

The Impact of the Charlottesville Protests on Virginia Employers

By: Stacey Rose Harris and Noor Chughtai

Since 1924, a statue of Confederate general Robert E. Lee riding his horse Traveller has stood in what is now known as Emancipation Park in Charlottesville. Until last year, most people paid little heed to the statue. But that changed dramatically when the city voted to remove the statue as part of the recent national trend to reconsider public displays that may be perceived to honor those who fought to uphold slavery.

The Charlottesville Protests

We know all too well that on Friday, August 11th, white supremacists and neo-Nazis gathered to protest the removal of the statue. And, when counter-protestors from movements such as Black Lives Matter arrived on scene, chaos and brutality followed. Many were injured, and a young woman was killed after being rammed by a car driven by a person who had espoused white supremacist views.

Americans nationwide reacted in horror to the violence that occurred in Charlottesville and to the sight of neo-Nazis parading in a torch lit march on the grounds of the University of Virginia, founded by Thomas Jefferson. Such a sight certainly raised concerns about the prevalence of racism and anti-Semitism within our society.

Political Speech and Employment

In the wake of the violence in Charlottesville, it is not surprising that many persons have taken it upon themselves to pressure employers to fire those who attended the protest as white supremacists and neo-Nazis. Indeed, a twitter account with the handle @yesyoureracist has sought help in identifying those who participated in the protest that sided with the white nationalists. With the assistance of their followers, @yesyoureracist has managed to pressure a

restaurant in California to secure the resignation of an employee who participated in the Charlottesville protest, and it is likely that other employers will come under similar public pressure.

Such pressure can be of significant concern to a business. It is important for a company to maintain its reputation and to take steps to prevent anything that could cause it to be the subject of disrepute. A business also may wish to use its position within the community to send a message that rejects ideologies that are threatening to the public good and are inimical to what the country stands for. Thus, many employers are now asking whether they should consider firing a worker for off-the-job political conduct or speech that is racist and beyond the pale, and if they do, could they face legal repercussions.

Legal Protections for Speech

Under Title VII of the Civil Rights Act of 1964, employees are protected from being fired based on such protected categories as race, color, sex, national origin and religion. Political beliefs, however, are not protected by Title VII. The First Amendment prohibits the government from interfering in a person's ability to exercise his or her freedom of speech, and it protects governmental employees. Private employers, however, are not subject to the same constitutional restraints.

In addition to federal laws, certain states have laws that serve to protect employees due to their political involvement and activities. New York and California are two such states with laws on the books that do, in fact, limit the freedom of private employers to terminate employees for off-duty political speech. In New York, certain private employers are precluded by statute from terminating workers for "lawful" political speech outside the workplace, which can include anything from participation in an legally-sanctioned rally to social media posts. Similarly, in

California, private employers are prohibited from retaliating against employees for any legal, off-duty political speech, and further, may not make any rule or policy that could be construed to forbid, or control, in any way, an employee's political speech.

Virginia, however, is not one of those states. Virginia strongly adheres to the doctrine of at-will employment, and a private employer is entitled to hire or fire an employee for any reason that is not discriminatory (i.e., on the basis of race, gender, national origin, religion) or in violation of public policy (i.e. for refusing to commit a crime or engage in an otherwise unlawful act). Thus, a private employer in Virginia may terminate an employee because it does not approve of that employee's participation in political protests, because it does not approve of the way the employee dresses, or for no reason at all. Indeed, if you are firing an employee for political speech in an at-will state such as Virginia, the best policy may be to give no reason except that the employee's services are no longer needed. Refraining from providing any further explanation will also help avoid any potential defamation claims by the employee if a prospective employer inquires as to the reason for the termination.

Bottom Line:

For a Virginia employer, ultimately the question of whether to terminate an employee for off-duty conduct—political or otherwise—of which the employer disapproves—will likely come down to a common-sense balancing test. On one hand, you should ask whether the employee's conduct may be harmful to your business, or simply represents the type of conduct you choose not to support. This should be balanced against potential distraction and upheaval at the work place that may be generated by the termination of the employee, and any potential perceived unfairness by other employees or the public.

That being said, if you truly are interested in taking a moral stand against racism and anti-Semitism in the wake of the horrific events in Charlottesville, terminating employees who have racist views you find abhorrent may not be the best way to do so. Rather, a more productive response may be to reinforce in your workplace what Mary T. Barra, CEO of General Motors, has said are the “values and ideals that unite us – tolerance, inclusion, and diversity.” We all know that acting responsibly and leading by example is the best way to work toward what Kenneth Frazier, CEO of Merck, has said is the “American ideal that all people are created equal.” Charlottesville has reminded us that we have a ways to go before we achieve that ideal. We cannot rest on our laurels.

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