

Exercising one's right to free speech can come with a price

In the early morning hours of May 29, Roseanne Barr, the namesake of the sitcom "Roseanne," learned the hard way that freedom isn't free. At 1:45 a.m., she tweeted what many people considered an unprovoked racial slur. Within hours, ABC canceled the renewal of her hit show.

But how could that be? The tweet happened on Ms. Barr's own time, and had no direct connection to her work with ABC. Some observers could think she is subject to different rules because she is a celebrity with a TV show, but they would be mistaken. The same rules that allow ABC to protect its reputation from employees' off-the-clock conduct protects others' workplaces as well.

A stubbornly persistent myth among employees is that so long as they are professional and respectful at work, they can behave any way they want outside of work and their bosses cannot do anything about it. Most often, we hear people citing some vague understanding of the First Amendment of the Constitution and its protection of free speech. Logically and legally, that makes no sense. Legally, the First Amendment (grossly simplified) only protects citizens from imprisonment or punishment from their government for expressing opinions.

As a general rule, the First Amendment does not apply to the private workplace. Businesses are free to fire employees who use their freedom of speech in a reckless or irresponsible manner. Logically, this makes sense. Nobody cites "freedom of speech"



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when their spouse leaves them for saying something inappropriate, or for a friend shunning them for being offensive.

However, freedom in the workplace does not come without limitations. It is important for private businesses to take into account the effects of anti-discrimination laws such as Title VII, retaliation laws and other local laws. Although not directly associated with the First Amendment, the aforementioned are protections that govern employees' ability to speak freely.

The nature of what is considered offensive expression changes and is a reflection of larger societal and historical trends and issues. Accordingly, the demand to determine how to maintain a nondiscriminatory environment that is both conducive to learning and beneficial to the business is an ever-present and ongoing challenge for employers. One of the main threshold questions is whether a certain behavior constitutes "speech" or "expression" protected by the First Amendment, or "conduct" that is not protected.

Public employees who work for the government are protected by the First Amendment. As a result, public employees can exercise certain First Amendment rights,

but the protection is often limited to speech surrounding matters of "public concern." To find relief under the First Amendment, an employee must prove that his or her interest outweighs the government's interest in having an effective workplace environment. If, however, a public employee is acting within the scope of his or her employment and not as a member of the public voicing a matter of public concern, the employee is not entitled to First Amendment safeguards.

Private employers, quite conversely, have the freedom to create policies that define the culture they seek, as well as the ability to terminate employees who are unwilling to conform. One caveat: this policy cannot discriminate and must be applied consistently and across the board to all employees. Most employees at private organizations are "at-will" and can be terminated without cause, provided that the termination is not retaliatory or discriminatory.

One area where free speech rights have come into play involves on-the-job political protest, such as in the NFL with players taking a knee for social justice. Recently, the NFL approved a league policy surrounding the protests, under which teams can be fined if their players are on the field or within the sidelines but do not stand during the anthem. As a private business, the NFL is entirely within its legal right to implement such a policy. This is yet another example of how free speech is not really free, especially within the realm of private

business.

All employers must be cognizant of the power of speech and the necessity for workplace policies. Employers should create policies related to conduct and speech that extend beyond work hours and office boundaries, including but not limited to its employees' use of social media. As a reminder, Ms. Barr tweeted when she was off the clock, but this offered her no protection against disciplinary action. And while company policies are seeing a greater incorporation of accountability, more employers need to get on board.

Handbooks are an excellent means of providing employees with explicit and precise policies. However, it is not enough for employers to have policies on paper. These policies must be implemented on a daily basis to ensure consistency in the treatment of employees. The existence of such policies is mutually beneficial for employees and employers. For the former, definite expectations are set. For the latter, there are specific policies to rely on in order to avoid litigation that may arise in relation to retaliation, disparate treatment or discrimination suits.

By taking simple steps, employers can set clear expectations early and avoid losing good talent to bad conduct.

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