What if You Don't "Like" an Employee's Social Media Content?

BY GABRIELE WOHL, BOWLES RICE LLP

In November 2018, a senior analyst at BYN Mellon's wealth management department in Pittsburgh filed a lawsuit in federal court, claiming she had been unlawfully terminated as a result of her race. Five months earlier, the analyst had posted a comment on her personal Facebook account, criticizing recent racial justice protests and willing violence upon the protesters. She was fired from her job at the bank and alleged in her complaint that she was targeted because she was white.

The bank, according to the Pittsburgh Post, claimed at first that she was fired for violating the bank's code of conduct, and then later stated that she was terminated for poor performance. The lawsuit is still in its early stages.

This incident, and the resulting litigation, exemplify both the far-reaching consequences of employees' personal posts in a public forum and employers' need for strong social media policies.

There are billions of active social media users in the world right now, including more than 2 billion Facebook users alone (according to Facebook). That is a sizable fraction of the world's population, and likely includes a majority of employees and job seekers. At this point, not having a social media presence can seem like more of an eccentricity than a passive resistance – like not having a cell phone or driving a stick shift. If you are an employer, an internet search for employees' or job applicants' public social media accounts is an obvious screening tool that can be highly (and sometimes unfortunately) revealing. At its most useful, social media will affirm who has the good judgment to not share information that they wouldn't want an employer to see. At its worst, employees' and applicants' social media will expose objectionable behavior or content potentially harmful to an employer. Employment actions based on a person's social media content can be warranted but can also lead to litigation. This article will provide some explanation and tips for employers to avoid pitfalls of social media monitoring.

What does the First Amendment protect?

There is a common misconception that the First Amendment to the United States Constitution grants every person the right to say, post, or tweet every fleeting thought that comes to mind. The idea that there may be negative consequences to one's late-night profanity-laden rants often generates a "freedom of speech" protestation. In reality, the First Amendment does not guarantee anyone the right to the freedom to post. The freedom of speech is actually a broad – but not absolute – freedom from government censorship. Private individuals and employers have no sweeping Constitutional obligation to protect anyone's speech. This distinction is important because public employers must take a different approach than private employers to employees' speech.

When can a government employer regulate employee speech?

A public employer, such as a public school or other government agency, is prohibited by the First Amendment from taking adverse action against an employee because of the employee's speech. To a point. If a government employee's speech was made pursuant to his or her employment, then the speech may not be protected by the First Amendment. The government employer must have the ability to evaluate its employees doing their jobs, after all. If the speech was outside of the scope of employment, like an off-hours internet post, then the employee does enjoy some Constitutional protection from censorship, particularly when it comes to matters of public concern. However, the

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government employer has an interest in efficient and effective operation and can restrict employee speech as necessary to protect that interest. How does this play out? A government employer can take action against an employee when his or her speech is damaging to the mission of the government body, such as when police officers or public school teachers use Twitter or Facebook to publicly attack a group of people they are entrusted to protect.

Considerations for private employers.

The free speech clauses of the United States and West Virginia Constitutions do not apply to private employers. Without the First Amendment analysis that is inherent to government employers, private employers have much wider latitude for disciplining or terminating employees for their social media speech.

However, private employers should be mindful of the general holding in Harless v. First National Bank in Fairmont and its prodigy, that an employer does not have the absolute right to take adverse action against an at-will employee if "the employer's motivation for the discharge is to contravene some substantial public policy principle… ." While the First Amendment may not provide a substantial public policy protecting speech generally on social media platforms, the speech itself may do so. For example, if an employee posts on social media about information relevant to an OSHA investigation, he or she may be engaging in protected whistleblowing activity and should not be disciplined or discharged as a result of those activities. Employers also should be aware that Section 7 of the National Labor Relations Act gives employees the right to engage in "concerted activity" for the purposes of collective bargaining. That protected concerted activity could occur over social media, and employers cannot interfere with it.

On the other hand, employers can monitor employees' social media and take employment action if an employee violates any of the employer's other policies, particularly anti-harassment and anti-discrimination policies, confidentiality policies, or if an employee publishes statements harmful to the organization that the employee knows are untrue.

Have a social media policy and enforce it consistently.

Employers and human resources professionals are familiar with the common advice to adopt clear policies on various issues and apply them consistently, and the topic of social media is no exception. A social media policy should inform the employee (1) that the employer monitors their public social media platforms, (2) whether social media platforms may be used for business purposes and, if so, the scope of such permitted use, and (3) that use of employer computers and technology should not be used for engaging in personal social media activities. The scope of an employee's permitted use of social media should be limited to legitimate business purposes, and employees should be reminded that the employer's other policies apply to their use of social media. The social media policy should specifically acknowledge the employee's right to protected activity under Section 7 of the National Labor Relations Act. If an employer is considering taking any employment action based on an employee's social media presence, it should carefully consider whether the employee could argue they are being treated differently than other employees who engage in similar activities outside of the realm of social media.

Quick tips

To summarize, an employer may have a valid reason to terminate or discipline an employee based on his or her social media content, subject to the caveats above, for:

- Violating the social media use policy;
- Using social media to harass or threaten, or to perpetrate a crime;
- Using social media during work time;
- Tarnishing employer's reputation (except when the speech can be considered "protected activity");
- Lying to the employer (posting pictures of self on a cruise while on sick leave);
- Sharing employer's confidential information or trade secrets;
- Posting content that is disruptive to government employer's operations or mission.

An employer may not terminate or discipline an employee based on his or her social media content if:

- The employee is engaging in protected activity (e.g., whistleblowing);
- The employer is not following protocol in social media policy, or not applying policy consistently;
- The employer is retaliating against the employee for reasons unrelated to the content;
- The employer is acting with a discriminatory motive.

Finally, while employers are free to access publicly available social media accounts, they should keep in mind that West Virginia Code §21-5H-1 prohibits employers from requesting or requiring employees or applicants to disclose their usernames and passwords to personal social media accounts, to access their accounts in the employer's presence, or compel employees to grant access to their accounts. UNITY

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