

Help... My Employee is a Member of a Hate Group: Can Employers Terminate Employees for Hate Speech in the Workplace or Participating in Off-Duty Protests?

2017 Labor & Employment Law Conference

Scott Cruz

(312) 985-5910

scruz@clarkhill.com

CLARK HILL

HYPOTHETICALS

- Charlottesville Revisited
 - Twitter Account @YesYoureRacist begins soliciting assistance from the general public to identify rally participants – “If you recognize any of the Nazis marching in #Charlottesville, send me their names/profiles”
- Google Revisited
 - Your employee circulates an “All Company” Memorandum stating women are underrepresented in the technology field because of biological differences, not discrimination
- Las Vegas Revisited
 - Employee logs on to Facebook (after work) and states the “Vegas victims don’t deserve sympathy because country music fans ‘often are Republican’
- Colin Kaepernick Revisited
 - Employee kneels during singing of national anthem during company softball tournament

CONSIDERATIONS FOR EMPLOYERS

- Do any company policies touch on the conduct at-issue?
- Are there any special legal factors at issue?
- What effect, if any does the (off duty) (lawful) conduct have on the employee's job performance, the workplace, or the company's image?
- What message do you want to send to your workforce?

EMPLOYEE HANDBOOK

- At-Will Employment Policy
 - Terminate at any time, with or without notice, for any reason, for no reason, or even a bad reason, so long as the reason is not illegal
 - Illegal terminations include terminations based on a protected characteristic, such as race, gender, religion, disability or age
- Social Media Policy
 - National Labor Relations Board protects employees from discussing their wages or other conditions of employment
- Off-Duty Conduct Policy
 - The way you conduct yourself when you are off-duty and away from work is generally your own business
 - However, ABC Company's reputation and business depend to a large degree upon the behavior of its employees
 - When employees fail to exercise good judgment and engage in offensive, inappropriate or immoral conduct, it may reflect negatively on ABC Company—**even if that conduct occurs when the employee is not at work or exercising his/her employment duties**

EMPLOYEE HANDBOOK

- Abusive Conduct Policy
 - The Company is committed to providing a workplace where each employee feels respected, valued and comfortable. Consequently, the Company will not tolerate abusive conduct directed at its employees and/or customers.

- Conflict of Interest Policy
 - We expect all employees to maintain high ethical standards in everything they do for the Company. This includes avoiding situations that may create an actual or apparent conflict of interest with your responsibilities to the Company

- Violence in the Workplace Policy
 - Any employee who attempts to intimidate or commits an act of violence toward any other employee, customer or vendor, or subtly or directly threatens or hints such action, will be subject to discipline, up to and including immediate termination

IS THE EMPLOYEE PROTECTED BY A CONTRACT?

- Employment Agreement
 - “For cause” termination – how is it defined?
 - Intentional breach of company policies
 - Willful conduct that is injurious to the company

- Collective Bargaining Agreement
 - Grievance procedure, including arbitration
 - “Just cause” termination – how is it defined?
 - Does it affect job performance?

IS THE CONDUCTED PROTECTED BY STATE OR LOCAL LAW?

- Certain states prohibit employers from taking adverse actions (i.e. firing, demoting, etc.) against employees because of their lawful off-duty conduct, including political activity
 - In California, for example, employers may not coerce employees, discriminate or retaliate against them, or take any adverse action because they have engaged in “political activity”
 - Similar prohibitions exist in other states, including Colorado, Louisiana, New York, South Carolina and Utah
 - “Political activity” has been interpreted by Courts to include promoting the acceptance of a cause and associating with others for the advancement of beliefs and ideas
 - Connecticut actually extends First Amendment protection of free speech to the employees of private employers
 - District of Columbia lists “political affiliation” as a protected category in its human rights law

IS THE CONDUCTED PROTECTED BY STATE OR LOCAL LAW?

- Illinois Human Rights Act does not offer protections for employees engaging in lawful “political activity” outside of the workplace
- However, the Illinois Human Rights Act does prohibit discrimination and harassment on the basis of religion, national origin, ancestry and color, among other protected characteristics. These “protected classes” could affect an employers response.

IS THE CONDUCTED PROTECTED BY STATE OR LOCAL LAW?

- Membership in a group degrading another race or ethnicity may be protected *if* that group is a *bona fide religious organization*. KKK is not a bona fide religious organization.
- If the group is not a *bona fide religious organization*, taking adverse action based *solely* on membership in a group, for example, KKK, likely would be permissible. The termination would be based on workplace policies forbidding discrimination and hatred in the workplace.
- However, termination of an African American who participates in and/or is supporter of the “Black Lives Matters” movement may subject an employer to a race discrimination claim, particularly if the decision maker is Caucasian

IS THE CONDUCT PROTECTED BY FEDERAL LAW?

- The First Amendment
 - The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or the press, or the right of people to assemble peacefully”
 - The First Amendment secures many essential rights for Americans – but it does NOT apply to **private employers/employees**, only to public employers/employees (i.e. government workers)
 - However, there are limits. To be protected by the First Amendment, the public employee’s free speech interests must outweigh the interest of the government as an employer in the efficient provision of services by its employees to the public.

IS THE CONDUCT PROTECTED BY FEDERAL LAW?

- National Labor Relations Act (NLRA)
 - The NLRA—which generally covers both unionized and non-unionized non-supervisory employees working in the private sector—provides under Section 7 that “[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection
 - The U.S. Supreme Court has interpreted this provision to mean that employees may organize as a group to “improve their lot” outside of the employer-employee relationship
 - Essentially, employees may engage in protected political advocacy so long as it relates to **labor or working conditions**; “advocacy” can mean contacting legislators, testifying before agencies, or joining protests and demonstrations
 - Employers are generally barred from retaliating against employees who participate in these types of political activities outside the work

IS THE CONDUCT PROTECTED BY FEDERAL LAW?

- Fired Google worker has filed an unfair labor practice charge with the NLRB, arguing, he has a right to express his “concerns” regarding the terms and conditions of his job. Did he engage in protected speech?
- Employee attends a demonstration in favor of immigration reform. According to the NLRB, because some employment verification legislation could be deemed to chill even legal hiring activity, a demonstration against immigration reform relates to employees’ mutual aid and protection under Section 7 of the NLRA.
- Worker picketing over perceived unfair wages makes racist comments, but with no overt gestures, directed toward a group of black replacement workers. Court found this “speech” to be protected, rationalizing that it was “non-disruptive” and occurred while the employee was engaging in protected activity (*i.e.* picketing about wages).
- Charlottesville rally participant – likely no connection/nexus between the specific issue that is the subject of the rally (*i.e.* white supremacy and hatred for minorities) and a working condition and/or term of employment

IS THE CONDUCT PROTECTED BY FEDERAL LAW?

- Title VII of the Civil Rights Act
 - Must always remain cognizant of your obligations under federal anti-discrimination/harassment laws
 - If the protesting employee falls within a protected class, he may feel that he is being discriminated against because of his race or another unlawful factor and may pursue legal action
 - No matter how defensible your position may seem, you may still have to deal with the consequences

IS THE CONDUCT PROTECTED BY FEDERAL LAW?

- Title VII of the Civil Rights Act
 - However, any items containing racist, sexist and other offensive images should be prohibited in the workplace
 - If someone has a swastika tattoo, the Company can require that it be covered at all times because it is offensive. Being a Nazi and/or White Supremacist is *not* a protected class.
 - If the employee refuses, the employer can lawfully terminate
 - Cars in the company parking lot should be required to comply with anti-harassment policy and law as well
 - Discriminatory decals and bumper stickers can be prohibited

DID THE EMPLOYEE ENGAGE IN VIOLENCE?

- An employee's engagement in violent conduct, whether on or off-duty, gives employers added discretion to take adverse action
- An employee's propensity for violence could raise a worksite safety and/or negligent retention, training, or supervision issue making it impossible for the employer to continue the employee's employment
- Section 5 of the Occupational Safety and Health Act of 1970 ("OSHA") requires that employers provide a safe workplace
- OSHA can fine employers who failed to take proactive, preventative steps when workplace violence occurs
- Additionally, the engagement in violence while participating in a concerted activity could quell Section 7 protections, under the NLRA, clearing the way for the employee's termination

ADDITIONAL ISSUES TO CONSIDER . . .

- Is there a specific reason, perhaps based on the nature of your business, that disciplining or reassigning the employee because of his protest/hate speech/offensive conduct might be either appropriate or inappropriate?
- Would it be useful to speak with the employee to find out his precise rationale for participating in the protest/hate speech/offensive conduct?
- In lieu of termination, should you retain the employee and attempt to “rehabilitate” him?
- Might there be any other reasons, beyond the protest, underlying the decision to discipline or reassign the employee? Have there been prior incidents between the complaining coworker and the employee, or others, that should be factored in your analysis?
- How would you justify any discipline or reassignment to the employee?
- Will you the employer listen to his position if he challenges the decision?

ADDITIONAL ISSUES TO CONSIDER . . .

- How would you explain any discipline or reassignment to other employees—and your community—particularly since the decision is not based on the protesting employee's work performance?
- To the extent possible, try to keep your personal politics out of the assessment
- At the end of the day, you as an employer should strive to make an informed, deliberate business decision, regardless of the political context

QUESTIONS?



Scott Cruz

(312) 985-5910

scruz@clarkhill.com

THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

CLARK HILL