

How Free Is Speech for Private Employees?

By Carolyn Conway Duff

A recent Appellate Division case has garnered attention for addressing the hot-button issue of the intersection of social media speech and private employment: whether a private employer can fire an at-will employee for off-hours online speech. In a case of first impression, the appellate court determined that a private employer may terminate an employee based on their social media speech. The case forced the court to wade into a tumultuous sea in light of today's increasingly partisan political discourse. This article describes the case, issues surrounding employee speech, and offers some practical advice to both employers and employees.

Case Summary

The plaintiff in *McVey v. AtlantiCare Medical System Incorporated*, ___ N.J. Super. ___ (App. Div. May 20, 2022), began working as a nurse for Defendants AtlantiCare Medical System Incorporated and Geisinger Health System Incorporated ("AtlantiCare") in 2005. Plaintiff Heather McVey was promoted several times, and by 2020 had attained the position of "Corporate



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Director of Customer Service." AtlantiCare had a social media policy that, among other things, advised employees to be respectful when posting online, including consideration of AtlantiCare's workforce, customers, and other related individuals.

Soon after the murder of George Floyd in May 2020, and during the protests that were occurring across the country in response, McVey, according to the court, posted on Facebook "that she found the phrase 'Black Lives Matter' to be 'racist,' believed the Black Lives Matter movement 'causes segregation,' and asserted that Black citizens were 'killing themselves.'" McVey was terminated after her employer discov-

ered she had posted the online statements.

McVey filed suit, claiming her termination violated New Jersey public policy. Specifically, she claimed that her termination for exercising her free speech rights under both the federal and New Jersey constitutions was illegal. Her employer quickly moved to dismiss, and the trial court granted the motion. McVey then appealed.

On appeal, McVey argued that the trial court erred because her termination "was contrary to a clear mandate of public policy," again citing to the First Amendment of the federal constitution, as well as its state analog in the New Jersey Constitution. McVey felt

that “her right to speak her mind outweighed AtlantiCare’s right to promote an inclusive, non-divisive environment for its clients and employees.”

The Appellate Division disagreed and affirmed the trial court, relying on the tenet that the free speech rights guaranteed in the federal and state constitutions can only be violated by state action. According to the court, AtlantiCare, as a private employer, could terminate *McVey*, an at-will, private employee, based upon her speech. *McVey* has sought review from the New Jersey Supreme Court, which is pending.

Employees Terminated for Online ‘Free Speech’

The *McVey* court cited to multiple out-of-state cases where a private employer’s right to terminate an employee based upon employee speech was upheld in the face of a constitutional challenge. None of the cases involved social media speech. However, there have been some high-profile cases of employees fired for posts they made on social media. In one example, a communications executive was terminated for a post she made on Twitter before boarding a plane for a lengthy flight. By the time she landed, her employer was already aware of her online speech and terminated her soon after. (She was ultimately rehired by a related company a few years later.)

Not every termination involves contemporaneous speech. In another high-profile firing, Guardians of the Galaxy director James Gunn was famously let go by Disney in 2018 for Twitter posts he had made approximately 10 years prior involving inappropriate jokes about the Holocaust and the September 11th attacks, among other things. (He was ultimately hired back less than a year later.)

On the opposite end of the spectrum, there are situations where private employers are clearly compelled to fire an employee for social media speech. A nurse in Texas posted information about a measles patient to an anti-vaccination Facebook group. Her employer fired her on the basis she had violated the Health Insurance Portability and Accountability Act by revealing patient information.

Different Ways to Approach Employee Speech Online

Despite the pending petition for certification, the Appellate Division holding in *McVey* seems to be on firm ground. The court looked to other jurisdictions and found no case supporting *McVey*’s argument. Opponents of the court’s decision, however, may find comfort in other states’ legislation that endeavor to extend free speech rights to private employees. For example, Washington, D.C., and California prohibit termination based upon an employee’s political affiliation

even in the private employment context. D.C. Code §2-1401.01, et seq.; Cal. Lab. Code §1101.

Connecticut, as the *McVey* court noted, offers even greater protection for private employees by providing a cause of action for wrongful termination based upon protected speech. Conn. Gen. Stat. §31-51q. Yet even with such legislative protection for employees, the right to free speech would still not be absolute. The gray area of “protected speech” would be ripe for litigation, as it already is in the context of state action.

Although the court’s holding was firmly grounded in AtlantiCare’s private status, the *McVey* court nevertheless delved into whether the speech would be entitled to protection even under constitutional jurisprudence. The court commented in dicta that even if it had “balanced *McVey*’s freedom of speech protections against AtlantiCare’s business interests under the circumstances of this case,” it would have nonetheless held that *McVey*’s termination was permissible. Jumping into the debate over the merit of the speech, the court found that it was racist and therefore undeserving of protection under *Karins v. Atlantic City*, 152 N.J. 532, 563 (1998). However, such analysis seems unnecessary for employers who are not state actors, and those employers should not feel legally compelled to first weigh the merits of online speech before terminating an employee.

Protected Speech in New Jersey

Despite the lack of state action, a private employee fired for “speech” may nevertheless have a claim in New Jersey courts under both federal and state law. For example, if a private employee is posting on social media about work-related matters such as working conditions, then the posts would likely be protected under the National Labor Relations Act (NLRA). Similarly, an employee engaged in whistleblowing in their online speech may be protected under the Conscientious Employee Protection Act. Likewise, an employee speaking out against workplace discrimination may be protected under the New Jersey Law Against Discrimination (LAD).

Practical Advice

How should private companies approach the increasing prevalence of employees’ social media speech? One way is to develop a social media policy that can help head off problems before they develop by alerting employees to the employer’s expectations. If the employment is at-will, then the policy should state that and remind employees that they may be terminated for off-hours, social media speech. Although the policy must be clear that it does not prohibit speech protected under the NLRA, such

as speech about wages or safety violations, it can stress the difference between personal speech and that which is made about or on behalf of the company. Employees may be reminded that speech made on social media platforms where the employee is identified as working for the employer may be imputed to the employer. Employees should be discouraged from implying their opinions are those of the company, and should be warned against using a profile that identifies them as an employee to speak about their own personal opinions.

The policy may also advise employees to be respectful, and it should prohibit harassing, threatening or discriminatory statements. References within the social media policy to other existing company policies regarding these issues will provide further insight into what type of speech the company prohibits. It is, of course, permissible for an employer to prohibit employees from speaking out about trade secrets or other private or confidential information.

Although an employer can attempt to guide how an employee utilizes social media speech, under New Jersey law a policy cannot include any attempt by an employer to gain access to an employee’s social media account, including via “shoulder surfing,” forced acceptance of a “friend”

request, or requiring employees to change privacy settings so that an employer may have access to their social media accounts. N.J.S.A. 34:6B-5, et seq.

When a company is faced with an employee’s social media speech it deems inappropriate, the first concern must be whether the speech is protected under law. For example, if the speech concerns the company, the employer must be wary of violating the NLRA. But if the speech is on a social issue, then the employee may be subject to termination, regardless of the content of the speech.

Employers should also be sure to apply any policies evenly. Terminating based on the content of speech could lead to discriminatory firings prohibited under LAD, where only those in a particular protected class are terminated for speaking out online.

Employees should consider deleting, or making private, social media posts that could be seen as inflammatory—even those that pre-date their employment. Privacy safeguards on social media accounts should be enacted. Finally, everyone should be reminded that unlike the town square of yore, where spoken comments disappear into thin air, social media posts lurk on the internet forever.

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