
Employer Discretion to Terminate Employees for Off-Duty Conduct in the Age of Charlottesville

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Before the rise of social media, employees' off-duty conduct was generally unknown to an employer, even if that conduct involved violence or unlawful conduct. On August 12, 2017, it took mere hours before the participants in the neo-Nazi, white supremacist rally in Charlottesville, Virginia were identified and reported to employers with calls for termination. This immediate and public social media response, compounded with an expectation of swift and decisive recourse, leaves employers little time to contemplate appropriate action.

With this often unrealistic expectation in mind, how can an employer ensure it is protecting the safety of its employees and the reputation of its company, while not suppressing the protected expression of, or unlawfully discriminating against, one of its employees? The following is a list of factors which an employer should consider when alerted to the off-duty conduct of one of its employees.

1. Was the employee protected by an employee handbook or CBA?

Generally, an employee is considered "at-will" and is subject to termination for any reason that is not illegal. Illegal terminations include terminations based on a protected characteristic such as race, gender, religion, disability or age, terminations in violation of the employer's policies and procedures or union collective bargaining agreements, and terminations for violations of various federal or state whistle blower statutes or retaliation in violation of public policy. Further, the expressive activities of public sector employees are afforded protection under state and federal constitutions, which prevent their termination for engaging in free speech.

2. Was the conduct protected by state or federal law?

State and federal laws provide protection for public and private employees' off-duty conduct if they are engaging in protected speech. For example, membership in a group degrading another race or ethnicity may be protected if that group is a bona fide religious organization, and the expressive activities of public sector employees are afforded protection under state and federal constitutions preventing termination for engaging in free speech. These protections extend to employees even if their membership or affiliation is adverse to subordinate employees or is causing the employer to lose business. Further, if a demonstration takes place to protest the working conditions and/or terms of employment, participation may be considered "concerted activity" and protected by Section 7 of the National Labor Relations Act, which applies to both union and nonunion employees. Although not protected by federal law, states provide varying degrees of protection for employees' off-duty political expression. Under these laws, participation in a political rally would ordinarily not present any "cause" for termination, unless perhaps the demonstration was abhorrent to the employer's cause and/or mission.

3. Is there a state law or employer policy which protects or limits off-duty conduct?

Some states, such as California, Colorado, New York, Nevada and North Dakota, have laws which protect the legal off-duty conduct of employees. Employers in those states may be prevented from taking adverse action if an employee's off-duty conduct was legal, even if the message of the conduct was adverse to the values of the employer. In the absence of those state or local protections, many employers have policies governing an employee's off-duty conduct, and require that an employee refrain from off-duty conduct that brings disrepute on, or that embarrasses the employer. As long as the conduct is not protected under other state or federal law, these policies give employers the ability to take action against an employee even if their conduct was legal.

4. 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. Additionally, the engagement in violence while participating in a concerted activity could quell Section 7 protections, clearing the way for the employee's termination. Regardless of the manner in which an employer learns of an employee's off-duty violent conduct, the employer may arguably have the duty to take action against that employee.

We recommend that before terminating an employee for off-duty behavior, the employer considers the above factors and consult with experienced labor and employment counsel to avoid a wrongful discharge law suit or administrative charge claiming a violation of a federal or state law.

If you have any questions about whether an employee's off-duty conduct is protected or whether you can discipline or terminate an employee for off-duty conduct, please contact [Deanna Forbush](#), [Stacey Schor](#) or another member of Clark Hill's Labor and Employment Practice Group.