Racism in Your Spare Time: What Are The Legal Limits for Employers?

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On Saturday, August 12, as the nation watched, protests in Charlottesville, Virginia regarding the anticipated removal of a statue of Confederate general Robert E. Lee turned deadly. In the days and weeks after, both the small city and the country wrestled to make sense of the events. In the aftermath, employers too were forced to make decisions and judgment calls as the online community identified specific individuals as white supremacists.

We suspect that most of our readers, like us, don't like white supremacists. But even apart from the moral implications of Charlottesville, the public acts of employees can impact the public goodwill, brand and reputation of an employer—that is, the most valuable things a company has. So when an employee associated with a particular employer engages in distasteful, or hateful, or outrageous public conduct, what can an employer do? Should the employees be terminated? Disciplined? Allowed to do and say whatever they want while not at work?

Background

Soon after August 12, Twitter accounts, including one called @YesYoureRacist, began attempts to identify rally participants, requesting the following of Twitter users: "If you recognize any of the Nazis marching in #Charlottesville, send me their names/profiles and I'll make them famous." The viral and fast-moving world of social media helped the YesYoureRacist Twitter account and similar accounts identify rally participants, both with names and pictures.

The identifications resulted in one father's public open letter response to his son's participation, informing the public that the family "loudly repudiate[d] my son's vile, hateful and racist rhetoric and actions" via a North Dakota newspaper. But the disclosures had workplace ramifications as well.

Following the identification of Cole White as a protester involved in the torch-lit march on Friday, August 11, the hot-dog restaurant in Berkley, California where White worked, Top Dog, reportedly displayed a sign on the restaurant's exterior stating "Effective Saturday 12th August, Cole White no longer works at Top Dog. The actions of those in Charlottesville are not supported by Top Dog. We believe in individual freedom and voluntary association for everyone." According to a statement issued by Top Dog to the Washington Post, White "voluntarily resigned" from his employment. The statement went on to note, "We do respect our employees' right to their opinions. They are free to make their own choices but must accept the responsibilities of those choices."

On the opposite coast, a cook at Uno Pizzeria and Grill in Vermont was reportedly terminated after his participation in the protests. Unlike Top Dog, the pizza chain's Chief Marketing Office, Skip Weldon, issued a statement to the Burlington Free Press that "Ryan Roy has been terminated…We

are committed to the fair treatment of all people and the safety of our guests and employees at our restaurants."

News outlets similarly reported the termination of a welder and mechanic based in Charleston, South Carolina after he was photographed in Charlottesville beside the individual accused of killing one person and injuring others with his vehicle. Other rally-related terminations were reported.

The Law

Employers operating within an increasingly charged and polarized political environment are caught in the crosshairs in situations such as these, where social media and active customer bases can do significant damage to a business should the employer choose to remain silent. However, employers may also worry that taking a public stance on an employee's distasteful speech and/or actions, could result in the business taking a political position. Beyond the employer's fear of taking a political position or alienating portions of its customer base, the employer must consider the legal framework connected with disciplining an employee due to his or her offensive or inflammatory off-duty actions.

The First Amendment protects individuals only from government attempts to regulate speech. As a result, private employees lack the protections employees of public employers (generally, government entities) maintain when employers are faced with employee speech they find objectionable. However, the inapplicability of the First Amendment to private employment does not mean employers have free rein to take any actions they please. Private employers must consider whether any other legal protections apply.

The National Labor Relations Board (NLRB) maintains the position that speech regarding the workplace is protected. This summer's comments by a Google engineer, James Damore, who claimed that women were not suited for the tech industry is a prime example. In that instance, the NLRB may find that Google violated federal labor law (the National Labor Relations Act) by firing the engineer because his comments were connected to the workplace. It remains to be seen what the agency will do with Damore's charge filed with the agency.

States such as New York and California offer protections to employees for "recreational activities" and other off-duty conduct. A rarely-invoked section of New York's Labor Law – Section 201-d – protects employees against discrimination for "engagement in certain activities." The New York law specifically protects employee "political activities" and "recreational activities," as defined by the law in certain instances. Regarding "recreational activities," the law states that "[u]nless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of…an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property." However, the law does provide certain carve-outs, including where the activity "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest." While the law dates back to the early 1990s, minimal case law exists interpreting the law. Most recently, in February of this year, Section 201-d was invoked by a New York Post columnist fired for a tweet about the inauguration of President Trump.

In California, the state's labor code similarly protects employees against discipline and termination, due to "lawful conduct occurring during nonworking hours away from the employer's premises." Whether the laws of New York, California or other states with similar laws protect employees against termination for participation in events such as those in Charlottesville is unfortunately often a gray

area.

What Should an Employer Do?

Ok, so employees have a right to say and to believe offensive things. But, as noted, our societal impression that we can say what we want specifically because of the First Amendment is often misplaced. The First Amendment binds the government, meaning the government can't generally pass laws making certain kinds of speech unlawful. That has nothing to do with what employers can do (unless, of course, the employer is the government). Private employers typically have other laws to contend with, like the NLRA and state laws protecting employees' private activities, or their speech as it relates to terms and conditions of employment.

As with any employment decision, we tell our clients that an employer has to weigh the risk of acting against the risk of not acting. Firing a torch-carrying white supremacist might expose, say, a New York employer to a claim that it unlawfully injured an employee for his activities outside of work. Or firing a sexist Google engineer might expose an employer to an NLRB claim that the employee was engaged in speech protected under federal labor law. Those are risks.

Equally as compelling, however, are the risks to an employer's goodwill and reputation. Saying that you employ all kinds of people—from immigrants to white supremacists—isn't the kind of "diversity" that makes you look good. Employers must also consider internal impacts: what does it say to your African-American or Jewish employees that you knowingly employ somebody who engages in hate speech?

When the risk of public damage outweighs the risk of fending off an individual employment lawsuit or a single NLRB charge, the decision is easy. And even when the publicity concern doesn't outweigh legal costs, for many socially conscientious employers, the decision is still easy.