

What to do with racist employees?

By: Kimberly A. Ross

Based on my experience dealing with employers and sharing war stories with fellow employment lawyers, I think it's fair to say that most employers are not racists. They tend to do everything reasonable to prevent racist conduct in the workplace and to correct it when it happens. Sure, the law requires preventative and corrective measures anyway, but most employers would want to prevent such inappropriate conduct even if they did not legally have to.

But unfortunately, there are people everywhere who hold racist beliefs. The problem for employers arises when employees express those beliefs publicly. If it happens at work, it should be relatively easy to deal with, particularly for companies with well-written anti-discrimination policies. The more difficult scenario occurs when the statements are expressed outside the scope of employment, such as on an employee's personal social media account.

The increased use of social media, with people more freely expressing their opinions whenever, wherever, and to whomever they want, has led to not infrequent situations where an employer learns that an employee has posted something online, or made some other public statement that is racist or bigoted in some other way regarding protected classes of individuals (such as regarding gender, national origin, religion, age, sexual orientation, etc.).

Recently, a client of mine faced a situation with a non-managerial employee who identified in his Facebook profile his employment status with the client and then made some racist comments online in response to the news story regarding a group of African American women who were kicked off a train in Napa Valley for being too loud. Although the initial comments did not directly relate to the company, another commenter on the post noticed the commenter's employer, suggested a boycott of the company, and also posted the employee's comments on the company's own Facebook page. In response to the boycott suggestion, the employee made another racist comment, this time in a manner that directly related to the company's business (suggesting that the company would engage in a practice that would be detrimental to African American customers).

Another client of mine faced a situation where an anti-fascist group posted on the company's Facebook page the identity of one of its employees (non-management) and some extraordinarily despicable racist comments he had made. As with the other company, there were online threats to start a boycott campaign until the racist employee was terminated. Interestingly, the employee had worked for the company for several years without incident.

Both clients wanted to know their rights with regard to whether they should -- or even could -- terminate employment. Each client brought up the concept of "free speech," but free speech only prevents the government, not private companies, from censoring speech. Further, in one of the situations, the speech was so vile that it also would have likely amounted to "hate speech," which would not be protected even if it was the government restricting it.

I would suggest that, rather than focusing on free speech, employers should focus on the harm to their reputations and the disruption to their business that their employees' racist comments may be causing. It is not necessary to prove actual harm has occurred; the mere possibility is enough.

For example, if the company might suffer a loss of business or harm to its reputation if it employs an overtly racist employee, it can terminate the employee. An openly racist employee's public comments can be the beginning of the creation of a "hostile work environment" for those employees who fall within the racial group that the comments target. Moreover, many states also provide protection for customers or other members of the public against such discriminatory behavior. Thus, if the employee were to act upon his racist feelings towards a member of the public, the company could be subject to liability for that conduct. This risk is especially great for those companies in any service industry.

Another factor to consider, which is particularly important if the racist comments are coming from a manager, but nonetheless still important if coming from a non-managerial employee, is whether the public comments are indicative of a propensity to express those comments, or act on those opinions towards other employees (or customers) of the companies in an illegal manner. In employment discrimination cases, when non-management employees are accused of harassing or discriminatory conduct, the standard of proof is whether the company knew or should have known of the conduct. One can certainly imagine a victim of such conduct arguing that, given the company's knowledge of racist or other inappropriate comments made on social media, it also should have known that the alleged harasser likely would have made similar comments at work. The publication of such opinions could easily cause disruption in the business -- assuming employees take time out of their day to talk about what they read, or have to deal with inquiries from customers or clients. Employees could also (rightfully) become upset or uncomfortable knowing they are working side-by-side with someone who holds those opinions (and who is not afraid to say them out loud).

It should be noted that some comments by employees would be protected such that employers are not allowed to make adverse employment decisions against employees for such comments, like those relating to political beliefs or affiliations, or an expression of religious beliefs. Employers also cannot punish employees for commenting publicly in a negative way about their terms and conditions of employment under the National Labor Relations Act.

But in the above situations involving racist or other inappropriate and unprotected speech made on social media, an employer must carefully consider the potential harm to the business' reputation, disruption to the business, the negative effects on other employees of the company, and the potential loss of a defense to litigation should the racist employee act upon his beliefs with other employees or the public. The employer can also simply consider the fact that the employee's racist beliefs do not comport with its own beliefs and terminate on that basis. And, of course, consult with your counsel to evaluate the nature of the statements and determine whether terminating the employees is within the employers' rights.