

## Employers Need Not Tolerate Workers Screaming On The Electronic Street Corner

June 6, 2016 | | [Social Media And Technology](#), [Labor And Employment](#)



**Hannesson  
Murphy**  
Partner

Over the last few days, the news media have widely covered Bank of America's decision to fire one of its employees for posting this on the employee's personal Facebook page:

I hate Facebook for this reason you f\*\*\*ing n\*\*\*\*rs. And yes, if [you] can call each that well I can too. 'F\*\*\*ing n\*\*\*\*r go back to Africa. Get over your pity party. You created this hatred and your own kind that brought your great-great-parents [sic] over here and sold them. 'Do something with your lives and your children's lives. I'm sure you don't work, collect welfare and teach hatred. Your poor children. All five of them you can't afford because I pay for them.

The bank became aware of the post after receiving multiple complaints and looking into the matter, promptly discharged the employee. This incident is the latest in a long line of cases where employees have been terminated for posting inappropriate messages on Facebook and similar online social media venues. Evidently, despite all of these examples, there are still people who view the keyboard and computer/tablet screen as providing them with an impenetrable shield of anonymity. The reality, however, is that saying something in an online forum – particularly one on the user's own personal Facebook page – is not materially different than shouting messages for the world to hear from the street corner. Except, of course, for the fact that social media is immensely less forgiving for those who choose to say stupid things: anything written online easily can be shared around the globe and also can be archived for all time. In addition to providing yet another reminder about the perils of going off on a rant online, the incident also provides a good example of how employers should handle these situations. Employers cannot simply to turn a blind eye toward what employees do on their own free time, especially when it comes to supervisors and managers. For example, say the bank in this instance had not fired the employee after learning about her Facebook post. If that employee later made a decision to promote or hire a white worker over an African-American, it is not hard to imagine the Facebook posting becoming Exhibit A in a subsequent lawsuit. The posting would provide concrete evidence about how the employee views minorities and would instantly discredit any attempt by her to rely on non-discriminatory factors. For the employer, the posting similarly would provide concrete evidence that the company was aware of her views, and that its failure to terminate her means it either deliberately choose to ignore her views (which would be bad) or that it shared them (which would be far worse).

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Regardless, any failure by the company to act once it is put on notice of the issue would call into question its motives, and ultimately, the legitimacy of its anti-discrimination or zero-tolerance policies. All of this is not to say that employers should make a habit of policing or trolling personal employee social media sites: such a practice would be fraught with problems, and for the most part, ignorance still can be bliss. However, once an employer becomes aware of conduct or statements like those at issue which the employee makes on social media – but which would clearly violate company policy – an employer cannot simply stick its head in the sand and hope everything will blow over. If the employer does not engage in disciplinary measures, then all of the hard work on creating an inclusive environment and crafting a solid EEO policy could be for nothing. Beyond the legalities, employers also should consider asking themselves why they would want to retain someone who engages in online rants for the world to see. Employers certainly would not stick their necks out for an employee with a penchant for screaming obscenities from the street corner and should not give a pass to an employee who is doing the same thing on the 21<sup>st</sup> Century's equivalent.