Sixth Circuit: "Twitter tirade" by Professor Critical of Public University Not Protected Speech

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A recent decision from the United States Court of Appeals for the Sixth Circuit confirms public employers can consider certain employee speech on social media in making personnel decisions.

Key Takeaways:

- *Legitimate, Nondiscriminatory Reason for Adverse Action.* Social media posts containing attacks on the employer and coworkers can be a legitimate nondiscriminatory reason for an adverse employment action. Policies prohibiting such attacks may aid in establishing the existence of a nondiscriminatory reason for an adverse action.

- *Speech on Social Media Not Always Protected.* Public employers retain the ability to discipline or otherwise make personnel decisions based on social media posts that do not speak on a matter of public concern. Speech on matters of public concern couched within personal attacks does not make the entire speech protected. Further, where such speech undermines the employer's ability to perform its basic purpose, the speech may not be protected.

In *Patterson v. Kent State University*, Patterson, a university professor who identifies as transgender, contacted university leadership and requested to become the new Director of the Center for the Study of Gender and Sexuality after the former Director stepped down. University administration informed Patterson that there was not yet a position open, but proposed to reallocate some of Patterson's teaching load so that Patterson could direct more attention to developing a new gender-studies major. Patterson again inquired about directing the Center, and university administration responded again that they were not yet sure how or when the hiring process would proceed. Patterson proceeded to then engage in a "weeks-long, profanity-laden Twitter tirade" critical of the university, its leadership, and its employees.

Thereafter, the university ultimately declined to elevate Patterson to the not-yet-established leadership position, revoked its previous offer to reallocate or lighten Patterson's courseload, and denied Patterson's request to transfer to another university campus. Patterson sued the university, alleging, among other things, claims of sex discrimination in violation of Title VII of the Civil Rights Act of 1964 and retaliation in violation of the First Amendment.

In affirming the district court's grant of summary judgment in favor of the university on all claims, the Sixth Circuit held that the university had a legitimate, nondiscriminatory reason for taking adverse actions (if any) against Patterson. Namely, the record, according to the Court, was replete with tweets, emails, and texts containing "disparaging" and "profanity-laden" attacks by Patterson referencing the race, sex, and occupations of the university Dean and a coworker, which created a toxic work environment and violated a university policy against such attacks. The Sixth Circuit also concluded that the university was entitled to summary judgment on Patterson's retaliation claim, because Patterson could not show the decision-makers were aware of any protected activity.

The Sixth Circuit further held that, for two reasons, Patterson's "Twitter tirade" was not protected by the First Amendment as a matter of law. First, Patterson's tweets were not speech on a matter of "public concern." While Patterson argued that some tweets publicized the university's alleged transphobia and exposed workplace discrimination, the Sixth Circuit explained that those tweets could not be viewed in isolation, as they were "swarmed on

either side" by personal attacks on Patterson's colleagues, and "a public employee can't blend protected speech with caustic personal attacks against colleagues, and then use the protected speech to immunize those attacks."

Second, the Sixth Circuit held that even if the tweets did involve a matter of public concern, they were not protected because the university's interest in educating students and administering effective public services outweighed Patterson's interest in "trash talk." In other words, "[w]hen an employee seriously undercuts the university's power to do its basic job, the Constitution doesn't elevate the employee over the public that [the university] exists to serve."

As employee speech on social media continues to pose issues in the workplace, employers – both public and private – should be mindful of their policies and decisions related to that speech. If you have any questions about these issues in your workplace, please do not hesitate to contact your Miller Canfield attorney or one of the authors of this e-alert.