

Are social media friendships evidence of bias in witnesses?

18.06.2024 3 min read

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In Brazil's labor courts, witness evidence is one of the most important instruments used in the search for the truth and in ensuring that the reality of the facts prevails over the formal aspects of the relationship between the parties. For this reason, both the Consolidation of Labor Laws (CLT – *Consolidação das Leis do Trabalho*, article 829) and the Code of Civil Procedure (CCP, article 457§1), which has secondary application, allow a party to object to witnesses in three circumstances: incompetence, disqualification, and bias, although the court has discretion to admit unsworn statements by minors and persons who are disqualified and/or biased.

While the question of whether a witness is incompetent or disqualified is determined by objective criteria, bias is a more subjective matter, which leaves a certain margin of discretion to the judge in finding indications of close friendship, enmity or even interest in the case (CCP, article 447).

Thus, when arguing for exclusion of a witness's testimony, a party can present any type of valid evidence that demonstrates the witness's lack of impartiality, such as texts and images taken from social networks. In the context of legal proceedings, the use of information extracted from social networks, even when it is not public, falls within the scope of article 7(VI) of Brazil's General Data Protection Law, and is increasingly admitted by Superior Labor Appeals Court (TST – *Tribunal Superior do Trabalho*).

Most decisions by Brazil's labor courts, however, take the position that the mere demonstration of a link between persons on social networks, or even photos taken in a work environment, will not disqualify a witness from giving evidence, since such links on social media are not sufficient to prove, in court, the existence of a personal relationship.

Thus, when a party asks to exclude a witness on the basis of documents extracted from social media, the evidence presented must be capable of demonstrating a relationship between the witness and the adverse party that is sufficient to interfere with the impartiality required of witnesses. In other words, the evidence must show that the relationship goes beyond work – photos taken on private trips or at personal events, and affectionate comments on posts are examples of the type of evidence required.

It must be kept in mind, however, that digital evidence enjoys a presumption of validity only if the opposing party does not challenge it, in which case the document will lose its validity until its authenticity is proven, according to articles 422, 428 and 429 of the CCP.

For this reason, the law allows documentary evidence extracted from social networks to be certified by a notary (CCP, article 384) or even through blockchain technology, which capable of registering and authenticating documents found on the internet, in order to avoid allegations that the

evidence was invented or came from adulterated documents (CCP, article 421).

In short, with the purpose of ensuring legal certainty of the procedure, information extracted from social networks can and should be used to show that witnesses should be excluded from giving testimony because of bias. Such evidence will only be effective, however, if the party presenting it makes use of the tools available to guarantee its authenticity.

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