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Kids/People Say the Darndest Things

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Companies work hard to have a vital, healthy corporate culture and business reputation. Infrastructure is put in place, such as codes of conduct governing employees' work behavior, including rules on equal opportunity, anti-discrimination, anti-harassment, affirmative action, and a host of other policies governing an employee's conduct at work. Companies develop a strong diversity statement. But even with the best corporate culture, an employee's behavior can lead to a company's loss of reputation and the resultant loss of business – and many times it occurs in a most unexpected way – by behavior not committed in the workplace. Frequently such behavior is totally unrelated to the company – and yet an employee's off duty behavior can have serious consequences for a company.

The Ramble Rant!

Consider the incident on May 25, 2020 in the Ramble of New York Central Park. Two individuals, a black male (Christian Cooper) and a white female (Amy Cooper), each engaged in a favorite hobby, the male bird watching, the female walking her dog, have a confrontation. Mr. Cooper recorded the confrontation, and in a matter of days the video went viral. Ms. Cooper is recorded calling the police and reporting that "an African American man" is threatening her life and her dog while she is walking in the Ramble (a very remote park of Central Park). Later the police reported Ms. Cooper called 911 not once, but twice, and made a false report that she had been assaulted.

The viral video sparked already strained racial tensions - happening the same day as George Floyd was killed in Minneapolis.[i] A white woman was reporting an "assault" by an African American man. Amy Cooper was quickly identified as an employee of Franklin Templeton, an investment company that bills itself as global but nimble, this even though Ms. Cooper did not make any mention of Franklin Templeton during the incident.

One click on Franklin Templeton's web page takes you to its Diversity and Inclusion page, which touts that "diversity and inclusion aren't just buzzwords to us."[ii] The diversity and inclusion page includes a description of 8 key communities that its employee led Business Resource Groups focus on, including: Able (individuals with disabilities); Ben (people of African descent); Hola (Hispanic/Latino); Veterans; API (Asian Pacific Islanders) Ethnicity (ethnic minorities); Pride (LGBTQ) and Women. Its Chief Diversity Officer is quoted on the page saying, "D&I is essential to navigating the dynamic landscape in our business industry. It is also a business imperative for better firm performance, decision-making and client success."[iii]

Despite its strong diversity statement, Franklin Templeton is suddenly in the midst of a social media storm – and at the center is the off duty conduct of its employee Amy Cooper. The day after the incident, Franklin Templeton tweeted the following statement:

> Following our internal review of the incident in Central Park yesterday, we have made the decision to terminate the employee involved, effective immediately. We do not tolerate racism of any kind at Franklin Templeton.[iv]

An employment law attorney's first instinctive response to this statement is – what HR department discusses employment actions, an involuntary termination no less, on social media? However, a company's reputation and possible loss of business frequently demands an immediate and very public response. But such a response is not without its legal ramifications.

Amy Cooper responded to her termination by filing a thirty-page complaint, asserting 7 different counts for relief pursuant to 42 USC § 1981, race and gender discrimination under the New York State Human Rights Law, race and gender discrimination under the New York City Human Rights Law, defamation, defamation per se, intentional infliction of emotional distress, and negligence.[v]

The complaint focused on several key elements, the first being an alleged statement tweeted by Franklin Templeton on May 25, 2020, that stated "we are in the process of investigating the situation . . ." The next day, on May 26, 2020, Franklin Templeton terminated Amy Cooper, stating it did so "following our internal review of the incident." Amy Cooper's theory was that Franklin Templeton did not perform an investigation, did not communicate with her about the incident, did not interview Christian Cooper or anyone else, did not obtain the 911 calls, and did not interview another individual – a black male who allegedly had a similar confrontation with Christian Cooper in the Ramble. Amy Cooper also compared herself to a male member of the board of directors who had been incarcerated for beating his wife – alleging that she was treated differently because of her sex and race.[vi]

Franklin Templeton responded to the complaint by filing a comprehensive motion to dismiss. On September 21, 2022 the court ruled on the motion to dismiss. The court first explained that "condemnations of racism . . . did not implicate [Plaintiff's] race because . . . [r]acism is not a race, and discrimination on the basis of alleged racism is not the same as discrimination on the basis of race."[vii] The court opined that calling someone a racist might indicate an unfair dislike but does not mean the "the object of the statement is being rejected because of his race."[viii]

The court also rejected the comparators – because they were in different positions, seniority, job responsibilities, business unit, performance, experience or even geography, and/or because the comparators had not engaged in comparable conduct.[ix]

In analyzing Amy Cooper's defamation claim, the court focused on whether the statements were true and whether the statements were fact or opinion. The statements that were alleged to be false included the statements that an internal review had been conducted before terminating Ms. Cooper, that Franklin Templeton did not tolerate racism of any kind, that the facts were undisputed in the case, and that Franklin Templeton has zero tolerance for racism.[x] The court found that the statements about an internal review being conducted were true, and that the remaining statements were opinion. [xi]

More than two years after the incident, the court ultimately dismissed the 1981 claim, the discrimination claims and the defamation claims, and Ms. Cooper withdrew her negligence and intentional infliction of emotional distress claims. Franklin Templeton appeared to be fully vindicated and the media nightmare appeared to be over, but no – on October 21, 2022, Amy Cooper file a notice of appeal.

"I'll Get off the F***ing plane, with you Liberal F@gg**s![xii]

A more recent incident of employees saying the darndest thing includes a GSK employee, who went on a rant while on a flight. A video of the incident was posted to social media on August 31, 2022. The individual verbally abused airline staff, yelled homophobic slurs, and while being removed from the plane, identified himself as an employee of GSK. GSK responded by posting, "On Wednesday, GSK was notified of an incident involving an employee on a flight to Dallas. We immediately conducted an investigation and as of Thursday, he is no longer employed at GSK. The person's behavior was reprehensible and does not reflect our company culture."[xiii]

Even Judges Can Say (and Do) the Darndest Things

My favorite incident though, which shows that social media and off duty conduct can be a downfall for anyone – is what happened in the Edno International PLc lawsuit. Judge Jonathan Young, a trial judge, imposed the strict sanction of default judgment against drugmaker Endo International Plc for intentionally withholding evidence from the plaintiffs. Endo moved to disqualify Young because of Facebook posts made by Judge Young. Judge Young posted that he wanted to ban opioids, complained about the lack of media coverage for the case, gave an interview

to Law 360 where he said that Endo's conduct was the "worst case of document hiding that I've ever seen" and compared the behavior to a John Grisham movie.[xiv] Endo moved to disqualify Judge Young. The Tennessee Court of Appeals found that Judge Young should have recused himself because he had a specific agenda that was antagonistic to Endo and threw out the sanctions imposed against Endo. The Court also noted that the Law 360 interview appeared to enhance Judge Young's bias. [xv]

But Judge Young's woes don't end there. Chelsey and Michael Hoover filed a complaint with the Board of Judicial Review. The Hoovers alleged that Judge Young flirted with Chelsey Hoover. Judge Young sent numerous text messages to Ms. Hoover. Judge Young requested explicit pictures of Ms. Hoover and and ultimately had sexual relations with Ms. Hoover – all while the Hoovers had an adoption case pending before Judge Young. The investigative panel found reasonable cause to believe that Judge Young had committed the misconduct described in the order.[xvi]

What's a Company to do?

The first thing a company should do is ask the following questions: (1) does the employee's conduct relate in any way to the performance of the employee's job? (2) does the employee's conduct place the company in an unfavorable light with the public? and (3) could the employee's conduct harm the business in any way. The answers to these questions can help guide the company's analysis and next steps in dealing with the situation.

Many employees mistake their "First Amendment" right to freedom of speech as free reign to act and state their opinions both at work and during their personal time. Notably, employees of public agencies have more rights to speak their mind than those in private companies. Private companies, however, have the right to take disciplinary action against individuals who say or do something that negatively affects the workplace or the company's reputation.

An employer can take action resulting from an employee's social media or off-duty speech if:

- the speech violates the employer's policies;
- the speech is derogatory, harassing, or defamatory;
- the speech is likely to cause disruption that is not protected by law;
- the employee reveals trade secrets or confidential company information; or
- the speech is not protected activity under Section 7 of the National Labor Relations Act.

An employer *cannot* take action resulting from an employee's social media or off duty speech if:

- the speech is protected under Sections 7 and 8 of the National Labor Relations Act;
- the employer is not applying policies relating to the speech uniformly;
- the company only knows about the speech because it improperly or unlawfully accessed the individual's social media or password-protected devices.

Section 7 of the National Labor Relations Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."

Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for an employer to "interfere

with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." For example, employers may not:

- threaten employees with adverse consequences, such as closing the workplace, loss of benefits, or more onerous working conditions if they support a union, engage in union activity, or select a union to represent them;
- threaten employees with adverse consequences if they engage in protected, concerted activity;
- promise employee benefits if they reject the union; or
- spy on employees or create the impression that they are being spied on for engaging in union activities.[xvii]

These are just a few examples of conduct that is prohibited under the National Relations Act. "Protected and concerted" activity includes talking with co-workers about wages, benefits and working conditions; circulating a petition asking for better hours; openly talking about pay and benefits; and joining with co-workers to talk directly to the employer, a government agency, or the media about problems in the workplace.[xviii] Interfering with these rights can land an employer in hot water with not only that National Labor Relations Board but also the Equal Employment Opportunity Commission and other state and federal agencies.

However, when an employee engages in conduct *not* considered to be protected and which damages the company's reputation or bottom line, a company can take action to correct the message and discipline the employee. Ideally, companies would have time to investigate the alleged conduct, interview witnesses, and develop a game plan for taking action when they learn of an employee's off-duty comments. Sometimes, however, the incident becomes public quickly via social media, and companies must manage their message and act swiftly to protect their reputation before undertaking action against the individual.

Companies can minimize the risk of employees engaging in problematic speech in several ways. They can address known underlying issues between employees before they come to a head. If a company is aware that an employee is upset or is having problems with a co-worker or supervisor, addressing the problem early can prevent a later incident that may prove to be more serious. Companies must also have clear policies in place that address harassment, discrimination, and employee speech that employees are required to read and sign and should conduct training on these policies to ensure employees understand how they apply.

While not all employee "bad behavior" can be addressed before it happens, if companies keep a pulse on their organization and understand how employees are feeling and what problems they are facing, they can often get out in front of potential problems within the workforce. When an incident of negative employee speech arises, the key is to act smartly – whether that requires immediate termination and managing the message to the public or requires an investigation that takes more time. Developing a plan to deal with speech that damages a company's reputation is money well spent if it protects the company from negative public attention or litigation.

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[i] https://www.facebook.com/christian.cooper1/videos/10158742130625229

[ii] https://www.franklintempleton.com/about-us/diversity-and-inclusion

[iii] https://www.franklintempleton.com/about-us/diversity-and-inclusion

[iv] https://twitter.com/FTI_US/status/1265348185201008641 and https://citywire.com/ria/news/judge-sides-with-franklin-templeton-in-central-park-karen-case/a2397892

[v] *Amy Cooper v. Franklin Templeton, et al*, 23 Civ. 04692 (SDNY May 5, 2021). *See*, Exhibit A.

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[vii] *Opinion & Order, Amy Cooper v. Franklin Templeton, et al*, 23 Civ. 04692 (SDNY Sept. 21, 2022). *See*, Exhibit B.

[viii] *Opinion & Order, Amy Cooper v. Franklin Templeton, et al*, 23 Civ. 04692 (SDNY Sept. 21, 2022). *See*, Exhibit B.
[ix] *Opinion & Order, Amy Cooper v. Franklin Templeton, et al*, 23 Civ. 04692 (SDNY Sept. 21, 2022). *See*, Exhibit B.
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[xi] *Opinion & Order, Amy Cooper v. Franklin Templeton, et al*, 23 Civ. 04692 (SDNY Sept. 21, 2022). *See*, Exhibit B.
[xii] https://www.reddit.com/r/americanairlines/comments/x2lyht/racist_homophobic_passenger_gets_kicked_off_flight/
[xiii] Employer Lessons From GSK Worker's Firing After Plane Rant – Law 360, September 8, 2022.
[xiv] *Clay County v. Purdue Pharma, L.P. et al.*, No. E2022-00349-COA-T10B-CV, 2022 WL 1161056 (Tenn. Ct. App. Apr. 20, 2022). *See*, Exhibit C.
[xv] *Clay County v. Purdue Pharma, L.P. et al.*, No. E2022-00349-COA-T10B-CV, 2022 WL 1161056 (Tenn. Ct. App. Apr. 20, 2022). *See*, Exhibit C.
[xvi] *In re: Judge Jonathan Lee Young*, File Nos.: B22-8885, B22-8936, B22-8935 (Tennessee Board of Judicial Conduct, July 26, 2022.) *See*, Exhibit D.
[xvii] [xvii] https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1
[xviii] https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/concerted-activity