

Employees May Be Fired for Hate Speech on Social Media

By Allen Smith, J.D.

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Employers usually may fire workers for posting racist content on social media, just as they can fire employees for making racist comments in the workplace. But when disciplining workers for offensive posts, employers need to ensure that they are following state laws and the National Labor Relations Act (NLRA), and that discipline is applied consistently.

Many private-sector employees operate under a misunderstood notion of free speech, so it's important for employers to educate employees, said Katrina Grider, an attorney with Ogletree Deakins in Houston. "Companies can hold employees accountable for their social media conduct," she said. But, as a matter of fairness, "employees need to be educated about their responsibilities and the consequences of their social media conduct and activities."

She said the following are examples of the types of posts that may warrant disciplinary action or termination:

- Hate speech of any kind regarding any protected class.
- Speech that is severe enough to constitute a hostile work environment.
- Threats to employee health and safety.
- Speech that damages the company's clients, customers or community at large.

Review Policies

Employers should review their employee handbooks and policies and adjust them accordingly to ensure that employees know what they can and can't do, said Lauren Novak, an attorney with Schiff Hardin in Chicago. Pay particular attention to the wording of social media, equal employment opportunity (EEO) and anti-harassment policies, she advised.

"The key to developing effective social [media] policies is to clearly define the subjective term 'offensive,'" said Mark Kluger, an attorney with Kluger Healey in Fairfield, N.J. For example, companies should specify that they want employees to avoid posting expressions of hate or intolerance on social media, he said.

"Any social media policy should also include appropriate disclaimers that clarify the policy does not prohibit activities protected by applicable law," said Laura Jacobsen, an attorney with McDonald Carano in Reno, Nev.

A general rule of thumb is that if a statement made in the workplace would justify discipline, it likely would justify discipline if expressed outside the workplace, she said. But, Jacobsen cautioned, a collective bargaining agreement or employment contract may limit an employer's ability to take disciplinary action based on posts made outside the workplace.

Right to Free Speech Is Commonly Misunderstood

"Contrary to popular belief, there is no First Amendment protection for private employees," said Adam Keating, an attorney with Duane Morris in Atlanta.

And while public-sector employees do have First Amendment speech protection, Grider explained it applies only when all three of the following criteria are met:

- They are speaking as a private citizen.
- Their speech pertains to a matter of public concern, such as a social, political or community matter.
- Their interest in speaking freely outweighs the government employer's interest in efficiently fulfilling its public services.

State Laws

Some states prohibit employers from taking adverse employment actions against employees based on lawful off-duty conduct, Grider said. "Currently, California, Colorado, Louisiana, New York and North Dakota ban employers from firing or retaliating against employees for any off-duty lawful activity, including speech," she noted. "Arguably, this could include conduct that their employers and co-workers may find offensive."

But, she added, "even in these states, online speech attacking other persons' immutable characteristics protected by law—such as age, race, ethnicity, sex and religion—or that constitutes workplace harassment is not protected."

In all other states, the fact that an employee makes comments or posts on social media outside of work does not preclude an employer from disciplining the employee based on that off-duty conduct, she said.

Nonetheless, be aware, she added, that Illinois, Minnesota, Montana, Nevada and Wisconsin prohibit employers from restricting employees' off-duty use of lawful products, which may include social media platforms, signage and other products used to deliver political speech. Even in these states, however, employers likely still may fire employees for racist posts.

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NLRA Protections Limited

The NLRA protects employees' right to communicate with one another about their employment, Grider said. More specifically, employees have the right to engage in protected, concerted activity regarding their workplaces, including sharing grievances and organizing online.

"Employees who are fired for posting online complaints about their wages, benefits, tip-sharing arrangements, management, hours or other work conditions could have a strong legal claim under the NLRA," she said.

But the National Labor Relations Board (NLRB) recently gave employers more flexibility (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/NLRB-Gives-Employers-More-Leeway-to-Fire-Workers-for-Profane-Outbursts.aspx) to discipline or fire employees for abusive conduct when they are engaging in otherwise protected activity under federal labor law.

In a decision on July 21 (<https://www.nlr.gov/case/14-CA-208242>), the board issued a new standard requiring the NLRB's general counsel to first prove that an employee's protected activity was a motivating factor for disciplinary action. "If that burden is met, the employer must then prove it would have taken the same action even in the absence of the protected activity, for example, by showing consistent discipline of other employees who engaged in similar abusive or offensive conduct," the board said.

Grider urged uniform and consistent enforcement of social media policies to avoid liability under EEO laws as well. "If employees are treated differently for the same or similar conduct without legitimate nondiscriminatory explanations, employers may face a risk of employment discrimination claims," she said.

Preparation Is Key

Many organizations either have found and eventually will find themselves facing an issue involving employee use of social media, said Susan Bassford Wilson, an attorney with Constangy, Brooks, Smith & Prophete in St. Louis. "Thus, it's a good idea to prepare for it and have policies and procedures in place before that happens."

Grider said, "In most cases, employers can take actions against their employees' racist off-duty conduct, and employers may need to do so to avoid legal liability."

Moreover, she added that the manner and timing of the company's response directly impacts employee morale; reflects upon the company's commitments to maintain a culture of diversity, equity and inclusion; and affects both the public and business community's perception of the company's reputation and corporate responsibilities.

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