

“Hope I don’t get AIDS. Just kidding. I’m white!”: How to get yourself fired for a Facebook post

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by Jillian Kornblatt

Social media has created a minefield of concerns for both employees and employers. The news is full of stories of employees documenting their questionable off-duty conduct on social media, or posting comments containing racist or derogatory remarks. Often, the employer—or sometimes, the rest of the online community—will demand that the employee be fired. In such a scenario many employers may be wondering: ***What could prevent an employer from lawfully terminating an employee based on social media activity, and what steps can employers take to best handle these situations?***

Recent examples abound:

Last year an employee of a large corporate bank was terminated following a racist rant on Facebook. Throngs of customers contacted the bank, threatening to close their accounts if the employee was not fired. The employee was promptly terminated for her “reprehensible” comments.

Many readers may remember the notable case of a ***public relations director*** in 2013, who, before boarding a flight to South Africa, tweeted: “Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!” Despite her 170 followers, her tweet immediately went viral worldwide. By the time she landed in South Africa eleven hours later, her manager had informed her that she’d been fired.

Most recently, on October 31, 2017, a marketing director for a government contracting firm was terminated after a photograph of her flipping off President Trump’s motorcade went viral on social media.

In the wake of the September “white nationalist” marches, numerous Twitter accounts were created to identify and draw attention to the participants. Many employers have been inundated with demands that these individuals be terminated, and have been quick to distance themselves from the employees. In this situation, there are several things employers should consider. First, be aware of state and federal laws which may affect the way you might react to employee social media use. For example:

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- **Off-duty Conduct Laws.** Some states have laws prohibiting employers from disciplining or firing employees for activities pursued in their personal time—including the use of lawful substances such as medical marijuana and tobacco.
- **Protection of Political Views.** A few states (and some cities and counties) protect employees from discrimination based on their political views or affiliation. In such a state, terminating or disciplining an employee for purely political social media activity or for political conduct outside the workplace could be illegal.
- **NLRB Protections.** The National Labor Relations Act and similar state laws protect employees' rights to communicate with one other about their employment. More specifically, employees have the right to engage in "protected activity" regarding their workplace—sharing grievances and organizing online in protected activity. Under these laws, an employee who is fired for posting online complaints about their wages, benefits, tip sharing, management, or hours, etc. could have a strong legal claim. As we noted in a recent post, this protection can be quite robust, leading to the reinstatement of a union employee fired after posting: "F*** his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!!" (He was saved by the last sentence, which linked the rant to his union activities.)
- **Prohibitions on Retaliation.** Beyond NLRB protections, many employment laws protect employees from retaliation for claiming that their rights have been violated. If an employee complains online about workplace discrimination, harassment, or other legal violations, that employee may be protected.

However, at the end of the day most states are "at-will" employment states, meaning both employers and employees are free to terminate the employment relationship at any time with or without reason. Therefore—if an employer determines that an employee's speech outside the workplace runs counter to the employer's values or public image, the employer could have solid grounds for termination. While this is not the case in all states (for example, Montana), in the vast majority of states employment is considered at-will. So long as the aforementioned laws are taken into account, chances are good that an employer can safely terminate an employee for objectionable conduct online. While consulting with legal counsel prior to any such termination is recommended, employers can take the following affirmative steps to provide proper procedure in the event of an employee's worrisome or unacceptable online behavior.

- **Social Media Use Policy.** Adopt a policy, included in your handbook, informing employees that their personal social media accounts, online networking account, blogs, and general online posts could get them in trouble at work. Explain what types of content could create problems, including harassing and bullying behavior or discriminatory or offensive language. This can include online conduct that may be associated with the company or which could cause serious interpersonal problems in the workplace.
- **Be Consistent.** As with all employment policies, be consistent when enforcing your social media policies. If a female employee is terminated for posting objectionable material on the internet but a male employee is not for the same or similar conduct, the female employee may have a cause of action for sex discrimination. Always enforce your policies consistently to protect your company.