The Consequences of Hate Speech in the Aftermath of Charlottesville: An Employer’s Guide to Handling Rally-Attending Employees

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In the aftermath of the events in Charlottesville, Virginia, over the weekend, a Twitter account with the handle @YesYouReRacist began soliciting the assistance of the general public to identify rally attendees based on photographs. “If you recognize any of the Nazis marching in #Charlottesville, send me their names/profiles and I’ll make them famous,” the Twitter-detective tweeted. Not surprisingly, many rally attendees were quickly identified, along with their educational institutions and/or places of employment. For employers this raises an interesting question: “Does my employee who participates in a white supremacist/neo-Nazi rally enjoy any job protections from said participation?” It depends.

In the days following the events in Charlottesville, we have already seen one rally participant resign his employment; three rally participants have been terminated by their respective employers; one university has publicly condemned white supremacy but informed the public they would not expel participating students; one family has publicly disavowed their son; two web-service providers removed a neo-Nazi-themed website from its servers; one Pennsylvania firefighter is under investigation for a distasteful Facebook post directed at an African-American colleague; and two police officers, one in Massachusetts and one in Kentucky, are under scrutiny for making Facebook posts mocking counter-protesters who were run down by a motor vehicle during the rally. In today’s world of mass consumerism, and with the public pressures of social media, this type of public shaming and influence is likely here to stay.

Although public-sector workers generally cannot be terminated for their exercise of speech, many union contracts require “just cause” to terminate, and some employees have employment contracts which control grounds for termination, federal law does not offer any protections for employee hate speech in the private sector, except in limited circumstances discussed later where the employee may otherwise be engaging in protected activity. Thus, for private sector employers not subject to off-duty conduct state law protections, it is not per se illegal to fire workers if what they choose to do or say in their free time reflects poorly on your business.

Employers and employees alike are probably asking: “But what about the Constitutional right to free speech?” The First and Fourteenth Amendments offer little protection for individuals who engage in hate speech and are fired by their private employer. Although “hate speech” in and of itself may be protected (except for fighting words, or true threats of illegal conduct or incitement), a private employer is equally protected when it “speaks” by terminating its employee. Private-sector employers do not have to allow employees to voice beliefs they or other workers may find offensive. While employers in the public sector need to proceed with caution, where a worker attends and participates in something as extreme as a white supremacist/Neo-Nazi rally, the employee will generally lose the protection of the Constitution. For instance, in Lawrence v. James, the Eleventh Circuit affirmed a correctional institution’s interest in the efficient operation of a correctional facility outweighed a public-sector correctional officer’s First Amendment right to wear, off-duty, a T-shirt adorned with a swastika and the words “White Power.”

Employers must also consider whether the National Labor Relations Act (NLRA) offers any protection to both
union and non-union employees engaged in this or similar off-duty conduct. While the NLRA’s primary concern is unionized workers, Section 7 also protects nonunion workers when they engage in “concerted activities for the purpose of . . . mutual aid or protection.” As of late, the National Labor Relations Board has taken an expansive view of Section 7, recently commenting that a picketing worker who made racist comments, with no overt gestures, directed towards a group of black replacement workers was protected. The Board reasoned that one of the necessary conditions of picketing is confrontation, and that impulsive behavior on the picket line is expected, particularly when it is directed against non-striking employees. In affirming the Board’s decision in Cooper Tire & Rubber Co. v National Labor Relations Board, the Eighth Circuit noted the picketing employee’s statements were not violent in character, did not contain overt or implied threats, and were not accompanied by threatening behavior or intimidating actions toward the replacement workers. The speech was protected because it was non-disruptive and occurred while the employee was engaging in protected activity (picketing). Here, it would be difficult for a Charlottesville rally participant to argue that his or her behavior under the circumstances was non-disruptive, non-threatening and/or not intimidating.

To be certain, private employers have a right to hold employees accountable for their viewpoints and to make employment decisions based on those actions, particularly where employers have a good faith belief that an employee’s viewpoints or actions may create a hostile work environment for other employees. However, as with any termination, employers should proceed with caution. Employers should not blindly trust a Twitter-verse investigation and should instead conduct their own investigation before making any employment-related decisions. Moreover, if you are a public sector employer or operate in a state subject to off-duty conduct statutes or one that does not follow the standard at-will employment doctrine, it is imperative you consult with legal counsel before proceeding with discipline or other employment-related decisions. Last, employers must not forget that if the to-be-disciplined employee also falls into a protected class, you should remain cognizant of the potential exposure with respect to a separate or inter-related discrimination claim.

Now may be as good of time as any to re-visit sensitivity and workplace harassment training.

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