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Private Employer May Terminate Employee for Racially Insensitive Social Media Post

By Julie Levinson Werner

Last week the New Jersey Appellate Division affirmed the dismissal of a lawsuit by an employee who alleged she had been wrongfully terminated based on her controversial Facebook post. In so doing, the court held that the employee of a private business is not protected from termination under the U.S. and New Jersey constitutions when the employer is not a state actor. In an age in which many individuals believe they have the legal right to post on social media and that doing so is akin to speaking in the "town square," the New Jersey court's decision provides notable pushback on this view and follows the majority of courts that have addressed this issue.

In *McVey v. Atlanticare Medical System*, an employee prominently displayed her association as her company's corporate director of customer service on her private Facebook account. During the height of the nationwide protests involving George Floyd's murder, the employee posted on her Facebook account that she believed the phrase "Black Lives Matter" was racist, caused segregation, and that she "support[ed] all lives … as a nurse they all matter, and [she] d[id] not discriminate." She also posted that she did not condone the rioting that had occurred following Floyd's death.

McVey's employer, a health care system, informed all employees, including the plaintiff, through its social media policy to be mindful of their social media posts because their social media activities had the potential to affect the employee's job performance, the performance of others, the company's brand and/or reputation, and the company's business interests. The company also warned employees in its social media policy to be cautious about "topics that may be considered objectionable or inflammatory – such as politics and religion…." Upon learning of the employee's Facebook post, the company informed the employee that it was conducting an investigation, and then terminated her employment very shortly thereafter.

The employee's lawsuit against her employer was limited to one claim: that the termination of her employment violated a clear mandate of New Jersey public policy under the First Amendment and the New Jersey state constitution. In rejecting this position, the court held that a claim for wrongful termination of employment as against public policy cannot be based on constitutional free speech rights where the employer is a private business. Constitutional rights can be violated only if there is state action. The court also confirmed that the employer had the right to terminate its at-will employee, particularly given the identification on the employee's Facebook account of her status as an employee of the company, and the potential risk her inflammatory post could harm the company's business.

Because the employee's lawsuit was limited to her claim that the company had violated her federal and state constitutional rights, the court's decision did not address the other instances in which employees may still have legal protection for their social media posts, including under the National Labor Relations Act. There are also instances in which employees have the right to speak out on social media when they believe their employer is violating antidiscrimination laws, wage and hour laws, and the like. As such, employers should not construe the *McVey* case as a blanket endorsement of a private employer's right to terminate employees for their social media posts in all instances. Each situation will need to be assessed on a case-by-case basis depending upon the language in the post and any public policy considerations at issue.

If you need assistance navigating the complex employment laws governing the workplace, please contact Lowenstein Sandler's Employment Counseling & Litigation practice group.

Contact

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