

ESPN Anchor Flap Underscores Value Of Social Media Policies, ft. Lori Adelson

Lori Adelson, partner in KD's Ft. Lauderdale office, was quoted in a Law360 article by Braden Campbell.

Law360, New York (October 10, 2017, 9:31 PM EDT) — The reaction to ESPN's decision to suspend anchor Jemele Hill over politically charged tweets has been both heated and divided, showing that controversial social media postings by workers can cause backlash against businesses from all angles and highlighting the need for employers to have clear policies on social media use, experts say.

With platforms like Twitter and Facebook giving a megaphone to everyone from assembly line workers to the president, a strong and consistently enforced policy can not only nip potential problems in the bud but also give an employer a strong defense if a worker files suit after being disciplined over tweets or postings.

"We have a Twitter world, all the way from the top — the president of the United States — down," said Eve Wagner, founding partner of Los Angeles firm Sauer & Wagner LLP. "This is only the beginning of this issue, and that's why I think employers need to get out in front of it."

Hill, co-host of ESPN flagship show "SportsCenter" and a face of the network, tweeted Sunday that fans could hurt Dallas Cowboys owner Jerry Jones by bringing pressure to bear on his advertisers. Jones had earlier pledged to bench any Cowboys player who refuses to stand for the national anthem, as many players have done to protest police brutality against African-Americans.

ESPN said Monday it was suspending Hill for two weeks "for a second violation of our social media guidelines," the first being her statement last month that President Donald Trump is a white supremacist. The company said it told her after this first comment that tweets reflecting negatively on the network "would have consequences."

Such a stance isn't surprising in a world where the lines between work life and private life are becoming increasingly blurred, attorneys say.

"There's still a misconception that there is this separation," said Meyers Roman Friedberg & Lewis employment partner Jonathan Hyman. "I think what history is going to say about social media is that what it ultimately did was irreparably rip down the wall between the workplace and one's personal life."

With these divisions dissolving, the danger for employers is that members of the public may punish an employer for an employee's speech. In Hill's case, some — including the president — said the company didn't go far enough, while others are condemning the network for, in their eyes, suppressing Hill's speech.

Whether one agrees with Hill's comments or not, the situation is clearly a headache for ESPN. A good social media policy is one that prevents employees from putting their employer in a bad light, and limits the damage when they do, attorneys say.

One way an employer can keep its distance from workers' comments is to require that they specify that any opinions expressed on their social media accounts are theirs and not their employer's, Kaufman Dolowich Voluck LLP employment partner Lori Adelson said.

"That's the critical language in the social media policy," Adelson said. She also recommends that clients make clear that employees should not share confidential or proprietary information and should maintain a professional tone.

Sharon Stiller, employment group practice chair at Abrams Fensterman Fensterman Eisman Formato Ferrara Wolf & Carone LLP, always recommends that her clients include provisions specifying who owns worker social media accounts. An employer

should also carefully consider whether to allow workers to follow customers or vendors on Facebook, or allow supervisors to follow those who work under them and vice versa, she said.

And while a social media policy should give workers clear guidelines for what is and isn't acceptable, it shouldn't be so long that it goes unread, she said.

"It's a good thing to provide guidance," Stiller said. "I never think you should go really granular on any policy, because you can't cover any situation, and people won't read it. If it's not user-friendly, people won't read it."

Because state and federal law limit what activities employers can forbid, what social media policies do not say is in many cases as important as what they do.

While the First Amendment largely blocks public employers from limiting what workers can say, private employers in most states have a lot of leeway to limit workers' speech, which includes social media. There are exceptions, however.

Several states and municipalities bar employers from discriminating or retaliating against workers based on nonwork activity, including political activity. Private workers in Connecticut, where ESPN is based, are protected by the First Amendment unless their activity causes reputational injury to or poses a conflict of interest for their employer, for example.

The National Labor Relations Board has lately waded into social media rules, declaring illegal any policies that prevent or dissuade workers from exercising their rights under the National Labor Relations Act to join together to improve employment conditions. The board has recently found workers were protected when they made profane statements about their bosses, for example.

Attorneys expect the board might loosen its social media stance now that it has a Republican majority, but for now it's another thing employers must consider.

A worker could also allege a policy violates Title VII of the Civil Rights Act by affecting them differently based on their membership in a protected class. Employers increase their risk for such suits when they apply policies differently against different workers.

"If you don't discipline someone who's protesting ... neo-Nazis, and you do discipline people who are protesting in favor of the NFL players who are taking a knee, it's going to look like race discrimination," Wagner said.

ESPN's handling of the Hill situation is notable for many reasons, including its actually handing down a suspension, Adelson said. Relatively few companies give their policies teeth, leaving themselves vulnerable to damage when workers take that inaction for granted.

"Apply your policies in a neutral manner, and if you have policies, use them," Adelson said. "That's usually how you stay out of trouble, and you avoid the firestorm."

-Editing by Philip Shea and Brian Baresch.