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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.<sup>[1]</sup>

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.<sup>[2]</sup>

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.<sup>[3]</sup> 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.<sup>[4]</sup>

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.

## **First, is being 'racist' a violation of your organization's policies?**

In the scenario given above, many may consider Kelly's actions to be racist. But what does this mean in terms of your policies?

Does your organization consider *being racist* to be a violation of any policy? If so, how do you define that? According to the *Merriam-Webster*, it is "a belief that race is a fundamental determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race."<sup>[5]</sup> The scholar and author Ibram X. Kendi defines it as "a marriage of racist policies and racist ideas that produces and normalizes racial inequities."<sup>[6]</sup>

Thus, we can consider being racist to essentially constitute a set of beliefs, policies, or ideas. But can someone's

racist beliefs, policies, or ideas be *investigated*?

Perhaps you consider the alleged behavior to violate your code of conduct. Do you have a clause that sets forth an expectation that employees behave properly when in public? For example, the UN's Standards of Conduct for the International Civil Service provide that:

Impartiality implies tolerance and restraint, particularly in dealing with political or religious convictions. While their personal views remain inviolate, international civil servants do not have the freedom of private persons to take sides or to express their convictions publicly on controversial matters, either individually or as members of a group, irrespective of the medium used.<sup>[7]</sup>

In the UN, impartiality is an important value, given the international and intergovernmental nature of its work. Our fictional character Kelly's conduct and postings might violate the UN's standard of conduct on the value of impartiality if she were an employee there.

Legal and policy compliance considerations do not end the discussion. There are many legal and policy violations that do not lead to disciplinary action; organizations focus discipline on different violations based on their mission and culture. For example, a spirits company may have a policy of terminating the employment of anyone with a conviction of driving under the influence; many other companies would only take such harsh action against their vehicle operators.

## **Second, can you even investigate this allegation?**

Kelly's actions probably occurred outside of work hours. The statement appeared on her personal social media account. What are your policies on investigating employees' personal off-work behavior? Does your approach vary by the type, importance, or visibility of the employee (e.g., executive, mid-level employee, or contractor)? Using statements made in a private group, even online, might be a violation of state electronic privacy laws, European Union data privacy protections, and/or other legal restrictions. Thus, the video that a staff member shares after gathering it in a private group on social media might be off-limits.

Then there is the issue of whether the behavior must have been exhibited *at work* to be actionable. If so, how are you determining what constitutes *working hours*? Surely this is a different calculation for your hourly workers versus your salaried workers. Your executives and other staff with high visibility likely are expected to represent the organization before, during, and after work hours. But when do they have freedom to be themselves even if that means doing something that is against your organization's values? Where do we draw the line?

Of course, the global COVID-19 pandemic has upended the question of what counts as working hours for many professionals who are now working from home.

## **Third, would public opinion and outcry affect your response?**

Imagine that a week after the report is made to your hotline, a local activist with thousands of followers posts the same information to her Twitter feed, stating that your organization "is knowingly employing racist senior officials" and demands that the organization fire Kelly. A counter-tweet from a regional militia group states that if you fire Kelly, "we will call for all patriots to boycott this organization."

Would your approach and response to these situations consider practical considerations like public opinion? In some organizations, the public outcry can cause a hasty reaction that may not be aligned with your values. This can lead to a public relations nightmare.

## Some considerations for responding to allegations of racism

Your response to specific incidents and allegations—and more importantly, your strategy—must include all of these facets. First, there is the law. If the behavior alleged would, if true, violate the law, you may find it easy to take action. If the behavior violates a clear policy, you may similarly take action without too much concern.

Disciplinary action against people like Kelly may be justified under the more general allegation of a “demonstration of a lack of integrity” or “conduct unbecoming a staff member of our organization.” While this may be accurate for some, it also is vague. Be sure that you are applying such rules consistently.

Is there a philosophical approach to be considered? For most compliance and ethics professionals, talk of Immanuel Kant’s or Adam Smith’s theory is best left in the classroom. But if you review your organization’s values, you can find the philosophical concepts hiding in plain sight. Most organizations have a profit motive and a goal to serve some greater good—within certain boundaries.

When an issue arises that is not covered by your specific policies, think of it as a time to reflect on how the issue reflects upon your organization’s mission and values. What does your organization really stand for when difficulty arises? You don’t have to invoke Kant’s categorical imperative (stated roughly as “everyone deserves respect”), but you can discuss with your decision-makers what the value of, for example, “respect for all” means in this context. Your codes of conduct set forth your mission and define those boundaries.

### Have a strategy ready

Responding to behavior that is clearly harassing or discriminatory against other staff should be routine in organizations today. Responding to behavior that one considers abhorrent, but that is not harassing or discriminatory, requires a balancing of interests. And responding to what may just be an employee’s affiliation with racist individuals may be the hardest of all to do. Can a person be racism *adjacent* but not *racist*? We believe this is possible. However, the concept of “racism adjacency” may be lost on the public and on your employees.

If you are taking action against a person based on their views and not their behavior—essentially, for being racist, sexist, or any other prejudice—know that there may be legal consequences depending on your jurisdiction. Yet, failing to take such action may also have ethical consequences, including for your reputation and employee morale. In these times, it is important to have a strategy before you have to implement it.

### Takeaways

- Compliance professionals and others must weigh stakeholders’ expectations for addressing racism in the workplace against the need to differentiate employees’ views from their behavior.
- Investigating an employee’s statements made in a private online settings may invoke electronic privacy laws and/or other legal restrictions.
- When an issue arises that is not covered by specific policies, think of it as a time to reflect on your mission and values.
- Responding to behavior that one considers abhorrent, but that is not harassing or discriminatory, requires a balancing of interests.
- Disciplining employees for their views may carry legal consequences, but failing to take any action may have consequences for your reputation and culture.

- 1** “17 Goals to Transform Our World,” Sustainable Development Goals, United Nations, accessed December 12, 2021, <https://www.un.org/sustainabledevelopment>.
- 2** Paurav Shukla, “Can Luxury Brands Ever Really Be Inclusive? Consumers Are Not Convinced,” *The Fashion Law*, August 11, 2021, <https://www.thefashionlaw.com/can-luxury-brands-ever-really-be-inclusive-consumers-are-not-convinced>; Gina Bhawalkar and Senem Guler Biyikli, “Words Matter: Inclusive Experiences Start With Inclusive Language,” *Forrester*, September 8, 2021, <https://www.forrester.com/report/words-matter-inclusive-experiences-start-with-inclusive-language/RES176170>; Melissa Michelle Oliver, “How Diversity and Inclusion Affect Shopper Attitudes,” Lindenwood University, March 2021, <https://digitalcommons.lindenwood.edu/cgi/viewcontent.cgi?article=1004&context=theses>.
- 3** Joseph Pisani and Cathy Bussewitz, “Rioters Who Stormed US Capitol Now Face Backlash at Work.” *U.S. News & World Report*, January 8, 2021, <https://www.usnews.com/news/business/articles/2021-01-08/rioters-fired-face-company-boycotts-after-storming-capitol>.
- 4** Astead Herndon and Ali Watkins, “How a Racist Scandal at the F.D.N.Y. Led to Its Biggest Suspensions Ever,” *The New York Times*, updated October 5, 2021, <https://www.nytimes.com/2021/10/01/nyregion/fdny-racism-scandal.html>.
- 5** “Racism,” *Merriam-Webster*, accessed December 14, 2021, <https://www.merriam-webster.com/dictionary/racism>.
- 6** Ibram X. Kendi, *How to Be an Anti-Racist* (New York: One World, 2019), 17–18.
- 7** International Civil Service Commission, *Standards of Conduct for the International Civil Service*, United Nations, 2013, <https://www.iaea.org/sites/default/files/19/03/standards-conduct-isc.pdf>.

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