



Doc made a bad tweet? Before disciplining, consider possible legal comebacks

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Practice management

Two physicians' recent social media reactions to the Israel-Gaza conflict, and their fallout, serve as a reminder that First Amendment defenses don't always override contract terms. But when they do, it can mean legal trouble for employers.

While one M.D.'s intemperate posts drew a suspension that went unchallenged, the disciplinary response to another's has drawn a lawsuit that experts say has at least a fighting chance of success.

According to news sources, the doctor who chose not to protest his suspension, Darren Klugman, M.D., director, pediatric cardiac critical care and associate professor of anesthesiology and critical care medicine at Johns Hopkins in Baltimore, put up posts on X/Twitter that referred to Palestinians in toto as "barbaric animals" and "savage animals," and suggested approval of their "large scale slaughter."

The Maryland office of the Council on American-Islamic Relations (CAIR) filed a complaint against Klugman; Johns Hopkins, which says their official policy forbids "statements that explicitly threaten or extol violence against groups or individuals" by their employees, put Klugman on leave pending an investigation, according to the Johns Hopkins Medical School newsletter.

The New York Post reports Klugman sent an apology to Hopkins personnel, saying that "these messages in no way reflect my beliefs, me as a person, a physician, a friend, or colleague."

Less apologetic is Benjamin G. Neel, a cancer researcher and professor, department of medicine of New York University Langone Health (NYULH), who was put on leave after reposting what the New York Times described as "a variety of anti-Hamas political cartoons, including two with offensive caricatures of Arab people, and messages on the social media platform X [aka Twitter], like one that appeared to question the extent of the death toll in Gaza from Israel's relentless bombing campaign."

Neel is suing, charging that, in addition to breaching his contract, NYULH "violated New York Labor Law 201-d," a section on "discrimination against the engagement in certain activities," mainly protective of behavior "outside of working hours." He also claims NYULH violated New York City and state human rights laws "by discriminating against his religion." Dr. Neel is Jewish, and his suit asserts that "for Jewish people, support for Israel is not a political viewpoint; rather it is a key component of their Jewish religious, ethnic and ancestral identity."

Neel further states that his tweets expressed "balanced positions concerning the Israeli-Palestinian conflict," and claims NYU Langone disciplined him because they were disciplining a doctor who'd posted an allegedly pro-Hamas tweet and wanted to "feign the appearance of even-handedness," and that his own posts are "far more temperate than much of the social media content and little different than the official views espoused by NYULH."

Does he have a case?

Looking at the two cases, neither Amanda Marie Baer, a partner in the Labor, Employment, and Employee Benefits Group at the Mirick, O'Connell, DeMallie & Lougee firm in Westborough, Mass., nor Mark F. Kluger, a labor and employment lawyer and co-founding partner at Kluger Healey in Fairfield, N.J., thinks Johns Hopkins' Klugman would have much of a case if he changed his mind and decided to sue.

"Hospitals have duties to their employees, students, patients and community to ensure that their environments are free from discrimination," Baer says. "If a hospital is concerned that a provider may discriminate against other employees or patients because of their protected classifications, it is entirely reasonable for the hospital to investigate the concern."

But they both see some wiggle room in Neel's case, despite the general presumption in favor of the employer's right to restrict speech for the good of the company.

"Only Connecticut has a law that prohibits employers from terminating employees for speech that would otherwise be protected by the First Amendment," Kluger notes. "In recent years, we have increasingly seen employers assert their right to terminate employees for their views or activities in response to, for example, events in Charlottesville, the Black Lives Matter movement, Covid vaccination mandates and January 6."

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Baer considers the "balanced positions" claim "a drafting tactic by Dr. Neel's lawyers," and says the tweets in question "could be viewed as discriminatory against Palestinians." Kluger thinks that while Neel may have a case on contractual grounds, as his employment agreement provides that Dr. Neel can be terminated only "for cause," the terms of NYULH's social media policy might give them cause to do so.

But Kluger believes the statutory claims have sufficient validity for the case "to get past at least any initial efforts by NYU Langone to seek dismissal." New York's 201-d, which prohibits employers from terminating employees for engaging in legal recreational activities, defines those activities "as including sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material," Kluger says. "So far, that protection has not been extended to engaging in social media posting -- [but] this case might take it there."

On the other hand, Kluger says, "an employer's position may be that it is not terminating the employee for engaging in social media, but rather for the nature of the posts. So if an employee posts hate speech, [or] condones or even threatens violence, the termination may well be legally defensible because of the potential that such posting creates a hostile work environment for co-workers or simply the negative impact on the organization's public image."

In Kluger's opinion, "the most complicated and potentially strongest legal argument in the case may turn out to be the claim for religious discrimination under the NYC Human Rights Law."

While Kluger thinks the complaint may have overstepped by "alleging an interconnection between support for Israel and practicing Judaism on behalf of all Jews... this claim of religious discrimination may however have legs because he need only prove that the interconnection is true for Dr. Neel, and that NYU terminated the doctor due to the expression of his religious views."

Baer, however, counters that laws prohibiting discrimination against employees because of their religion "do not require employers to permit employees of one religion or national origin to discriminate against employees of a different religion or national origin."

Kluger thinks Neel's claim that his posts were "little different than the official views espoused by NYULH" may also fly, based on sentiments expressed in emails sent by management to NYULH staff, e.g. "the killings and hostage-taking by the militant group Hamas are barbaric and inexcusable." On the other hand, Baer says, this approach "may boomerang against his claim that he was disciplined because of his religion, especially if other public statements that he claims were tolerated by NYULH were made by Jewish employees."

If nothing else, these pros and cons should remind you to consult legal counsel before responding to your physicians' controversial social media posts.

Resources

- Baltimore Banner, "Johns Hopkins doctor on leave following violent anti-Palestinian social media posts," Nov. 16, 2023: www.thebaltimorebanner.com/community/public-health/darren-klugman-johns-hopkins-UIYEXTJASFBVNI7MJSYLPYUENE/
- CAIR, "CAIR Files Complaint Against Maryland Doctor who Allegedly Expressed Support for Slaughter of Palestinians," Nov. 14, 2023: www.cair.com/press_releases/cair-files-complaint-against-maryland-doctor-who-expressed-support-for-slaughter-of-palestinians/
- Johns Hopkins News-Letter, "VVV," Nov. 21, 2023: www.jhunewsletter.com/article/2023/11/johns-hopkins-medicine-doctor-and-professor-placed-on-leave-following-anti-palestinian-tweets
- New York Post, "Johns Hopkins doctor on leave after calling Palestinians 'blood thirsty morally depraved animals,'" Nov. 17, 2023: <https://nypost.com/2023/11/17/news/johns-hopkins-doc-on-leave-after-calling-palestinians-animals/>



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