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NJ Court Holds First Amendment Does Not Prohibit Employee Discharge for Racially Insensitive Post

Private employers may find that their employees' social media posts do not align with their values. In such instances, it may be permissible for employers to discipline employees for their posts. Indeed, the New Jersey Appellate Division recently affirmed the dismissal of an employee's lawsuit challenging her discharge for posting racially insensitive remarks on Facebook.

In *McVey v. AtlantiCare Medical System*, the Facebook profile of Heather McVey listed her name as "Jayne Heather" but included her photograph and identified her as a corporate director at AtlantiCare Regional Medical Center and a former AtlantiCare nurse. AtlantiCare employees, including McVey, were subject to the company's social media policy. That policy required employees to be mindful and respectful when using social media and to consider that their social media posts have "the potential to affect AtlantiCare employee job performance, the performance of others, AtlantiCare's brand and/or reputation, and AtlantiCare's business interests."

During the height of nationwide protests concerning the murder of George Floyd by police in Minnesota, McVey posted that she found the phrase "Black Lives Matter" to be racist and that she believed the Black Lives Matter movement causes segregation. She further posted that Black citizens were "killing themselves." McVey also wrote that she "support[ed] all lives . . . as a nurse they all matter[,] and [she] d[id] not discriminate." She further wrote that she did not condone the rioting that occurred in response to George Floyd's death. Upon learning of McVey's Facebook posts, AtlantiCare suspended her and conducted an investigation, then terminated McVey's employment.

McVey sued AtlantiCare, alleging that she had been wrongfully discharged for exercising free speech under the First Amendment and the New Jersey Constitution. The trial court dismissed McVey's complaint because, in the absence of state action, a private employee's wrongful termination claim cannot be based on the employee's exercise of free speech.

On appeal, McVey argued that her discharge was contrary to public policy set forth in the United States Constitution and in the New Jersey Constitution. She argued that she had the right to make her remarks about the Black Lives Matter movement under both constitutions and 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 with McVey and affirmed the trial court's ruling.

The Appellate Division held that McVey could not state a wrongful discharge claim because her discharge did not violate a clear mandate of public policy. The court reasoned that a violation of McVey's constitutional rights required state action. Since AtlantiCare is a private employer, its discharge of McVey could not violate a clear mandate of public policy as established by the United States or New Jersey constitutions. The court also noted that, unlike other states, such as Connecticut, the New Jersey legislature has not created a cause of action that subjects private employers to liability for discharging an employee for speech protected by the First Amendment. Consistent with decisions from around the country, the court held that "absent specific statutory employee protection or state action, an employer does not violate a clear mandate of public policy by terminating an employee for the employee's speech."

The Appellate Division stated that, if it were to balance McVey's freedom of speech protections against AtlantiCare's business interests, it would still conclude that AtlantiCare properly terminated her employment. The court described McVey's interest in publicly posting her remarks as "minimal" and "slight," as compared to AtlantiCare's "strong" interest in fostering a diverse set of customs, values, and points of view. The court also noted that since McVey's Facebook posts identified her as

an AtlantiCare corporate director, they opened the company's business to the possibility of unwanted and adverse publicity and criticism.

Key Takeaways

This case has important lessons for employers. In upholding the employer's ability to discharge an employee because of her Facebook posts, the court relied, in part, on the fact that AtlantiCare had previously given her a copy of its social media policy. That policy warned against posting about topics that might be considered objectionable or inflammatory and stated that an employee's use of social media could affect AtlantiCare's business. The outcome also might have been different if the employee had not identified herself with AtlantiCare in the posts at issue, if the posts had not so clearly gone against AtlantiCare's values, or if McVey had not been an at-will employee. Despite the ruling in this case, employers should confer with legal counsel to ensure their social media policies are appropriately protecting their rights before taking adverse action against employees based on their social media posts since other laws, including the National Labor Relations Act, may protect such conduct.

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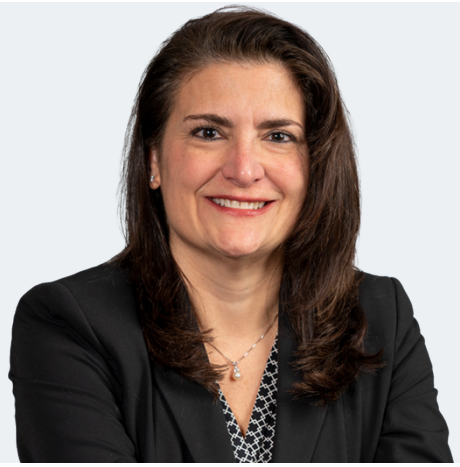

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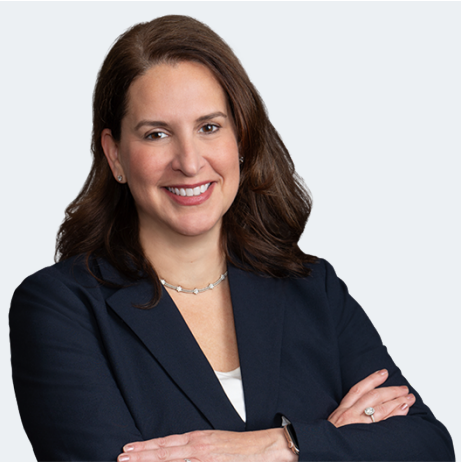

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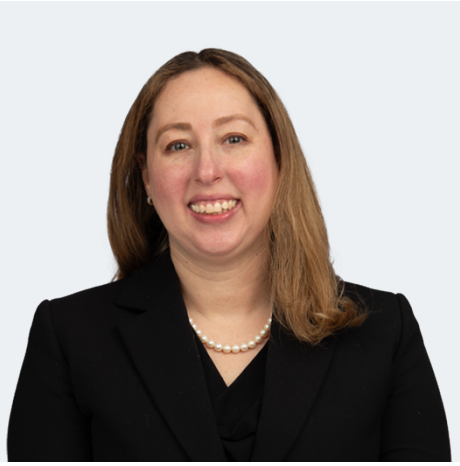

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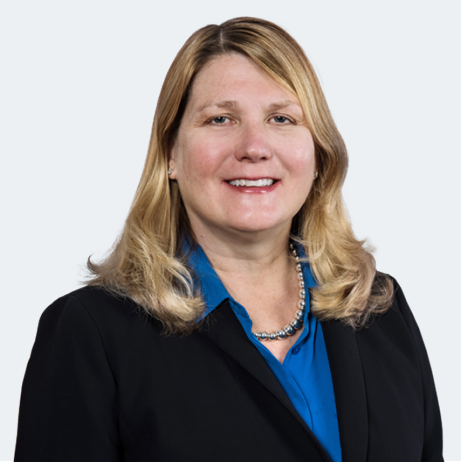

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