

EMPLOYEE SPEECH: POLITICS, SOCIAL MEDIA, AND EMPLOYER RIGHTS

Daniel A. Krawiec

(313) 309-9497

dkrawiec@clarkhill.com

Stephanie V. Romeo

(313) 309-4279

sromeo@clarkhill.com

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WHO ARE WE?

Clark Hill is a multidisciplinary, international law firm with over 600 attorneys and professionals in 25 offices across the nation, as well as in Dublin and Mexico City.



Daniel A. Krawiec (dkrawiec@clarkhill.com)

Detroit, MI

B.A., University of Michigan, Ann Arbor, 2005

J.D., University of Miami School of Law, 2008



Stephanie V. Romeo (sromeo@clarkhill.com)

Detroit, MI

B.S., University of Michigan, Ann Arbor, 2013

J.D., Michigan State University College of Law, 2018

OVERVIEW

- Employee speech and conduct is an increasingly hot topic
- Advances in technology enable employers to know more about their applicants and employees
- Changes in workplace dynamics and technology are blurring the line between on and off duty
- Public employers in particular face unique challenges establishing just cause and balancing First Amendment concerns

TYPES OF OFF-DUTY CONDUCT

- Legal but potentially undesirable conduct
- Social media activity
- Political activity
- Financial responsibility
- Illegal conduct (arrest or conviction for DUI, domestic violence, fraud)
- Conduct while on medical or disability leave

EMPLOYEE OFF DUTY CONDUCT IN THE HEADLINES

- A woman was fired from her marketing position after she was identified in a photograph flipping her middle finger to a presidential motorcade
- A firefighter was suspended without pay after posting remarks on Facebook about preferring to save a dog from a burning building rather than a person of color
- A nurse was fired after it was discovered she commented on Facebook that an unarmed black man killed by police “deserved it for being stupid”
- A Florida middle school teacher submitted her resignation after it was found she was also the host of a white supremacist podcast called "Unapologetic" and the voice behind a Twitter account riddled with racist and anti-Semitic posts
- The director of the Michigan State Police faced calls for her resignation after sharing a Facebook post that labeled NFL players who kneel or sit during the pre-game national anthem to protest racial injustice as “millionaire ingrates who hate America and disrespect our armed forces and veterans”

GENERAL RULE FOR OFF-DUTY CONDUCT

- For an at-will employee, an employer may impose discipline for any off-duty conduct as long as the conduct is not protected
- Employees may have more protection if they are subject to a collective bargaining agreement or an employment contract with a just-cause provision
- Public employees have certain First Amendment rights

LEGAL PROTECTIONS FOR OFF DUTY CONDUCT

- Constitution (federal or state) for public employees only
- Collective Bargaining Agreements and Employment Contracts
- Federal and State EEO laws
- Retaliation and Whistleblower claims
- National Labor Relations Act (NLRA) claims (or MERC claims)
- State statutes that protect specific employee off duty conduct
- State statutory or common law privacy rights

EEO LAWS AND PROTECTED CHARACTERISTICS

- EEO Laws
 - Title VII – protects race, color, religion, sex or national origin
 - Elliot Larsen Civil Rights Act – protects race, color, religion, sex, age, national origin, height, weight, and marital status
 - Americans with Disabilities Act
 - Michigan Persons with Disabilities Civil Rights Act
 - Age Discrimination in Employment Act

PUBLIC EMPLOYEES

- Public employees have First Amendment rights, so any termination must be carefully considered in light of these rights
- Presumption that an employee's private life is outside of the employer's control
- However, discipline or termination for off duty conduct can be appropriate where there is a nexus between the off duty conduct and employer's legitimate business interests

COLLECTIVE BARGAINING AGREEMENTS AND EMPLOYMENT CONTRACTS

- CBAs and contracts may protect employees from discipline for off duty conduct. The typical language prohibits termination unless “just cause” exists.
 - “Just cause” requires a nexus between off-duty conduct and the workplace
 - Arbitrators will generally sustain discharge grievances for off-duty conduct except under three circumstances where supported by evidence:
 - 1) The off-duty behavior harms the company’s reputation, business, or product
 - 2) The off-duty conduct renders the employee unable to perform his duties or appear at work, in which case discharge would be based on inefficiency or excessive absenteeism
 - 3) The off-duty conduct leads to refusal, reluctance, or inability of other employees to work with the individual

HARM TO THE COMPANY'S REPUTATION

- Where an employer claims that the off-duty conduct caused harm to the employer's business, this typically refers to an actual business loss or damage to the employer's reputation
- Arbitrators have also made the following considerations
 - **Adverse publicity**
 - *Baker Hughes*, 128 Lab. Arb. (BNA) 37 (2010) (denying grievance, arbitrator noted that employee's blog had reached 10,000 views and that the blog harmed his supervisor's reputation and disrupted the harmony in the plant)
 - *Handy v. Harman Refining Division*, 106 Lab Arb. (BNA) 1049 (1996) (Newspaper article that does not even mention the company's name militated against a finding that the off duty conduct hurt the company's reputation)

RETALIATION AND WHISTLEBLOWER LAWS

- Numerous Michigan and federal laws provide protection to employees who oppose or report illegal activity
- Employees who engage in protected activities under laws in the following subject areas are protected from retaliation:
 - Discrimination, harassment, failure to accommodate
 - Wage and hour
 - Occupational safety and health
 - Workers' compensation
 - FMLA leave
- Michigan also has a general whistleblower protection statute, the Whistleblowers' Protection Act (WPA) that prohibits retaliation against employees who report or are about to report a suspected violation of law to a public body

NATIONAL LABOR RELATIONS ACT

- Section 7: “Employees shall have the right . . . To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”
- Section 8(a)(1): “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of this Act”
- NLRB and off duty conduct policies

PRIVACY LAWS

- Electronic Communications Privacy Act, 18 U.S.C. § 2510
 - A person “may not intentionally . . . intercept any wire, oral, or electronic communication”
 - Only covers “interception”
 - Merely viewing Facebook pages not “interception”
- Stored Communications Act 18 USC § 2701
 - Allows employer access to stored communications (voicemail or email) with employee’s consent
 - Protects only communications in which the employee had a reasonable expectation of privacy not those readily accessible to the general public
- Michigan’s Internet Privacy Protection Act (IPPA)

STATE STATUTES PROTECTING OFF DUTY CONDUCT

- Michigan does not have a specific state law that protects employee off-duty activities and behavior
- However, some states, like California, Colorado, New York, Nevada and North Dakota, have laws which protect the legal off-duty conduct of employees
- Employers in those states may be prevented from disciplining or terminating an employee for off-duty conduct that was legal, even if the message of the conduct was adverse to the values of the employer

POLITICAL ACTIVITY

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POLITICS IN AND OUT OF THE WORKPLACE

Does the constitution protect employee's right to political speech in the workplace?



POLITICS IN AND OUT OF THE WORKPLACE

- **IT DEPENDS**
- Public employees have a right to free speech, including free political speech, in the workplace
- Private employers may prohibit political speech, discussions, and conduct at the workplace
- Private employers may generally refuse to hire, adjust pay/benefits and discharge “at-will” employees because of their political views

POLITICS IN AND OUT OF THE WORKPLACE

- Exceptions to employer's free discretion to legally limit politics in the workplace

1) State Laws

- Under Michigan law:
 - It is a misdemeanor criminal offense, either directly or indirectly, to give, lend, or promise valuable consideration to any person to award them for voting a particular way or refraining from voting
 - Employers may not, either directly or indirectly, discharge or threaten to discharge an employee for the purpose of influencing their vote

MCL § 168.931



POLITICS IN AND OUT OF THE WORKPLACE

- Exceptions to employer's free discretion to legally limit politics in the workplace

2. Section 7 of the NLRA

- “Employees shall have the right . . . To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”
 - Non-supervisory employees have a right to discuss wages, hours and other terms and conditions of employment (“concerted activity”)
 - Protections extend to workplace conversations as well as those outside the workplace and outside working hours
 - Union and non-union employees



POLITICS IN THE WORKPLACE

- Exceptions to employer's free discretion to legally limit politics in the workplace

2. Section 7 of the NLRA (CONT.)

- NLRB has broadly interpreted Section 7 to prohibit employers from banning all political communications and activities in the workplace
- NLRB has struck down “bad behavior” policies, i.e. policies requiring respectful communication, prohibiting workplace gossip, profanity, offensive comments, and displaying or wearing racially insensitive slogans or depictions
- 2015 GC Memo
- New political landscape today (Guidance withdrawn on Dec 1, 2017)

POLITICS IN THE WORKPLACE

Quiz: Would the following employer rules be allowed?

1. Be respectful to the company, other employees, customers, partners, and competitors
2. Show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion
3. It is important that employees practice caution and discretion when posting content on social media that could affect the Employer's business operation or reputation
4. An unwritten rule that only voters of a particular party can keep their jobs

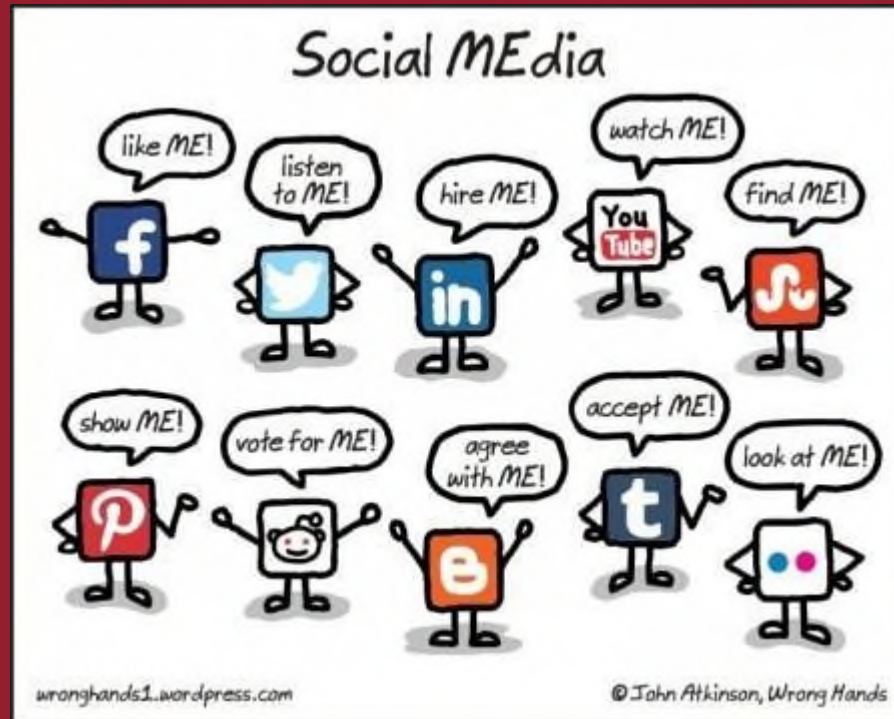
POLITICS IN THE WORKPLACE

- Regulating only “purely political speech” may bypass the restrictions of Section 7
 - Communications supporting a political party or candidate
 - Displaying “Vote for Smith” poster or button
 - Displaying or wearing a sign in support of a proposed law (the law must be unrelated to employment issues such as a traffic law)

POLITICS IN THE WORKPLACE

- Employer Best Practices
 - “No Political Activity” policies must have carve-outs for communications and activities protected by Section 7 or applicable state laws
 - Ensure policies comply with NLRB’s rules on permissible restrictions
 - Have procedures to promptly address violations of policy or violent, disruptive, or unlawful conduct related to politics
 - Enforce policies consistently and without regard to political party

SOCIAL MEDIA



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SOCIAL MEDIA IN THE WORKPLACE

- Reasons to allow:
 - Effective business tool
 - Professional networking
 - Marketing
 - Product/service feedback
 - Greater interactivity between customers and businesses
 - Employee recruitment
 - Community outreach
 - Reach out to masses

SOCIAL MEDIA IN THE WORKPLACE

- Reasons to prohibit:
 - Diverts employees' attention away from work priorities
 - Hurts productivity
 - Can lead to security incidents

SOCIAL MEDIA IN THE WORKPLACE

- Why develop a social media policy?
 - Protect trade secrets
 - Prevent employees from tarnishing an employer's brand or reputation with clients or customers
 - Prevent unlawful harassment between co-workers
- The NLRB has long held that Employers usually may not discipline employees for engaging in certain collective or concerted activity, including comments regarding terms and conditions of employment, unless the employee's behavior is so outrageous that it loses the protection of the Act

SOCIAL MEDIA IN THE WORKPLACE

- Section 7 does not protect all employee speech, and a well-crafted social media policy can still prohibit:
 - Unprotected speech that may damage an employer
 - Accessing social media use during working hours
 - Identifying as being employed by a specific Company
 - Disclosure of confidential information or trade secrets
 - Harassment or discrimination



Our benefit package is we don't block Facebook.

SOCIAL MEDIA IN THE WORKPLACE

- In 2010, Philadelphia-area teacher Natalie Monroe posted on her personal blog that she should call students on their report cards:
 - “ratlike”
 - “frightfully dim”
 - “dunderheads”
- She also wrote that she wished she could leave the following comments for her students’ parents:
 - “Am concerned that your kid is going to come in one day and open fire on the school. (Wish I was kidding.)”
 - “Rude, belligerent, argumentative f**k.”
 - “There’s no other way to say this: I hate your kid.”
- Ms. Monroe was disciplined for her comments. A Pennsylvania federal court eventually concluded that the interests of the employer in maintaining the integrity of the teacher-student relationship trumped Ms. Monroe’s First Amendment rights. The Third Circuit affirmed.

SOCIAL MEDIA IN THE WORKPLACE – HEADLINES

- In Alabama, a police officer was terminated after speaking at a League of the South rally. Portions of his speech were posted for the public's view on YouTube and his involvement with the League of the South was covered in local articles.
- League of the South is a White-Nationalist and White-Supremacist organization that advocates for a second Southern secession



- The police officer sued the City alleging his termination violated his constitutional rights
- The Court upheld the termination, finding that the interest in speaking out was outweighed by the police force's interests in maintaining order, loyalty, morale, and harmony within the police force and throughout the community

SOCIAL MEDIA IN THE WORKPLACE – HEADLINES

- In March 2009, the Philadelphia Eagles fired a six year employee for posting a critical message about the team on his Facebook page
- The employee wrote:

“I am f-----g devastated about [Brian] Dawkins signing with Denver... Dam Eagles R Retarded!!”
- Despite removing the message and apologizing, the Eagles fired him in a telephone call



SOCIAL MEDIA IN THE WORKPLACE – HEADLINES

- “Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.”
- Connor Riley, a 22 year old college student sent out the tweet and received this tweeted response from Time Levad, “channel partner advocate” for Cisco Alert:

“Who is the manager. I’m sure they would love to know that you will hate the work. We here at Cisco are versed in the web.”



SOCIAL MEDIA IN THE WORKPLACE – HEADLINES

- A 38 year old war-veteran James Kennedy took to twitter to complain about Chipotle:
 - “@ChipotleTweets, nothing is free, only cheap #labor. Crew members make only \$8.50hr how much is that steak bowl really?”
- Kennedy’s boss determined this violated part of the restaurant's social media policy that prohibited "disparaging, false ... statements about ... Chipotle"
- Kennedy was terminated. Was his termination legal?



SOCIAL MEDIA IN THE WORKPLACE – HEADLINES

- An extra on *Glee* tweeted out who was crowned prom queen and king in an episode that had yet to air
- *Glee* co-creator Brad Falchuk tweeted in response:
 - “Hope you’re qualified to do something besides work in entertainment . . . Who are you to spoil something talented people have spent months to create?”
- The extra was fired from the show



SOCIAL MEDIA IN THE WORKPLACE – HEADLINES

- In August 2017, a Google Engineer was fired for publishing a controversial memo where he claimed women are underrepresented in technology because of psychological and biological differences, not sexism. NLRB dismissed his claim. He and another former engineer are now suing the company for discrimination against white men and conservatives.
- The NLRB, in a memo regarding the claim, found that statements regarding immutable traits linked to sex were discriminatory and constituted sexual harassment. It concluded: “Thus, while much of the Charging Party’s memorandum was likely protected, the statements regarding biological differences between the sexes were so harmful, discriminatory, and disruptive as to be unprotected.”



SOCIAL MEDIA IN THE WORKPLACE – HEADLINES

- A white employee posted the following on her personal Facebook page:

“All lives matter. Period. I will not be preached to. I never said Black lives dont [sic] matter. I believe Black lives matter is stoking the fire of racial tension and hate by exploiting deaths and encouraging division. Period. Look again at my words and do not put words in my mouth.”
- The employee complained to management that coworkers were creating a hostile work environment by calling her racist in response to the post
- In February, the court dismissed her racial discrimination claims. The Judge emphasized that calling someone “racist” is not racial on its face, and is not related to race.



CASE STUDY: MAKING FUN OF THE EMPLOYER ON FACEBOOK

The employer operates several car dealerships. When the employer's BMW dealership introduces the redesigned BMW 5, the employer serves customers hot dogs, Doritos, cookies and water. Bob, a salesman at the employer's BMW dealership, along with several other salespersons, complains about the food. Bob and the other salespersons were concerned that the food would affect BMW's image and their commissions would suffer as a result. Bob takes several pictures of customers and employees eating hot dogs and posts the pictures with snide comments on his Facebook page. Bob's family and friends comment on his post. Several days later, at the employer's Range Rover dealership across the street from the BMW dealership, a 13-year-old boy drives a Range Rover into a pond located next to the dealership. Bob takes a photo of the car in the pond and posts it on his Facebook page along with more snide comments about the employer. Several Land Rover employees comment on the post.

Can the employer discharge Bob?



RANGE
ROVER

SOCIAL MEDIA IN THE WORKPLACE

Steps employers can take to draft acceptable social media policies:

- Address employee conduct both at work and at home with regard to harassment, discrimination, code of conduct, confidentiality, non-disparagement and technology use
- Prevent social media use at work unless it is part of an employee's assigned duties
- Preserve confidentiality and privacy by crafting carefully written policies that specifically delineates which posts are prohibited. Internal company matters should never be posted online or discussed online, regardless of whether the employer is indicated.
- Review and rethink existing policies and prohibitions to ensure that they properly take account of Section 7 concerns.
- Provide examples in employee handbooks that explicitly describe which communications are allowed.

****Make clear that the policy is not intended to prohibit protected speech or interfere with employee rights recognized under the NLRA****

SOCIAL MEDIA IN THE WORKPLACE

- Other steps an employer should take:
 - Respond to workplace complaints made on social media
 - *Debord v. Mercy Health Systems of Kansas, Inc.* (10th Cir. 2013) – employee complained on Facebook that her supervisor “needs to keep his creepy hands to himself . . . Just all around d-bag”
 - Preserve evidence – screen shots (do not preserve metadata), litigation hold letters

OFF-DUTY CONDUCT (EMPLOYER LIABILITY)

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OFF-DUTY CONDUCT – EMPLOYER LIABILITY

- Most state laws provide that employers have a duty to act reasonably in hiring, supervising, and retaining their employees
- To recover for a breach of that duty, a plaintiff must prove:
 - The defendant-employer knew or should have known that an employee had a particular unfitness for his or her position so as to create a danger of harm to third persons
 - Such particular unfitness was known or should have been known at the time of the hiring, retention, or failure to supervise
 - This particular unfitness proximately caused the plaintiff's injury

OFF-DUTY CONDUCT – EMPLOYER LIABILITY

****WARNING: LISTENER DISCRETION ADVISED****

- *Anicich v. Home Depot U.S.A., Inc.* (3/24/17)
 - Male supervisor (regional manager)
 - Supervisor became fixated on one female employee in particular, Alisha
 - The supervisor's behavior was known to senior management
 - The supervisor asked her to go to his sister's wedding in Wisconsin with him. She refused. But, after he threatened to fire her or cut her hours if she did not go, she went.
 - After the wedding, the supervisor took Alisha to a hotel room where he killed her



OFF-DUTY CONDUCT – EMPLOYER LIABILITY



- *Anicich v. Home Depot U.S.A., Inc.* (3/24/17) (CONT.)
 - Home Depot argued it was not liable for two reasons:
 - It did not owe a duty of care to Alisha, because the murder occurred off premises and the supervisor did not commit the crime using store property
 - It was not reasonably foreseeable based on the supervisor's past conduct that he would commit such a horrendous act
 - The Court (7th Circuit) ultimately held that while the murder occurred off-site, the supervisor misused his supervisory authority by threatening Alisha's job if she did not attend the wedding. The Court also held that it was a question of fact as to whether some harm was foreseeable based on what the employer knew about the supervisor's conduct.
 - What does this mean? Employers *may* be liable for crimes committed by their employees outside of the office.

OFF-DUTY CONDUCT – EMPLOYER RESPONSIBILITY

- What can an employer do to protect itself?
 - Have clear policies and procedures which:
 - Maintain employer discretion to discipline for any unprotected conduct
 - Instruct employees not to mention their employer on social media or wear clothing with a company logo during off-duty activities in public
 - Reserve the right to intervene if an employee's private activity could tarnish the image of the company or hurt your business position in the community
 - Carve out exceptions for Section 7 conduct
 - Prohibit, under any circumstance, the disclosure of confidential information or trade secrets

QUESTIONS?



Daniel A. Krawiec

(313) 309-9497

dkrawiec@clarkhill.com

Dan is a Senior Attorney in the Labor & Employment Business Unit in Clark Hill's Detroit Office. He attended the University of Michigan and the University of Miami School of Law.



Stephanie V. Romeo

(313) 309-4279

sromeo@clarkhill.com

Stephanie is an Associate Attorney in the Labor & Employment Business Unit in Clark Hill's Detroit Office. She attended the University of Michigan and Michigan State University College of Law.

THANK YOU

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