

Employment Practices Liability

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Can You Fire an Employee Involved in Racist Protests? Should You?

By Kimberly A. Ross, Partner; FordHarrison

Following recent events in Charlottesville, Virginia involving a “Unite the Right” rally organized by multiple white nationalist groups protesting the removal of a statue of Robert E. Lee, which turned violent and ended in the tragic deaths of a counter-protestor and two police officers monitoring the situation, a large social media campaign has been undertaken in order to identify the protestors and encourage their employers to terminate their employment. Groups identified as having ties to the Unite the Right rally include members of the Ku Klux Klan, as well as other white supremacist and white nationalist groups, neo-Nazis, skin-heads, and the “alt-right.”

This is, therefore, an important time for employers to consider their rights and responsibilities to their employees, the public, and to their business in general. In October 2015, the author of this Alert wrote a blog entitled “[What to do with racist employees?](#)”. Although the blog partially focused on employees who made racist comments through social media, the analysis holds true in the scenario of a white nationalist march, or potentially other marches, such as Black Lives Matters or even the counter-protests to such marches. For instance, an employee at a BLM protest who shouts “death to whites” or a counter-protestor at a Nazi march who commits an act of violence would be equally problematic to an employer as a white supremacist shouting “death to blacks” or otherwise engaging in violent conduct. Deciding whether to take action against an employee for off-duty conduct, particularly if the conduct is deemed to be legal, even if repulsive to the employer, co-workers, or the general public, can create a slippery slope.

The focus for (private) employers must not be on the political aspects of the protest, much of which would be protected conduct under many states’ laws (though not under federal law), but rather, on the content of what is being said and the context in which it is being said. Employers should look at whether the employee stating racist or similar slogans

or carrying such signs or symbols is a manager, which can have greater implications to the employer than a non-managerial employee. For instance, if the manager is known to espouse racist or anti-Semitic views and then acts on them at work, the employer will likely be liable for those acts in a harassment or discrimination claim. Depending on the exact conduct, the employer could also be held liable on tort theories such as negligent hiring, retention or supervision, under the argument that the employer knew or should have known of those propensities. Employers should also analyze whether the employee has ever shown a tendency to make such statements or act on such beliefs at work. Where relevant, employers can also consider whether the conduct of its employee may lead to a loss of business or disruption in the company or among other employees. Employers should also be careful to determine whether the employee at the protest was an active participant, or mere observer.

Finally, employers must also be careful not to run afoul of the National Labor Relations Act by punishing employees who may be commenting about the terms and conditions of their employment. For instance, a white employee protesting about losing out on a promotion to a black (or other minority) co-worker as part of an affirmative action program may be engaging in protected conduct (depending on other circumstances, such as exactly what was said). Because of all of the complex issues to be considered, employers are encouraged to consult with their employment counsel before making any significant decisions based on their employees’ off-duty conduct.

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