

## NJ Court Holds First Amendment Does Not Protect Private Employees' Free Speech Rights for Racially Insensitive Social Media Posts

The New Jersey Appellate Division prohibited a private employee from relying on freedom of speech to support her wrongful termination lawsuit. Specifically, the court found that a private employer had the authority to fire their at-will employee, Heather McVey, for making racially insensitive remarks about Black Lives Matter on her personal Facebook.

The Court's decision is rooted in the examination of whether or not the First Amendment, or its New Jersey counterpart, prevents a private employer from firing an employee because of racist remarks. Although the post was on a personal Facebook page, the employee identified her employer, who has a written social media policy warning against content and association with the employer. Further, the company has made clear its desire to respect diverse viewpoints and avoid insult and obscenity.

McVey, a Corporate Director of Customer Service, posted on her personal Facebook account that she found Black Lives Matter to be racist, criticizing the movement. After an internal investigation, McVey was fired at which time she filed a wrongful discharge lawsuit claiming she was unlawfully punished for exercising her federal and state constitutional rights to freedom of speech. After the trial court dismissed McVey's complaint, on appeal, McVey argued that her firing violated a mandate of public policy. In essence, she argued that her right to speak her mind outweighed her employer's right to promote an inclusive environment for its employees and clients.

The appellate court concluded that no public policy existed to prohibit a private entity from encroaching upon a private individual's constitutional rights to free speech. The court reasoned that a violation of McVey's constitutional rights required state (i.e., government) action. Since she worked for a private employer, its firing of McVey could not violate a clear mandate of public policy. The court also noted that NJ has not created a cause of action that subjects private employers to liabilities for firing an employee for speech protected

by the First Amendment. The Appellate Division also stated that even if it were to balance McVey's freedom of speech protection against the employer's business interests and public policy, it would favor the employer. Furthermore, McVey's Facebook post identified her as the employer's corporate director thus subjecting the company to possible negative publicity and criticism.

It is important to note that although federal and NJ constitutional free speech only protects people from actions by the government, and not private employers, employers should put in place a specific social media policy to ensure that their rights as a private company are appropriately protected.

If you have questions about this issue or your company's social media policy, please contact [Peter Frattarelli](mailto:Peter.Frattarelli@archerlaw.com) at 856-354-3012 or [pfrattarelli@archerlaw.com](mailto:pfrattarelli@archerlaw.com).

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