

How to Handle Unique Disciplinary Issues

When Your Employees' Social Media, Social Justice, and Social Lives Impact the Workplace



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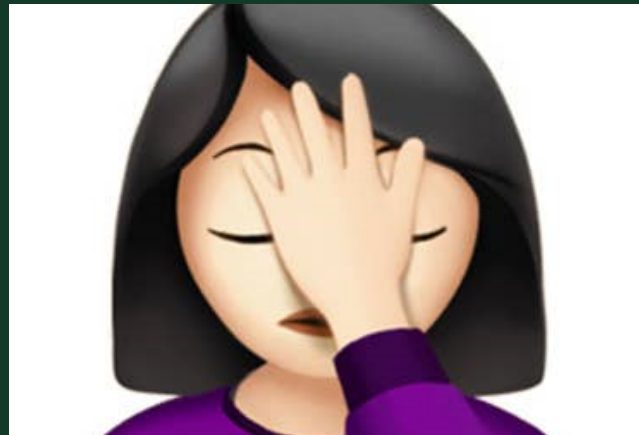
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Social Media: The Employer's Dilemma

*When Can/Should You Discipline
Due to Social Media?*



Employees' Social Media

- In January 2024, staffing firm Express Employment Professionals released a poll it commissioned from The Harris Poll:
 - **88% of managers** said they would consider **firing employees** for content found in workers' posts
- **Cited reasons for firing:**
 - Publishing content that damaged the company's reputation
 - Revealing confidential company information
 - Showcasing and/or mentioning illegal drug use
 - Violating the company's social media use policy or contract
 - Showcasing and/or mentioning underage drinking



Discipline for Social Media Conduct Outside Work



- Social Media Policy: Should educate employees and give a fair warning; ensure employees know what they can and can't do
- **Posts that may warrant disciplinary action or termination:**
 - Hate speech of any kind regarding any protected class
 - Speech severe enough to constitute hostile work environment
 - Threats to employee health and safety
 - Speech that damages the company's clients, customers, or community at large
- Other similarly concerning outside conduct
- Government employers and freedom of speech
- NLRB

Social Media Policies

- Most effective tool in protecting against legal liability and harm to company's reputation and goodwill from the use of social media
- Protects company's interests and guides employees on acceptable and unacceptable online behavior

Considerations:

- Explain ownership and ability to monitor company computer systems: no duty of privacy expected
- What is the company's tolerance for personal use of social media?
- Does the company permit or require use of social media for marketing and business development?
- How will the company handle employees who post arguably inappropriate, but not unlawful, posts?
- How will the company comply with laws protecting employees' rights to engage in lawful non-working time and off-duty conduct, but still ensure nothing damaging is posted online?
- Training so employees understand what is forbidden
- Who will monitor and enforce compliance with the policy?
- What will the repercussions be for violations?
- How does company keep the policy simple and reactive to ever-changing social media?

Workplace Social Media Policies: Points to Include

- Using social media while at work
- Criticism of company
- Confidentiality
- Harassment on social media
 - Be specific: *Will not tolerate expressions of hate or intolerance*



Social Media Policies...cont.

- Employers should use the social media policy to educate employees that public or workplace social media activity is not private and that the employer has the right to discipline harmful employee social media use, as necessary.
- Other overlapping policies to consider:
 - Use of company technology
 - Use/misuse of company intellectual property (confidential, proprietary, and privileged)
 - Protection of third-party privacy in the context of employees' personal use/HIPAA
 - Harassment
 - Discrimination
 - Defamation and disparagement



Social Media: When Can/Should You Discipline Due to Social Media?

- Since 1935, Section 7 of the NLRA has provided employees “the right to ... engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”
- Protected concerted activities include discussing terms and conditions of employment with other employees
- Criticism of an employer or its management may be protected when the communication is considered an attempt to garner support or rally others as long as the post is not “malicious or reckless”
- In August 2023, a divided NLRB held in *Stericycle* that employers violate the NLRA when they issue facially neutral work rules, that a “reasonable employee,” viewed through the lens of economic dependence on their employer, could believe infringes on their Section 7 rights



Social Media

- Policies should never be so broad as to prohibit discussions of wages or working conditions among employees
- Can be unlawful if employees would *reasonably believe* it prohibits such interactions – or when combined with other separate policies, bars protected activity
 - **Example:** Vague policies limiting speech and reasonable interpretations
- How to address this:
 - Carefully craft policies
 - Regularly review handbooks for potential violations
 - Conduct management training



Social Media

1. You learn that one of your employees posted a very strong opinion about a very controversial topic on their social media platform. What can we do about it?
2. What should your social media policy say to prevent future situations like this?
3. Is there anything specific or new you need to look at on this topic?



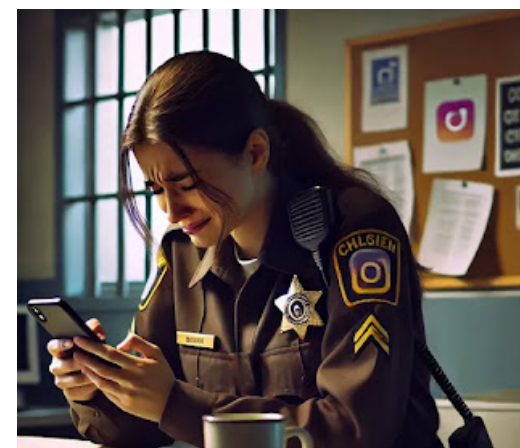
Social Media: The Employer's Dilemma

- Five employees posted comments on Facebook discussing their opinions about the poor work performance of a coworker
- The employee complained, and the employer fired the five employees for harassment and bullying
- The NLRB found the employer violated the NLRA because the five employees “were engaged in protected concerted activity”



Social Media: The Employer's Dilemma

- In July 2024, in *Okonowsky v. Garland*, the Ninth Circuit reversed summary judgment against a Title VII sexually hostile environment action, finding that the court had erred by considering only some of the evidence and by applying incorrect legal standards
 - Okonowsky discovered an Instagram account in which her male colleague had posted hundreds of **sexist, racist, anti-Semitic, homophobic, and transphobic memes**
 - Some of the posts contained derogatory images resembling Okonowsky and specifically referred to her, including a post “joking” that the all-male custody officers would “gang bang” Okonowsky at her home
 - One of her supervisors told her the page was “funny” and another stated that the page was not “a problem.” It took months of complaints and escalating posts before the prison took action
 - Okonowsky sued the Bureau of Prisons for sex discrimination under Title VII, alleging the Bureau failed to take adequate measures to address a hostile work environment at the prison
 - The district court granted summary judgment against her after limiting its consideration of the evidence to just five posts and, because those posts **occurred entirely outside of the workplace**, concluded that there was no triable issue as to whether Okonowsky’s work environment was objectively hostile



Social Media: The Employer's Dilemma

- On appeal, the Ninth Circuit ultimately rejected the notion that “only conduct that occurs inside the physical workplace can be actionable, especially in light of the ubiquity of social media and **the ready use of it to harass and bully both inside and outside the physical workplace**”
- The Court specifically emphasized this principle in the social media context:
 - *[I]t makes little sense to describe a social media page that includes overt comments about a specific workplace ... as ‘occurring’ in only a discrete location ... Social media posts are permanently and infinitely viewable and re-viewable by any person with access to the page or site on which the posts appear. No matter where [the author] was or what he was doing when he made his posts, ... employees who followed the page were free to, and did, view, ‘like,’ comment, share, screenshot, print, and otherwise engage with or perceive his abusive posts from anywhere. The Instagram page also served as a record of which co-workers subscribed to the page and commented on posts, showed their comments and their ‘likes,’ and could be seen at any time from any place— including from the workplace.*

Social Media: The Employer's Dilemma



- **Takeaway:** An employee's social media activity can create a hostile work environment – even if the posts were made entirely off-site
- This confirms that employers must review and respond to employee complaints that other employees' social media posts are creating a hostile work environment – even if those posts were created entirely during off-duty hours on a personal account
- Evidence of other coworkers engaging with the offensive social media content is also relevant:
 - The Court found that evidence of other colleagues engaging with offensive social media content is relevant to whether the plaintiff experienced a hostile work environment
 - As such, any workplace investigation should also examine whether other employees – even those that did not create or post from a particular account – “liked,” commented on, or shared the offensive content

Social Media: The Employer's Dilemma

- Even someone else's social media post could affect employment
- Emmanuel Cafferty was terminated from his job for the following:



Social Lives: The Employer's Dilemma

**When Can Employee's Social Lives
Result in Discipline?**

Social Lives

- Unintended outcomes = distraction from business goals, leading to decreased productivity and focus and increased turnover
 - Personal relationships
 - Personal affiliations
 - Current Events



Election Speech and Similar Social Issues

1. An employee is claiming they have the right to say whatever they want at work about the upcoming election, citing the First Amendment right to free speech. Are they correct?
 2. Does that mean employers can prohibit whatever election-season speech in the workplace we want, including that we can discipline or even fire any employee that violates our rules?
 3. Is that it, then?
- **Be consistent!**

Election Speech and Similar Social Issues

1. Employees want to wear political buttons, flare, masks, etc. to work. You believe it will all lead to arguments and tension and become a distraction. What can you do?
2. Employees want to use your email system or your breakroom to send out announcements for their candidate, what can you do?

Social Lives

- Have a clear policy regarding expected workplace interactions
- Have a clear policy about dress code that is applied consistently and fairly
- Have a clear policy about solicitation that is applied consistently and fairly
- If applicable, have a policy regarding romantic relationships in the workplace
- Moonlighting?

Resolving Conflicts

- Schedule a meeting to address the problem in person (neutral location)
- Set the ground rules (all parties treat each other with respect and empathy)
- Each participant is asked to describe the conflict and their desired outcomes
- Each participant is asked to restate what others have said to ensure everyone is listening and understanding what is being said
- Summarize the conflict, base, and obtain agreement from participants for a path forward
- Brainstorm solutions by discussing all options positively

Social Justice: The Employer's Dilemma

*When Can Employee's Social Justice Activity
Result in Discipline?*



Social Justice Defined

- Oxford: justice in terms of the distribution of wealth, opportunities, and privileges within a society
- Britannica: the fair treatment and equitable status of all individuals and social groups within a state or society.
 - Movements that seek fairness, equity, inclusion, self-determination, or other goals for currently or historically oppressed, exploited, or marginalized populations.
- Examples:
 - Gender inequality
 - Racism
 - LGBTQ+



Social Justice

- Climate change
- Ferguson
- Healthcare (Affordable Care Act)
- #MeToo
- Minimum wage increases
- BLM (Whole Foods, Home Depot, etc.)



Employees have a right to express support for Black Lives Matter while they're on the job, according to a historic labor board decision

Published: March 14, 2024 8:42am EDT

A Taco Bell employee says he was fired for supporting Black Lives Matter: Could your company fire you for the same reason?

A Taco Bell employee said he was fired after wearing a Black Lives Matter face mask. Starbucks recently reversed its ban on Black Lives Matter apparel

By Meera Jagannathan

Published: June 21, 2020 at 1:37p.m. ET

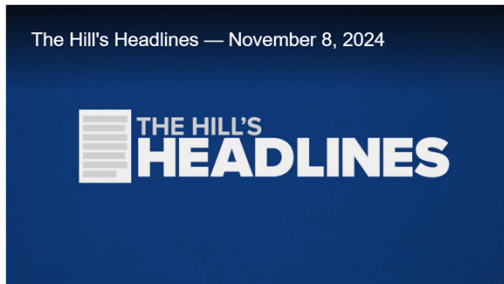


Shocks of George Floyd's death are still reverberating for Home Depot. Godofredo A. Vásquez-Pool/Getty Images

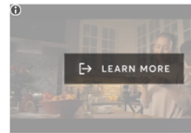
Social Justice

Why labor unions are backing pro-Palestine protesters after mass campus arrests

BY JULIA SHAPERO - 05/08/24 6:00 AM ET



Several major labor unions have criticized the mass arrests of students and



Most Popular

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War on Gaza: Google fires employee after pro-Palestine protest at Israeli tech conference

The employee disrupted an address by the head of Google Israel during an event in New York City



Activists and Google workers hold a protest outside Google's San Francisco office against the company's partnerships with Israel, on 14 December 2023 (X/No Tech for Apartheid)

By MEE staff

Published date: 8 March 2024 22:01 GMT | Last update: 8 months 1 week ago



Social Justice: The Employer's Dilemma

- Organization takes a position = should be assumed that employees are allowed to do the same
 - Managers should be trained with basic skills to create space for dialog
- The organization does not take a position = reasonable to discourage these discussions in the workplace
- When it comes to DE&I—and discrimination, injustice, and inequality—leaders and/or HR should carefully encourage, facilitate, and manage uncomfortable conversations among employees

Social Justice: Navigating Discipline

- 1. Establish and enforce written policies and procedures against workplace harassment and abuse**
 - Confirm employees have access to written workplace policies and procedures
 - Be direct and clear about the things your workplace expects and what it will not tolerate
 - Be direct about what will be done if something unacceptable does occur
- 2. Prioritize a policy that encourages and rewards diversity and inclusion**
 - Give D&I representation/representatives a meaningful voice in the workplace
 - Diversity is not only a racial issue
- 3. Conduct continual manager training**
 - Implicit bias: Learned stereotypes are deeply ingrained in people, influencing behavior in ways many don't even recognize
- 4. Have a contact number/email and educational forums**
 - Employees can use it to report any unethical or questionable conduct they experience or witness

Managing Social Justice Issues in the Workplace

1. Talk with your employees and, more importantly, listen
 - Create a safe and inclusive space for employees to express how they feel
 - Listening is crucial to navigating crises and developing leadership strategies; allows an organization to develop concrete actions to take to address inequality in the workplace
2. Demonstrate an active commitment to your employees
 - Set realistic and feasible goals, take action, and make substantial efforts to make the incremental changes needed within your organization to achieve long-term progress
 - Employees want to see action
3. **Continue the conversation even after the trend ends**

BUSINESS
INSIDER

'Social justice PTO' is the hot new perk for companies with activist employees

Chris Weller
April 24, 2017



womens march

(Shannon Stapleton/Reuters)

**When You Have Determined
Discipline Is Appropriate**

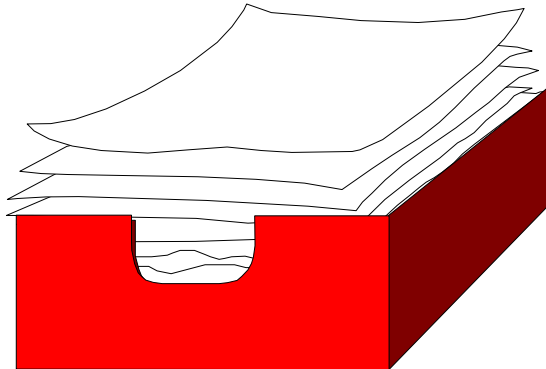


Having Tough Conversations

Application of Discipline

- Decide to whom it will apply
 - Provide notice
- Decide who will deliver the message
 - Discipline administered (on standardized template) by designated position (after HR review of warning document)
- Discipline should be delivered timely - within 2-3 days of infraction
 - Barring necessary investigation
- Preliminary HR investigation before warnings issued (as necessary):
 - LISTEN
 - Verify the infraction occurred as stated by dept. leader
 - Allows EE/witnesses to explain (opportunity to be heard)
 - Ensure consistent process overseen by “neutral” 3rd party
 - Could reveal issues with training/expectations (EE not at fault after all)
 - Provides EE opportunity for input on how to resolve the issue
 - Manager/HR partnership in investigation findings review and next steps

The Importance of Documentation



- **Documentation: If it isn't in writing, it didn't happen. . .**
 - Establishes a record
 - Informs employees of expectations and consequences
 - Guides future behavior
 - Ensures fair treatment

Elements of Good Documentation

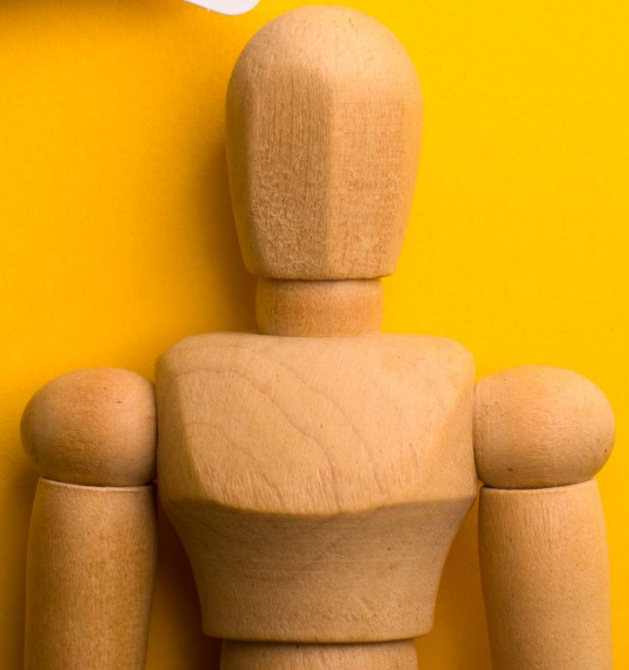
- Contemporaneous with events recorded
- Focuses on the facts
 - Who, What, Where, and When
- Gives context, if necessary
- No generalizations
- Professional in tone/content
- Records directives given



Please, No Editorial Comments

“I think he was drunk in our
meeting today.”

“She acts bi-polar.”



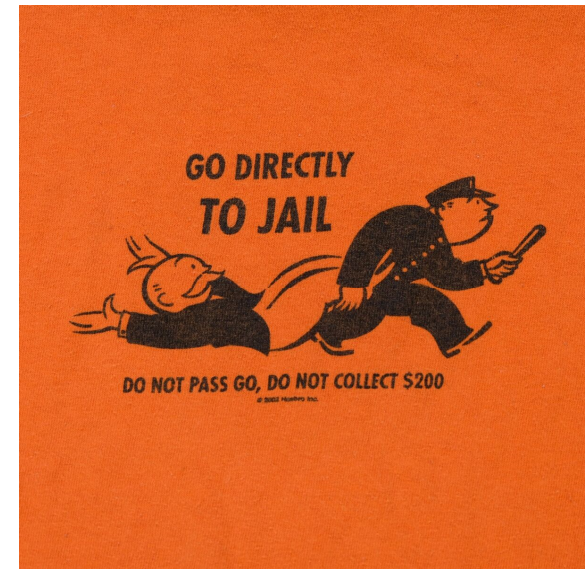
Skipping Steps Provision & Active Status/Duration of Warnings

1. Gross Misconduct Infractions

- Work conduct infractions regarded as extremely serious
- Final warnings and/or termination will likely result
- Will generally involve some level of HR investigation
(integrity, insubordination, falsification of records, theft, time theft, harassment/discrimination, safety/horseplay, HIPAA)
- Always “active” for purposes of “like” additional infractions

2. Progressive Step Infractions:

- Work conduct infractions considered less serious
- Generally, a progressive and sequential path of warnings
 - Verbals roll off in X months
 - Writtens and Finals roll off in Y months



Did the Employee Have Notice?

The employee must have been given notice of the rule/standard

Prove it with documentation where possible

- Prior counseling or discipline
- Receipt for rules of conduct
- Training records

Do I Have Enough Evidence?

You may need substantial evidence of guilt on part of the employee

Don't leave out an obvious source of evidence

Always ask yourself the following question:

If I have to defend this decision in court, will I have enough evidence to win?

Do the Documents Support Me?

- It takes strong evidence to . . .
 - Overcome the sympathy factor
 - Prove that the discharged employee did not deserve to keep his job
 - Prove you were fair
- Jurors are more likely to believe what they read than what they hear in the courtroom
- Jurors take exhibits (documents) to the jury room with them



Questions?



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