

# Labor and Employment 2019 Symposium

## Employee Discipline in the Age of Viral Videos

### Speakers

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### Materials

1. PowerPoint Presentation

# ahead of the curve

Workplace law trends for today and beyond.  
Come up to speed to stay ahead.



## Employee Discipline in the Age of Viral Videos

### Meet the Speakers:

Claire Smith, Legal Counsel – US, Canadian Pacific Railway *[unable to travel due to weather]*

Jack Sullivan, Partner, Dorsey & Whitney LLP

Briana Al Taqatqa, Associate, Dorsey & Whitney LLP

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## Welcome! Outline for Today:



- Legal framework for evaluating out-of-the-workplace conduct.
- When does out-of-the-workplace conduct warrant at-work discipline – and what are the pitfalls?
- Current best practices in the viral-video age.
- Questions?

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## Legal Framework



## Legal Framework

- **Title VII of the Civil Rights Act of 1964**
- **Americans with Disabilities Act**
- **Age Discrimination in Employment Act**
- **Minnesota Human Rights Act**
- **National Labor Relations Act**



## Title VII of the Civil Rights Act of 1964

- Prohibits employment discrimination based on protected characteristics
  - Sex
  - Race
  - Color
  - National origin
  - Religion
- In the social media context, includes:
  - Harassment
  - Hostile work environment

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## Title VII of the Civil Rights Act of 1964

- Prohibits retaliation in response to protected activity
  - Opposing a discriminatory practice
  - Making a complaint or participating in an investigation
- In the social media context, includes:
  - Harassment
  - Hostile work environment

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## ADA; ADEA

- Prohibits employment discrimination and harassment based on
  - Disability
  - Age

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## Minnesota Human Rights Act

- Combines—and expands—the protections of Title VII, ADA, and ADEA by prohibiting employment discrimination and retaliation based on
  - Race
  - Color
  - Creed
  - Religion
  - National origin
  - Sex
  - Marital Status
  - Public assistance status
  - Familial status
  - Disability
  - Sexual orientation
  - Age

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## National Labor Relations Act

- **Provides “Section 7” rights to individuals:**
  - Self-organization
  - Form, join, assist labor organizations
  - Bargain collectively through representatives of their own choosing
  - Engage in other concerted, protected activities for the purposes of collective bargaining or other mutual aid or protection

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## In the context of social media:

- **We’ve long known how to protect employees:**
  - What do we do if an employee tweets a complaint about their job, given the protections of the National Labor Relations Act?
  - What do we do if someone posts to Facebook that they believe they were treated unfairly at work because of their religion, given the protections of Title VII?
- **But in the age of viral videos, how do we protect the company and coworkers when an employee’s out-of-the-workplace conduct comes to light?**

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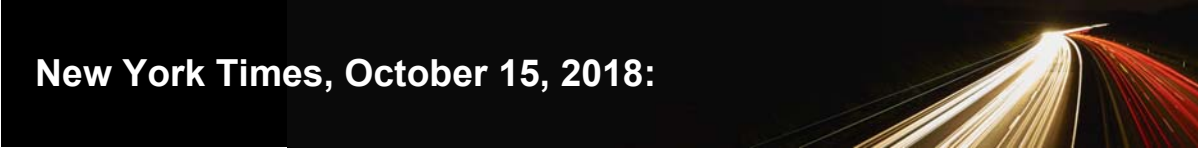


## When does out-of-the-workplace conduct warrant at-work discipline?



## When does out-of-the-workplace conduct warrant at-work discipline?

- **Social media makes the line between personal and professional life razor-thin**
- **Employers balance the potential damage to their image and reputation against their desire to foster a supportive workforce that doesn't micromanage workers' actions**
- **Employers should consider what they've learned about an employee when deciding how to respond**



**New York Times, October 15, 2018:**

**White Woman of Blocked Black Neighbor From Building Is Fired**

Images omitted.

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**Discussion**

- **The employee racially profiled a neighbor – and worked for a property management company.**
- **What if she didn't work for a property management company?**
- **What if the incident was not recorded and the neighbor simply called the employer to report the behavior?**
- **What risks did the employer take on for terminating the employee?**

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**Chicago Tribune, August 29, 2019:**

**University fires professor who suggested Harvey was karma for Texas Republicans**

Images omitted.

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## **Discussion**

- **Not an issue of bias against protected category.**
- **But: Judgment and reputational harm to employer.**
- **What risks did the employer take on for terminating the employee?**

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## WXIA-TV (Atlanta, Georgia), June 2, 2016

- **“Bank of America employee fired after racially offensive Facebook post goes viral”**
  - “A Coweta County woman is out of a job after apparently posting extremely racist comments on Facebook that went viral.”
  - “Thousands of people shared the post to her employer Bank of America through the company’s Facebook and Twitter feeds. Many also threatened to close their accounts.”
  - “Stunned Facebook users shared the post, tweeted it, and bombarded Bank of America’s social media accounts, insisting the woman, a personal banker, be fired.”

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## Employer’s Response:

### Bank of America News

Image omitted.

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## Discussion

- This personal banker made racist comments without an apparent connection to the specifics of her employment.
- Does that matter?
- All persons in all workplaces are protected from harassment and discrimination and employers face liability when harassment and discrimination occur.
- Reputational damage is real damage.

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## Roseanne Barr, in three tweets:

Images omitted.

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## Discussion

- **When does a failure to fire someone become an endorsement of their views and conduct?**
- **Does the prominence (notoriety?) of the employee matter? (Roseanne was a star of a network.)**

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## Current best practices for employee discipline and social media policies in the viral-video age



## Best practices: Discipline

- **What was the damage?**
- **What have you learned about the employee's judgment?**
- **What have you learned about how the employee fits into the culture?**
- **What have you learned about the risk the employee poses to discriminate against coworkers?**

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## Best practices: Online conduct

- **Establish a social media policy**
  - **Asks employees to not represent employer unless authorized**
  - **Disclaimer: Views are employee's, not employer's**
  - **Do not disclose confidential or proprietary information—including photos**
  - **Do nothing that could contribute to a hostile work environment**

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## Best practices: Online conduct

- **Consider training employees on importance of demonstrating professionalism online**
- **DON'T monitor social media**
- **Know the Section 7 line**

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## Best practices: Culture

- **Publish the company's core values to employees**
- **Promote diversity and inclusion initiatives and training**

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## Questions



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## Thank you!

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