Pennsylvania Ruling Shows Limits To Worker Free Speech Rights

Insights
7.17.20

Conflict over a variety of complex issues now seems to consume the nation's daily attention, and it is certainly not unusual for debates over these kinds of issues to spill over into the workplace. But what is perhaps different now from any time before is the ever-increasing usage of social media platforms by employees to express their opinions outside of the workplace.

These online comments, sometimes even occurring between complete strangers, tend to be angrier and less civil than real-life conversations. Unfortunately, an employee's social media posts sometimes go beyond the realm of inflammatory and can be viewed as offensive.

While these online comments are often posted by employees outside of the workplace and on their own personal time, with increasing frequency, their fellow employees and the greater community alike are looking to their employers to hold them accountable.

These kinds of circumstances leave many employers wondering what, if any, power they actually have to hold their employees accountable for their off-duty conduct on social media platforms. This issue was at the center of a recent Pennsylvania Supreme Court case, *Carr v. Commonwealth of Pennsylvania*, in which an employee of the Pennsylvania Department of Transportation, known as PennDOT, was terminated after posting what many viewed as an offensive rant on her personal Facebook page.

Members of the public complained to PennDOT about the employee's comments and pressured the department, as the woman's employer, to take responsive action against her. The public pressure made its way to PennDOT's human resources office and PennDOT ultimately terminated the employee.

In response, the employee brought suit against PennDOT challenging the grounds for termination under her right to free speech. But, in the end, the Pennsylvania Supreme Court ruled that PennDOT did not violate the First Amendment when it fired the employee over her Facebook rant.

Misunderstandings About the Freedom of Speech
Many employees, and some employers, think that off-duty social media comments are protected under the First Amendment. However, for private sector employees, the freedom of speech does not necessarily mean the freedom from consequence.

The First Amendment only protects employees' speech from government interference. Thus, private sector employees' online posts are not safeguarded from employment repercussions based on the freedom of speech.

However, things are a bit more complicated when it comes to public sector employees. In general, their speech will be protected by the First Amendment when: (1) they are speaking as a private citizen; (2) their speech concerns a matter of public concern, such as a social, political or community issue; and (3) their interest in speaking freely outweighs the government's interest in fulfilling its public services.

Thus, the freedom of speech can shield public sector employees from employment consequences for their social media comments.

That said, the above example from the case involving the PennDOT employee proves that the First Amendment's protection of public sector employees is not ironclad. In that case, PennDOT did not violate the First Amendment when it fired an employee over her Facebook rant about school bus drivers.

Interestingly, the court noted that, even if her rant happened to involve a matter of public concern, that alone is not enough to trigger the First Amendment's protection. Rather, the importance of that public concern, or lack thereof, must also be considered, and in doing so, the Pennsylvania Supreme Court found that the employee's rant was of limited public importance.

Such a holding, at a very general level, could serve as a springboard for holding public sector employees accountable for their social media comments, though made off-duty, even if they touch upon a matter of public concern.

Connections to the Workplace

While the First Amendment does not protect the online speech of private sector employees, the National Labor Relations Act does place some limits on the kinds speech that can be regulated by private employers.

The NLRA protects private sector employees — both unionized and nonunionized alike — against unfair labor practices, including from employers interfering with their right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Federal courts and the National Labor Relations Board have interpreted this clause as protecting speech so long as it has a sufficient nexus to the workplace.

Thus, for example, a post stating "my employer doesn't pay us overtime even though we work nearly 70 hours each week" might qualify for protection under the NLRA, whereas a comment simply stating "my employer is a cheapskate" likely would not. Besides the NLRA, various federal and state anti-discrimination/harassment and anti-retaliation laws may also protect employees who post online about workplace discrimination or harassment.

Impact of State and Local Law

All states follow the employment-at-will doctrine. This doctrine permits employers, or employees, to terminate employment for no reason or any reason at all, so long as the reason does not violate the law.

However, most of these states have created a public policy exception, which provides a claim to any employee discharged or disciplined in contravention of a policy set forth in federal or state laws. Several states, for instance, broadly prohibit employers from taking actions against employees based on political expression. That said, expressions of hate, racism or the like are not considered political speech.

Additionally, some states prohibit employers from taking adverse employment actions based on lawful off-duty conduct. These state laws could conceivably protect conduct even if others consider it to be offensive.

However, even under these laws, social media posts that could constitute workplace discrimination or harassment would not be protected. And, under federal and state law, if employers become aware of any such online comments, they will have an obligation to investigate them and take appropriate corrective action. In fact, the failure to do so could give rise to a number of legal, reputational and employee morale risks.

When Employers Should Take Action

Without question, employers should take immediate action, whether it is discipline or discharge, where online speech involves:

- Hate speech;
- Workplace discrimination or harassment;
- A threat to employee health and safety, including workplace violence; or
- Damage to an employer's reputation or relationships with employees, customers/clients and the community at large.

Unfortunately, there is no one-size-fits-all approach to the kinds of consequences employers should impose for offensive and inflammatory online comments. Sometimes, determining the appropriate response will be easy. For instance, responding to a racist online rant with an automatic termination.

Other times, however, employers may need to strike a balance. In other words, while automatic discharge might not be warranted, employers will still need to issue discipline in a manner that is proportionate to the harm caused by the social media post.

Best Practices Moving Forward

Given the explosion of the use of social media in recent years, and the fact that such usage has become increasingly divisive, employers should simply assume that, at some point, they will be

required to address the off-duty social media comments of employees. To that end, employers should consider the following practices going forward:

- Promptly investigate any reports, whether from employees, customers or the community at large, about inflammatory or offensive social media comments.
- Take appropriate corrective action based upon the investigation, and follow up as necessary to ensure that the corrective action resolved the problem.
- Review or implement employee handbook policies related to social media that clearly indicate that off-duty posts that violate the law or a company policy, or cause damage to the employer's reputation or relationships with customers or employees, may result in employment consequences; and
- Ensure that employment policies, procedures and training reflect any corporate values of tolerance, diversity and inclusion, social justice, and anti-discrimination/harassment/retaliation.

This blog post was originally published in the July 16, 2020 edition of Law360 and is reprinted with permission.

Related Offices

Philadelphia

Pittsburgh