over-interpretation of statements by drawing indirect connections, even if not directly addressed, would make public speech impossible.
For further explanations, see, Vuslat Özyurt, 'Sendikanın Boykot Çağrısına İlişkin Sosyal Medya İçeriğinin İşçi Tarafından Beğenilmesinin/Paylaşılmasının İş Sözleşmesine Etkisi: Yargıtay'ın Farklı Yaklaşımları Üzerinden İşçinin Sadakat Borcu ve İfade Özgürlüğü Bağlamında Bir Değerlendirme' (2021) 6(1) Çankaya Üniversitesi Hukuk Fakültesi Dergisi 443 ff.

In addition, it is also possible for the employer to make arrangements within the scope of the right to manage[19]. In this context, the provisions in the workplace (personnel) regulations annexed to the employment contract can regulate the use of social media. Employers may issue general instructions that are binding on all employees or a specific group, as well as specific instructions addressed directly to an employee. In practice, it can be seen that employers limit the use of social media to a certain extent through written regulations under the names of "code of conduct", "code of ethics", and similar labelling[20].

In this context, the first to be examined is the confinements of the discretionary authority of the employer. Obedience to such regulations must be to the extent required by the rule of good faith (Art. 399 of TCO), and those regulations must not be contrary to mandatory provisions, morality, public order, and personal rights or impossible in terms of their subject matter (Art. 27 of TCO). These confine the employer's right to manage[21].

The fundamental guideline is that the employer cannot give instructions that violate the personal rights of the employees and cannot interfere with their private lives[22]. In this vein, the absolute prohibition of employees' use of the Internet (beyond social media) is controversial. One view accepts an absolute ban[23], while the majority view considers such a ban to be an excessive practice in the light of the right to manage, freedom of communication of employees, and the obligation to protect the psychological and physical well-being of employees[24].

19 Süzek and Başterzi (n 1) 87; Nuri Çelik and others, *İş Hukuku Dersleri* (36th edn, Beta 2023) 140; Hamdi Mollamahmutoğlu, Muhittin Astarlı and Ulaş Baysal, *İş Hukuku* (7th edn, Lykeion 2022) 594; Öner Eyrenci and others, *İş Hukuku* (Beta 2020) 24; Sevil Doğan, *İş Sözleşmesinde Bağımlılık Unsuru* (Seçkin 2016) 159.

20 Erhan Birben, 'İşçinin Özel Yaşamı Nedeniyle İş Sözleşmesinin Feshi', *İş Hukukunda Genç Yaklaşımlar II* (On İki Levha 2016) 141; Çelik and others (n 19) 274. For example, the employer may set a maximum time limit for use, designate a specific area in the workplace for private computer use, restrict the websites and social media platforms that can be accessed, and prohibit the sharing of images displaying the whole or part of the workplace, the employer's name, or its emblem. See also Zeki Okur, 'İşyerinde İşçinin Bilgisayar ve İnternet'i Özel Amaçlı Kullanımının İş İlişkisine Etkisi' (2005) 8 Kamu-İş Dergisi 59.

21 Çelik and others (n 19) 314; Mollamahmutoğlu, Astarlı and Baysal (n 19) 87, 93; Ömer Ekmekçi and Esra Yiğit, *Bireysel İş Hukuku* (On İki Levha 2023) 388 ff.; Sezgi Öktem Songu, 'İşçilerin İşyerinde Özel Amaçlı İnternet ve E-Posta Kullanımına İşverenin Müdahalesi Üzerine Bir Değerlendirme', *Prof. Dr. Sarper Süzek'e Armağan Cilt I* (Beta 2011) 1062, 1072.
It must be remembered that the right to manage in question is at the bottom tier of the (unofficial) legal sources of Employment Law. See also Süzek and Başterzi (n 1) 88, 92; Mollamahmutoğlu, Astarlı and Baysal (n 19) 88.

22 For a judgment repeating the guidelines, see also the Court of Cassation, 9th Chamber, 3669/20770, 25.11.2019.

23 Öktem Songu (n 21) 1060. Some views hold that in cases where the private life has direct and adverse effects on the employment relationship, it is accepted that regulations broadly limiting personal rights, private life and freedom of communication can be introduced with the employee's consent. See, Şükran Ertürk, *İş İlişkisinde Temel Haklar* (Seçkin 2022) 127-128; Seracettin Göktaş, 'Türk İş Hukukunda İşverenin İşçinin Özel Yaşamına Saygı Borcu' (2021) 38 Anayasa Yargısı 12-13, 19; F Burcu Savaş, 'İş Hukukunda "Siber Gözetim"' (2009) 3 Çalışma ve Toplum 97, 119.

24 Erdem Özdemir, 'İnternet ve İş Sözleşmesi: Yeni Teknolojilerin İş İlişkisine Etkileri Üzerine' (2008) 13 Sicil İş Hukuku Dergisi 13, 19; İlke Gürsel, 'Kişisel Verilerin Korunması Hakkının İşçi ve İşveren İlişkilerine Etkileri' (2016) 13 Legal İş ve Sosyal Güvenlik Hukuku Dergisi 763, 834; Göktaş (n 23) 1, 34; Yeliz Bozkurt Gümrükçüoğlu, 'İşçinin Sosyal Medya Kullanımının İş Hukukundaki Etkileri' (2018) 7 PressAcademia Procedia 372-373; Selen Uncular, 'Teknolojinin Etkisiyle Dönüşen İş İlişkisinde Giriş Kontrol Sistemleri, Yer Belirleme Sistemleri ve Sosyal Medya Vasıtasıyla İzleme' (2020) 3 Çalışma ve Toplum 1673, 1684; Duygu Çelebi Demir, 'İşçinin İnternet Kullanımının ve E–postasının Denetlenmesi', *Dijital İş Hukuku Uygulamaları* (Adalet 2024) 601.

The view of the overwhelming majority holds that the employee should be permitted to use the Internet at the workplace for private purposes, provided that it does not cause a detrimental effect on the workplace and remains within reasonable margins. Accordingly, it can be said that the use of the Internet is not limited to emergencies, provided that it does not involve additional costs to the employer, remains within reasonable and acceptable margins, does not hinder the obligation to perform work properly, and does not cause a detrimental effect on workflow[25].

One view, which we also uphold, states that the employer's discretionary authority in those cases should be exercised moderately[26]. The Constitutional Court has also stated that the regulations made by the employer should not touch upon the essence of the fundamental rights[27]. Within this framework, when interfering in the private life of the employee, the employer must be based on a justifiable reason, must inform the employee in advance about the intervention, and must choose the method that is necessary, capable of justifying the interference, and the degree of intrusion must be as scarce as possible by complying with the principle of proportionality.

The recent decisions of the Constitutional Court also support the majority view against an absolute ban on the use of the Internet through the principle of "as scarce as possible intrusion". In our view, the principles in question also apply to restrictions on social media activities.

On the other hand, the existence of the employer's instructions alone is not sufficient. Even though employers are often advised to have a clear policy on the social media activities of employees, there are legitimate reservations that the mere existence of such policies will ensure compliance with the law[28]. We therefore consider that the test of proportionality is also required in all cases.

The second issue to be examined is the consequence of non-compliance with lawful restrictions on Internet usage and social media activities. Failure to comply with the employer's instructions regarding the performance is considered a direct

25 Çalışkan Yıldırım and Uğur (n 10) 1178; Özdemir (n 24) 19. Confer, the Court of Cassation, 9th Chamber, 27583/5294, 17.3.2008. In this outdated decision, the Court of Cassation ruled that the use of the Internet for private purposes in the workplace is prohibited unless there is an express or implied consent of the employer, an emergency, or any other work-related reason.
However, we believe that this decision is difficult to reconcile with the current situation, given the proliferation of the Internet as a common tool in almost every aspect of our daily lives. Even in non-emergency situations, the use of the Internet for reasonable periods falls within the ordinary course of life.

26 Okur (n 20) 54; Birben (n 20) 142; Ali Güzel, 'İş Hukukunda "Yetki" ve "Özgürlük"' (2016) 15 İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi 93, 115; Mantouvalou (n 3) 118 ff.
For further explanations on the principle of proportionality, see also Deniz Ugan Çatalkaya, *İş Hukukunda Ölçülülük İlkesi* (On İki Levha 2019) 284 ff.

27 CC, Samet Ayyıldız Apl., 2018/34548, 28.12.2021, para. 34. See also Süzek and Başterzi (n 1) 60.

28 Mantouvalou (n 3) 112.

breach of the primary obligation (to perform work)[29]. Therefore, in the vast majority of cases, if there is a breach of an explicit (and lawful) instruction of the employer regarding Internet use, then there will be a direct breach of the obligation to perform work instead of a breach of the obligation to comply with the instructions (to obey).

In case of cyber-loafing[30], the employer must warn the employees who disrupt their work due to social media or Internet use if the employee is covered by the employment security system. Then, it is necessary to determine whether there is a valid reason for termination with notice[31]. The Court of Cassation ruled that if the behaviour of the employee, who was found to have used the Internet for private purposes during working hours despite being warned in advance, caused negativity in the workplace, the valid ground for termination was justified[32]. Therefore, it must be ascertained whether the employees could have avoided the concrete breach of the obligation if they had intended to, in short, whether they were negligent. In addition, the Court of Cassation emphasises that in such cases, the periods of overlapping working hours with the periods allocated for Internet use should be determined in a way that is suitable for inspection during the proceeding[33].

At the final stage, it should also be examined whether the breach in question is severe enough to give the employer the right to terminate the contract immediately. This is possible in the event of a total failure to perform work even after being warned about the duties (Art. 25/II-h of the Labour Act). On the other hand, immediate termination may be justified due to the features of the websites visited, regardless of the time spent on the Internet. In particular, in cases where an employee accesses betting or obscene sites, the Court of Cassation justifies immediate termination due to the risk of leaving a trace on the Internet network used through the workplace and damaging the employer's reputation within the framework of termination based on employee behaviour incompatible with honesty and integrity (Art. 25/II-e of the Labour Act)[34].

In summary, the use of social media must be tolerated by the employer provided that it does not cause a detrimental effect on the workplace and remains within reasonable margins. It is necessary that the employer's business interests (i.e. detrimental effect on workflow or reputation) are damaged due to the employee's breach to mention a

29 Accordingly, instructions clarifying the content of the obligation to perform work are considered within the principal obligation. The scope of those instructions varies from a broad outline to a fully developed performance specification. Ekmekçi, Korkusuz and Uğur (n 1) 81; Süzek and Başterzi (n 1) 86, 363; Çelik and others (n 19) 275.

30 See also Yamakoğlu (n 8) 92 ff.; Ali Gürsoy and Betül Erkanlı Başıbüyük, 'İş Hukuku Boyutuyla Örgütlerde Sanal Kaytarma', *Örgütsel Davranış ve İş Hukukuna Yansımaları* (Seçkin 2020) 239 ff.

31 Undoubtedly, this is the case for employees covered by employment security. See also fn. 4 and Göktaş (n 23) 33.

32 The Court of Cassation, 9th Chamber, 27212/620, 13.1.2016; 39671/37399, 13.12.2010; 19150/26792, 10.10.2006. See also Yamakoğlu (n 8) 94.

33 The Court of Cassation, 22nd Chamber, 248/5281, 14.3.2017.

34 The Court of Cassation, 9th Chamber, 27583/5294, 17.3.2008.

valid reason or just cause for termination[35]. The type of termination will be determined according to the severity of the breach.

In addition, it should be noted that rules and regulations on the use of the Internet and social media, which stem from the employer's right to manage, are subject to the proportionality test, even if these regulations are highly recommended to employers.

III. The relationship between the use of social media and freedom of expression and duty of loyalty of the employees

In the doctrine, the duty of loyalty is defined as the obligation of the employee to protect the rightful interests of the employer as required by the trust relationship between the parties and the rule of good faith[36]. According to Article 396 of the TCO, the employee must act honestly and faithfully in the protection of the employer's rightful interests[37].

More precisely, the Court of Cassation describes this obligation as "*not harming the counterparty's personality, properties, and other assets protected by law upon performing contractual obligations, (...) avoiding all kinds of behaviours that may endanger the purpose pursued by the contract, particularly those that may weaken the mutual trust between parties*"[38]. On the other hand, when determining the scope of the duty of loyalty, the fundamental rights of the employee must also be considered[39].

While evaluating the impact of social media use on employment relationships and mutual trust, the audience that the posts reach should be considered. In order to strike a fair balance between the employee's freedom of expression and their duty of loyalty to the employer, it is necessary to examine by whom, with whom, and under what circumstances the social media posts are shared[40].

Considering the speed at which social media posts spread, it is very likely that more than the originally anticipated users may be privy to the content[41]. In the

35 Süzek and Başterzi (n 1) 602; Çelik and others (n 19) 529; Mollamahmutoğlu, Astarlı and Baysal (n 19) 1023 ff.; Ekmekçi, Korkusuz and Uğur (n 1) 146. See also Eyrenci and others (n 19) 204; Fatih Uşan and Canan Erdoğan, *İş ve Sosyal Güvenlik Hukuku* (5th edn, Seçkin 2023) 160; Kenan Tunçomağ and Tankut Centel, *İş Hukukunun Esasları* (10th edn, Beta 2022) 226-227; Emine Tuncay Senyen Kaplan, *Bireysel İş Hukuku* (13th edn, Yetkin 2023) 410; Ufuk Aydın, *Bireysel İş Hukuku* (Nisan Kitabevi 2023) 324; Haluk Hadi Sümer, *İş Hukuku* (26th edn, Seçkin 2024) 109.

36 Gülsevil Alpagut, 'İşçinin Sadakat Borcu ve Türk Borçlar Kanunu ile Getirilen Düzenlemeler' (2012) 7 Sicil İş Hukuku Dergisi 23; Arzu Arslan Ertürk, *Türk İş Hukukunda İşçinin Sadakat Borcu* (On İki Levha 2010) 144; Ekmekçi and Yiğit (n 21) 388; Mollamahmutoğlu, Astarlı and Baysal (n 19) 601; Çelik and others (n 19) 317.

37 Arslan Ertürk (n 36) 7 ff.; Ekmekçi, Korkusuz and Uğur (n 1) 82. Also see Süzek and Başterzi (n 1) 364; Çelik and others (n 19) 318; Mollamahmutoğlu, Astarlı and Baysal (n 19) 600 ff.; Aydın (n 35) 206-207; Uşan and Erdoğan (n 35) 120 ff.; Eyrenci and others (n 19) 133; Tunçomağ and Centel (n 35) 109-110; Senyen Kaplan (n 35) 241; Sümer (n 35) 78.

38 See, the Court of Cassation, 9th Chamber, 13571/1815, 1.2.2010; 21545/32180, 12.11.2015 (own translation).

39 Ertürk (n 23) 116.

40 Özyurt (n 7) 303 ff.; Yamakoğlu (n 8) 106 ff.; Heper (n 12) 1912-1913. Also see CC, Volkan Çakır Apl., 2017/35488, 7.4.2021, para. 28, 34-37; Ahmet Akyol Apl., 2019/14799, 7.2.2024, para. 20-21.

41 Özyurt (n 7) 279 ff.

doctrine, it is accepted that in the termination process, a distinction should first be made according to the degree of confidentiality and the audience reached by social media posts[42]. Therefore, private sharing should generally be considered confidential if it reaches one or a few recipients[43]. On the other hand, in a case before the Court of Cassation, the concrete situation showed that even within a closed group, the degree of confidentiality can be considerably reduced due to the large number of group recipients[44]. This ascertainment is also upheld by the doctrine, since it is difficult to accept that there is a reasonable expectation of confidentiality when the group in which the relevant message is shared has a large number of members[45].

In summary, the High Court recognises that private messaging systems are internally protected because they are closed to third parties. Therefore, it is not prohibited for employees to form a group and communicate in it as long as it does not disrupt the workflow and does not affect the work performance of the participants[46]. In this regard, employees' WhatsApp conversations are, as a rule, confidential personal data[47]. On the other hand, it should be remembered that, as mentioned above, if there are a large number of members of the group sharing, it should be accepted that there will be less protected expectation of confidentiality, and it should be decided according to the content[48].

Following this evaluation regarding the audience that the expressions reached, it is also necessary to make a separate evaluation regarding the content of the shared expressions. The Court of Cassation's decisions evaluate social media content, especially in the termination process, and examine the legality of the termination according to the concrete effect of the shared content on the employment relationship.

42 Göktaş (n 23) 34; F Burcu Savaş Kutsal and Şelen Kolan, 'Paylaşmadan Önce Dikkat! İşçilerin İşyeri Dışında Sosyal Medya Kullanımları Üzerine Hukuki Bir Değerlendirme' (2019) 62 Legal İş ve Sosyal Güvenlik Hukuku Dergisi 503; Özyurt (n 7) 310 ff. See also fn. 40.

43 Çalışkan Yıldırım and Uğur (n 10) 1185; Gaye Burcu Yıldız, 'İşçinin Sosyal Medya Paylaşımları Nedeniyle İş Sözleşmesinin Feshi Konusunda İki Farklı Yargıtay Kararının Değerlendirilmesi' (2018) 39 Sicil İş Hukuku Dergisi 105, 111.

44 See, the Court of Cassation, 9th Chamber, 1718/559, 10.1.2019; 14205/9526, 1.6.2017. On the other hand, it is also possible to consider texting abusive messages as a valid reason if they cause unrest among employees even in the same (closed) WhatsApp group, due to the detrimental effect on the workflow (the Court of Cassation, 9th Chamber, 7066/357, 15.1.2020).

45 Nurşen Caniklioğlu, 'İş İlişkisinin Sona Ermesi ve Kıdem Tazminatı', *Yargıtay'ın İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2017* (On İki Levha 2019) 265-266.

46 The Court of Cassation, 9th Chamber, 10166/15745, 24.11.2021.

47 The Court of Cassation, 9th Chamber, 10718/559, 10.1.2019. See also Yamakoğlu (n 8) 111; Heper (n 12) 1912.
The High Court also found the termination invalid on the basis of the correspondences, when these correspondences were communicated to the employer without authorisation by another employee in the same chat group (See, the Court of Cassation, 9th Chamber, 14206/9527, 1.6.2017). See also A Eda Manav Özdemir, 'İşçinin İzlenmesi ve Gözetlenmesi', *Muhtelif Yönleriyle Kişisel Verilerin Korunması Hukuku* (Yetkin 2022) 941.

48 On the other hand, damaging the employer's reputation by sharing photos containing distinctive elements of the business through social applications accessed by a large number of people should be discussed by taking into account the balance of conflicting interests. For a comparative law perspective see also Çalışkan Yıldırım and Uğur (n 10) 1188.
The sharing of some information about the employer or the workplace through social applications is also being discussed by the Constitutional Court in a case. See also, CC, Volkan Çakır Apl., 2017/35488, 7.4.2021, para. 28, 34-37.

The guiding principle is that an employee's contract cannot be terminated because of social media posts that are within the bounds of criticism. In other words, these posts are protected under the right to freedom of expression[49]. In this vein, a fair balance has to be struck between the conflicting interests of employer and employees[50]. It must also be assessed whether the interference is proportionate to the legitimate aim of the employer. Furthermore, relevant and sufficient grounds must be given by the courts in making their decisions according to the Constitutional Court[51]. Termination sanction imposed without concretising which statement made and in what way this statement violates the relationship of trust between the parties results in a violation of the right to expression[52].

It should be assumed that the statements made by the employees, which reflect the concrete situation and are within the bounds of criticism, such as on the failure to pay the overtime wages to the employees, working overtime in excess of the legal limit, and the failure to pay their wages on time and in full, do not violate the duty of loyalty[53].

Second, unless the employer can prove that the employer's business interests have been damaged and that the workflow and workplace peace have been disrupted by these posts, it cannot be said that a lawful termination is based solely on these expressions[54]. Undoubtedly, the employer must prove that the employee's relevant behaviour has a detrimental effect on workflow and workplace peace[55].

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49 Yıldız (n 43) 110; Yamakoğlu (n 8) 114 ff.; Heper (n 12) 1909 ff.; Alper Gürer and Şebnem Kılıç, 'İş Hukuku Boyutuyla Örgütsel Sinizm', *Örgütsel Davranış ve İş Hukukuna Yansımaları* (Seçkin 2020) 328 ff.; Savaş Kutsal and Kolan (n 42) 541-542. For the view that the right to criticise does not include any conduct by employees to challenge the employer or to speak or act against the employer's authority, see Ekmekçi and Yiğit (n 21) 389.

50 Ekmekçi and Yiğit (n 21) 389; Ugan Çatalkaya (n 26) 375; Ergin (n 11) 46; Aybüke Karaca Yağcı, 'İşçinin İfade Özgürlüğü ve İfade Özgürlüğünün Sınırlandırılması', *Dijital İş Hukuku Uygulamaları* (Adalet 2024) 538. See also Deniz Ugan Çatalkaya, 'AYM Bireysel Başvuru Kararları Işığında İşyerinde Haberleşmenin İzlenmesi Karşısında İşçinin Özel Yaşama Saygı Hakkı ve Haberleşme Özgürlüğünün Korunması', *İNTES Anayasa Mahkemesi Bireysel Başvuru Kararları Çerçevesinde İş Hukukunun Değerlendirilmesi Semineri* (2023) 110 ff.

51 CC, Mehmet Ekizler Apl., 2022/58456, 18.4.2024, para. 21, and the decisions mentioned therein. See also Muhittin Astarlı, 'Anayasa Mahkemesi Bireysel Başvuru Kararları Çerçevesinde İş Hukuku Uygulamaları', *İNTES Anayasa Mahkemesi Bireysel Başvuru Kararları Çerçevesinde İş Hukukunun Değerlendirilmesi Semineri* (2023) 119 ff.

52 See, CC, Volkan Çakır Apl., 2017/35488, 7.4.2021, para. 39; İdil Alakuş Dere Apl., 2019/38252, 11.1.2023, para. 22. For another decision of the Constitutional Court, which found no violation in a case where employees' financial loss were compensated, see also Burhan Diktepe Apl., 2018/10550, 21.12.2022, para. 21.

53 Yıldız (n 43) 110; Yamakoğlu (n 8) 118. For example, in a concrete case, it was not deemed intolerable for the employer that employees voiced their criticism about the employer not paying their social security contributions, which is one of the working conditions, and shared posts on social media for this purpose (the Court of Cassation, 9th Chamber, 1405/14318, 26.6.2019).
See also, CC, Serap Aslan Acet Apl., 2020/38733, 2.5.2024, para. 17-19; Volkan Çakır Apl., 2017/35488, 7.4.2021, para. 37-40; Kasim Çiftçi and others Apl., 2019/33243, 4.7.2022, para. 34.

54 Yıldız (n 43) 110; Gürer and Kılıç (n 49) 329. Confer, Ekmekçi and Yiğit (n 21) 672, 679 ff.
In the doctrine, especially in the case of disclosure or denunciation of a crime, the view prevails that this behaviour should not be considered a breach of the duty of loyalty, considering the public interest, which is a higher interest. For further information regarding "whistleblowing", see also Mustafa Alp, *Çalışanın İşvereni ve İş Arkadaşlarını İhbar Etmesi (Whistleblowing)* (Beta 2013); Çelik and others (n 19) 319; Ugan Çatalkaya (n 26) 376; Heper (n 12) 1914 ff.

55 For a decision stating that termination without evidence of detrimental effect is unlawful, see the Court of Cassation, 9th Chamber, 34334/752, 22.1.2018. Also see below, fn. 70.

The relevant social media posts should be examined separately regarding immediate termination for just cause. In this vein, if the employee (i) expresses any speech or action committing an offense against the honour or reputation of the employer or a member of the employer's family, or if the employee makes unfounded, grave accusations against the employer that jeopardise the employer's honour and dignity (25/II-b), (ii) harasses the employer, a member of the employer's family, or a fellow employee in the workplace, and (iii) commits a dishonest act against the employer that is incompatible with loyalty (25/II-e), the employer may, then, terminate the contract immediately. All these cases are listed among the grounds for just causes for termination by the employer under Article 25/II of the Labour Act[56].

In terms of the assessment of whether or not to be considered within the scope of expressions that may jeopardise honour and dignity, the High Court evaluates the weight of the act based on criteria such as whether the employer is a direct party to the sharing, whether the sharing is limited to the employee's circle, and whether the content consists of general expressions[57]. For instance, (even if not a family member) insulting or making unfounded accusations against the employer's acquaintances or with whom the employer has a business partnership may constitute a valid reason for termination, especially for small businesses where the employer's personality is of importance[58]. On the other hand, those allegations against third parties, such as other employees, customers, etc., that affect honour, and reputation may also be accepted as a just cause for termination depending on the concrete case[59].

Insulting posts about identified or identifiable persons are also considered sufficient grounds for termination, even if the employee does not express a full name[60]. On the other hand, if it cannot be understood that the statement in question was made against someone who can be subject to just causes for termination, the termination is not justified[61]. Immediate termination must be unavoidable for the party entitled to

56 Sexual harassment, which is recognised as a unique form of harassment, is addressed in a separate subparagraph (Art. 25/II). On the other hand, a compliment made via social media can be considered merely inappropriate behaviour, when it is not desired by the recipient. As long as it does not reflect on the workflow and the workplace, and most importantly, as long as it does not become a persistent attitude, it should not be regarded as grounds for termination. However, the way this behaviour is perceived and its effects should be considered on a case-by-case basis. See Kübra Doğan Yenisey, 'İş İlişkisinin Sona Ermesi ve Kıdem Tazminatı', *Yargıtay'ın İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi 2016* (On İki Levha 2018) 517-518.

57 For the decision review, see ibid. 387, 502-504 (Court of Cassation, 9th Chamber, 2635/12272, 23.5.2016). For the view that upheld the decision, see also Savaş Kutsal and Kolan (n 42) 542.

58 Çalışkan Yıldırım and Uğur (n 10) 1203. See also, the Court of Cassation, 9th Chamber, 2244/22331, 19.12.2016; 2778/422, 23.1.2017.

59 Çelik and others (n 19) 651. Making unfounded accusations against senior executives, such as "theft and bribery" is also included in this scope. See, the Court of Cassation, 22nd Chamber, 34583/918, 22.1.2015.

60 The Court of Cassation, 9th Chamber, 2778/422, 23.1.2017.

61 Savaş Kutsal and Kolan (n 42) 539; Çalışkan Yıldırım and Uğur (n 10) 1202. Likewise, in the Kadri Eroğul application, the Constitutional Court considered that it was unclear to whom the applicant's statements were directed. The expressions used by a person should not be given a meaning that goes beyond the meaning given by that very person (CC, Kadri Eroğul Apl., 2019/976, 11.5.2022, para. 26). Also, according to the High Court, it was not properly assessed that the applicant was also the director of an association protecting workers' rights (ibid).

terminate and must be implemented as a last resort. Therefore, social media sharing that does not reach this weight can be considered a valid reason.

In terms of the content of the post, it is necessary to examine the valid grounds for termination enhanced by case law for employees covered by employment security[62]. Harassing the employer through social media and posting expressions that damage the employer's dignity may be considered grounds for termination, depending on the severity of the conduct. In this context, the extent to which the trust relationship between the parties has been damaged will be used as a criterion to determine the type of termination[63].

Another critical issue is when employees use social media accounts to engage in hate speech against a person or a specific group of people on the basis of race, language, religion, sect, etc. Even if such statements do not constitute a criminal offense, they can be considered grounds for termination. In a case before the Constitutional Court, the Court evaluated the "alleged use of derogatory language and hate speech". In these cases, it is necessary to explain the reasons why the sharing led to the disruption of the trust relationship between the employer and the employee and what negative situation it caused in the workplace. Since the content of the posts in question was not disclosed and their effect on the employee's contractual obligations was not concrete, the Constitutional Court found a violation[64]. Undoubtedly, it should also be evaluated whether the sharing was confidential and was legally obtained[65].

Finally, it cannot be assumed that employees waive their freedom of expression simply by entering into an employment contract. They will undoubtedly continue to benefit from the protection of freedom of expression. Any ordinary remarks and expressions against the employer are not considered a breach. Therefore, the cynical expressions of the employee should not be considered a direct breach of the duty of loyalty[66]. For instance, criticism in a particular area of expertise or criticism of defects and improprieties in the work organisation is protected by freedom of expression[67].

62 In the relevant decision of the Appellate Court, the employee shared an article on social media criticising the aisle arrangements in the store and opposing the company's policies. Upon this, the employer asked the employee to delete the post, and the employee immediately obeyed the employer's request. Nevertheless, the employer terminated the employee's employment contract, stating that this behaviour constituted a breach of the duty of loyalty. In this concrete case, the Court of Appeal reversed the decision of the first instance court, focusing on the type of termination. As it is understood from the judgment, these posts, which express mistrust of company policies, are considered a valid (but not just) cause for the employer to terminate the contract (Ankara District Court of Appeal, 6th Chamber, 850/982, 16.5.2017).

63 The distinction between just causes and valid reasons is made in the doctrine according to the severity of the termination ground. Just causes are so severe that they outweigh the weight of the valid reasons. On the other side, the valid reason is deemed a justification that is not sufficient to provide a reason for the immediate termination of the employment contract on one hand, but not so simple that the employee's warning is sufficient on the other hand. See also Ekmekçi, Korkusuz and Uğur (n 1) 147, 150; Centel (n 4) 179.

64 CC, İdil Alakuş Dere Apl., 2019/38252, 11.1.2023, para. 20-22. See also Karaca Yağcı (n 50) 538.

65 Çalışkan Yıldırım and Uğur (n 10) 1216.

66 See also Gürer and Kılıç (n 49) 329.

67 The Court of Cassation, 9th Chamber, 2244/22331, 19.12.2016.

However, if the employee's use of social media has negatively affected the relationship of trust between the parties and this negativity has led to the continuation of the employment relationship cannot be reasonably expected, only in these cases the employee's behaviour should be considered as a reason for termination[68]. Therefore, it will be necessary to evaluate the expressions of the employees separately in light of each concrete case and to reach a conclusion by comparing the effect of the behaviour on the employer and the effect of the sanction on the employee[69]. In other words, it is necessary to determine concretely how the employer's business interests have been damaged and the connection between said harm and the pertinent posts. The failure to concretise the connection between those during the proceedings is considered a ground for violation[70].

Here, we would like to emphasise the following assessment of the Constitutional Court. According to this ruling, it should be remembered that the employee is not a civil servant who must have a certain and profound level of trust and loyalty relation with the administration. In this regard, the obligation of loyalty and confidentiality that employees working under private law have is not as strict as the obligations of loyalty and confidentiality that civil servants working under public law are expected to fulfil[71].

Another point that should be underlined here is that, as a rule, the duty of loyalty ends with the termination of the employment contract[72]. In a concrete case, a group of former employees formed to set up a website and shared posts against their former employer. In the proceedings, it is undisputed that the website founders were former employees of the employer and that the employees reacted to their collective dismissals via the website. In this concrete case, the employer's claims for damages arising from unfair competition were rejected, and it was ruled that the incident should be evaluated within the scope of the freedom of expression of former employees who were exposed to unlawful acts[73]. In summary, as it is understood from the Court of Cassation decision, such posts are also considered within the scope of freedom of expression.

68 Yıldız (n 43) 109.

69 Ugan Çatalkaya (n 26) 374.

70 CC, Volkan Çakır Apl., 2017/35488, 7.4.2021, para. 37-39. Accordingly, it is not legally accepted to rely on abstract and general statements for justification (Kasim Çiftçi and others Apl., 2019/33243, 4.7.2022, para. 34-36).

71 CC, Hülya İnan Apl., 2019/10642, 11.1.2023, para. 23; Oğuz Kurumlu Apl., 2019/12167, 11.1.2023, para. 23-24; İdil Alakuş Dere Apl., 2019/38252, 11.1.2023, para. 21. The Constitutional Court also stated that these strict restrictions were necessary due to the unique qualities of the public service, while providing certain advantages. See, Muhammet Serkan Şener Apl., 2016/13501, 17.11.2021, para. 38.

72 However, for the distinction introduced by the Turkish Code of Obligations regarding the post-contractual effect of the employee's obligations within the scope of the duty of loyalty, see also Süzek and Başterzi (n 1) 365; Çelik and others (n 19) 320; Ekmekçi and Yiğit (n 21) 392; Centel (n 4) 109.

73 The Court of Cassation, 11th Chamber, 2370/8090, 19.12.2018.

As a general framework, terminations based on an employee's social media posts should be considered lawful to a limited extent, and the impact and content of the posts should be scrutinised with caution. We also take the view that the employee's right to freedom of expression must be interpreted with vigilance against the imbalance of power inherent in the employment relationship[74].

Conclusion

In line with the issues discussed under the heading of digitalisation, this article embraces a descriptive approach to the regulations and jurisdiction in Türkiye regarding the impact of social media in disciplinary proceedings, especially during the termination stage.

First, in our view, passive activities such as "Liking" should be approached more moderately when evaluating the termination sanction. The expressions used by employees should be evaluated as a whole within a certain context with other expressions. Accordingly, from our point of view, if an active intention to disseminate cannot be determined, disciplinary sanctions would be contentious, although there are opinions in the doctrine and court decisions to the contrary.

In addition, the majority of the doctrine advise promoting responsible use of social media and to establish a social media or Internet use policy in the workplace. However, within the framework of the Constitutional Court's as scarce as possible approach to interferences with fundamental rights, policy documents that impose absolute bans should also be viewed with scepticism. At any rate, the test of proportionality should also be assessed. We align with the view in the doctrine that the legality of absolute bans is questionable in today's context.

There is a distinction to be made regarding the social media posts of the employees that lead to termination. First, excessive use of social media can prevent employees from fulfilling their obligation to work properly, and these behaviours, which are in some way related to performance, can pave the way for disciplinary proceedings. In other words, the employer must tolerate this situation, provided that it does not have a detrimental effect on the workplace/work flow and remains within reasonable margins.

Second, the content of the posts should be evaluated within the scope of the duty of loyalty. It cannot be assumed that employees waive their freedom of expression simply by entering into an employment contract. The Court of Cassation's decisions evaluate social media content, especially in the termination process, and examine the lawfulness of the termination according to the concrete effect of the shared content on

74 Mantouvalou (n 3) 103. See also Özyurt (n 18) 461.

the employment relationship. For instance, criticism in a particular area of expertise or criticism of defects and improprieties in the work organisation is protected by freedom of expression. It is also necessary to examine by whom, with whom, and under what circumstances the social media posts are shared.

In other words, it is necessary to determine concretely how the employer's business interests have been damaged and the connection between said harm and the pertinent posts. Undoubtedly, social media posts incompatible with the roles of the employee can be considered a valid reason in this frame. However, the failure to concretise the connection between those during the proceedings is considered a ground for reversal.

To draw a general conclusion, within the scope of the obligation of loyalty, the content of the statements and the audience they are shared with are important. Social media posts including relatively minor comments should not be subject to termination. Also, an employer's response to such inappropriate conduct should be dependent on the extent to which it could or potentially could damage an employer's/ reputation or business.

From our point of view, the employee's freedom of expression should be protected against overreactions by employers. In other words, termination can be used as a sanction in cases that are proportionate to the current situation within a very limited scope. In our opinion, the majority of the decisions of the Constitutional Court analysed in this article also support this view.

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