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Column: When online rant and business collide

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No matter how offensive an employee's rants on social media, in Connecticut, what the employer can do about it depends.

Recently, a Texas firefighter's Facebook posting was read as a sympathy statement for the racist who murdered nine African-Americans at a South Carolina church. The firefighter was dismissed. The case raises important questions about the limits on an employer's right to act when an employee launches an offensive or embarrassing rant on social media or some other area of the public domain.

The answer is not simple. The employee's offensive speech may be protected whether the rant relates to workplace conditions or to issues of public concern.

If the employee uses social media to object to working conditions, particularly if the complaints are likely to be read by other employees, the National Labor Relations Board may say it is protected speech, beyond employer control. The employee cannot be subject to disciplinary action. The protections are broad and the penalties for infringing on the employee's rights severe, including rescission of the discipline and a grant of whole relief to the employee.

If the speech addresses non-workplace issues, additional protection may be found in state law. Some employee complaints are also protected by federal and state whistleblower laws.

Discussion of the Confederate flag, however, presents a different problem, as this issue stands apart from the terms of employment (unless you manufacture flags). In this case, a private company's personnel look to Section 31-51q of Connecticut's general statutes for protection, prohibiting employers from disciplining or discharging any employee because of the exercise of rights protected by the First Amendment of the Constitution.

That protection is limited in two ways. First, the employee's speech cannot substantially or materially interfere with work performance. Second, it cannot substantially interfere with the employee's relationship to the employer. An employer who runs afoul of this statute faces the prospect of paying damages and attorney's fees to a successful employee plaintiff.

When considering a speech issue, the first point addressed is whether the subject is a question of public concern. This determination is for the court. Second, were the literal words spoken (or posted) really addressing the purported public interest? This question is for a jury. It is dependent upon the speaker's subjective intent. What does the jury think the speaker meant to convey through the offending words?

Two final obstacles face the employee seeking recompense.

First, the employee must show the offending remarks did not materially interfere with job performance or with his employer relationship. Second, the employee must prove the speech was, in fact, a substantial motivating factor in his discipline or discharge — often difficult facts to establish.

Where does this all leave our Confederate flag enthusiast? Depends.

The issue is not job-related. It seems to be a matter of public concern and so passes the first Section 31-51q test.

We move to the second analytical step. Do the words on our rebel's Facebook page actually address the flag issue or somehow wander off into something unrelated to the question of public interest. Assuming the words also meet this test, we have to see whether they adversely impact the employee's job performance or his relationship with the boss. If the boss is African-American, we may have a different result than if the company officials are white. Similarly, if the workforce is largely African-American and is angered by the pro-Confederate flag posting, there might be an adverse impact on the employees' job performance.

But what happens if the pro-flag posting goes viral and hurts the employer's business? Would this be enough to create a material and substantial adverse impact on the employee's relationship with her employer or her ability to perform her job? One would hope so, but predictions are dangerous with free speech issues.

Finally, assuming that the employee has shown the speech is on a public issue and the words used relate to the issue and presuming the words do not adversely affect the employee's job performance or his relationship to his employer, can the employee prove the words played a substantial motivating part in discipline or discharge?

The employer is likely to claim there was some other speech-neutral reason for the adverse job action. It is the employee's technical burden to overcome that employer assertion. However, as a practical matter, the employer should be in a position to demonstrate the stated reason, often poor job performance, was, in fact, what supported the decision to fire or otherwise punish the employee.

Addressing employee social media ravings or other public rants is not a simple matter. An employer's response should not be based simply on his or her own sense of outrage, but must be a decision made in the calm light of measured factual and legal consideration.

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