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When is racism misconduct?

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The concept of diversity, equity, and inclusion (DEI) is high on the international agenda. For a few years, organizations have focused DEI efforts on promoting gender equality. Indeed, gender equality is high on the list of the United Nations (UN) Sustainable Development Goals which, if achieved, will transform our world.^[1]

Lately, it has become even more apparent that DEI efforts must also include achieving equitable treatment of people based on their race as well as gender. A perception or allegation of racism lodged against an organization's staff could unravel even the most sincere efforts to promote inclusivity. Employees and consumers alike recognize and respond harshly to discrepancies between inclusive messaging and actions that belie those messages.^[2]

Global movements for racial justice call for organizations to take action against racism in the workplace and against their employees who are accused of being racist, but on what basis can the organization take action if there are no specific acts of misconduct occurring, the actions do not violate a law, or the actions did not occur in the workplace? What happens in places where employee discipline must be based on just cause?

Compliance professionals and others must weigh different stakeholders' expectations for addressing racism in the workplace against the need to differentiate employees' views from their behavior when taking action.

A hypothetical situation

In the United States, many employers, including government agencies, have had to reckon with revelations that one or more of their employees was found to have engaged in racist acts. Several people who were charged with crimes related to their attendance at the insurrection of January 6, 2021, at the U.S. Capitol building were subsequently suspended or fired by their employers.^[3] The New York City Fire Department recently suspended nine white firefighters for posting and sharing racist messages and memes on their phones following the murder of George Floyd, including comments mocking George Floyd's dying moments, and whether water hoses should be turned on protesters.^[4]

In the United States, these staff could be terminated or otherwise disciplined because their behavior constituted



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crimes or civil infractions such as harassment and discrimination. Few besides their unions' lawyers, perhaps, would argue otherwise.

Imagine, however, that an employee was seen on a social media platform posting racist comments to their *friends*, not their coworkers? What if an employee was seen at the January 6 insurrection outside the U.S. Capitol building waving a Confederate flag but not committing any crimes? Or what if it is not the person who committed the act, but their spouse? On what basis might an employer take action then? What action would be legally allowed? And even if such actions were legal, would they be *ethical*?

Let's use this example to illustrate the ethical dilemma: Someone anonymously reports to your US office's ethics hotline that your senior vice president of operations Kelly is married to a man who was seen on video at the U.S. Capitol on January 6 carrying a large Confederate flag and shouting, "We will not be replaced!" The reporter provides a link to this video as well as a screenshot from Kelly's Facebook page showing her standing with her husband and vowing to "fight the criminal charges unfairly filed against my husband, a true Patriot!"

The easy reply to any of these scenarios in the United States likely would be that Kelly can be fired, because in the US, employment for private sector employees is at will, so an employer may fire employees for any or even no reason, other than an illegal reason. But even in the US, many staff are not subject to at-will employment. This includes government employees, executives who have employment contracts, and independent contractors with specific termination clauses. Many states in the US have so many laws that regulate employment that at-will employment is, in reality, a significantly limited doctrine.

Most other countries' legal frameworks governing employment (those of which we are aware, at least) require that employees' terms and conditions of employment only be changed based on just cause and that employees be given due process before finalization of any changes.

Similarly, the UN manages staff not according to national or local laws, but instead according to its own internal rules and regulations. The UN's final arbiter for employment disputes is an administrative tribunal. Its regulations do not provide for at-will employment. Other international development organizations operate under similar regulations.

Thus, many employers already know that terminating an employee without a legally justifiable reason is usually a bad idea. And any organization seeking to do the right thing for the right reasons should consider whether that which is legal is also ethical.

With this in mind, how should your organization respond to an allegation that an employee is racist? We offer a few questions your organization might consider before taking action.

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