# 3rd Circ.: Employer Has Right to Fire Employee for Offensive Facebook Post

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By **Jeffrey Campolongo** | May 24, 2021

A question that often comes up in employment law circles is how much latitude an employer h in disciplining an employee for off-work conduct, particularly, on social media. It is not at all uncommon for employers to have a code of conduct or ethics policies that apply to the behav of their employees both on and off the job. The employment at-will doctrine generally provides employers the leeway needed to cut ties with employees who act or say things that are off co or offensive, even when it is not related to the job itself. A recent case out of Pittsburgh put th limits of this leeway to the test.

The U.S. Court of Appeals for the Third Circuit recently ruled that Bank of New York Mellon (BNY Mellon) did not violate Title VII of the Civil Rights Act of 1964 when it fired a woman because of her social media activity. See *Ellis v. Bank of New York Mellon,* No. 20-2061 (3d C March 4, 2021). The case arises from a Facebook post by Lisa Ellis, who worked for BNY Mellon as a senior control analyst.

On June 30, 2018, using her personal Facebook account, Ellis commented on a local news story calling it "Total BS. He should have taken a bus to plow thru." The story was about a councilman who had been arrested for driving a car through a crowd of demonstrators protesting the untimely death of Antwon Rose Jr., a young African American male who was sh and killed by an East Pittsburgh police officer 11 days prior. According to the opinion from the district court, Ellis's Facebook account was set to "public," and also referenced the fact that sh worked as a "vice president" for BNY Mellon. Unsurprisingly, BNY Mellon was inundated with complaints about the nature of the post and whether Ellis' post reflected the values of the company and condemned the post for encouraging violence.

The company undertook an investigation and ultimately decided to terminate Ellis for violating the code of conduct and the social media policy because her post was offensive, demonstrate poor judgment, showed a lack of respect for others, harmed BNY Mellon's reputation and encouraged violent behavior. BNY Mellon's social media policy warned employees to "be professional and responsible when posting on external social media; you are responsible for what you post," and "be respectful and remain aware of BNY Mellon policies prohibiting unlawful harassment and discrimination and be sure your postings are in compliance with the policies." The social media policy also cautioned employees that their "use of external social media must also comply with BNY Mellon's code of conduct" and warned that:

"Your use of external social media that harms or impairs BNY Mellon's financial or professiona reputation or is damaging to BNY Mellon in any other respect may result in consequences affecting your employment status. You may be subject to disciplinary action, up to and includi termination of employment if you violate this policy."

Following her termination, Ellis, who is white, claimed that she was the victim of reverse race discrimination under Title VII. The district court disagreed with Ellis and granted summary judgment to BNY Mellon, dismissing all of her claims. The district court found that Ellis had provided "no evidence of discrimination."

On appeal to the Third Circuit, Ellis argued that the lower court ignored evidence of

comparators (i.e., other co-workers) to prove her claim. Ellis pointed to nonwhite co-workers who purportedly made controversial posts. She argued that the company's decision to retain two Black employees who also made controversial posts was evidence of discrimination. One of the comparators, Nicole Manns, is African American and is both a vice president of BNY Mellon and a manager of affirmative action compliance. Just a few days before Ellis' controversial post, Manns posted the following comment on her public Facebook page:

"Against my better judgment, I just read some comments related to Antwon Rose Jr. running. Here's an idea, if you've never experienced what it feels like to be in a situation that could result in your death, NO MATTER WHAT YOU DO … please, kindly, Shut TF Up.

*note* This message is NOT race specific. It's for people who say and I quote, "Why wouldn't he just follow the officer's command? They are the law!"

This post, along with another several months later, resulted in Manns being counseled by BNY Mellon about being mindful of what she posts on social media. Manns was not fired.

Ellis also pointed to the social media post of Carra Thomas Reed, who is African American, and an employee in BNY Mellon's human resources department. On June 25, 2018, Reed posted the following message on her public Facebook page (which is not referring to Ellis):

"I can't believe this white girl at my job, BNY Mellon, who I thought I was cool with, just said she don't blame them for running over the peaceful protesters. Someone please pray for [me] because I'm on right now and I'm really not tryna loose my job yet smh."

BNY Mellon had a meeting with Reed to discuss her Facebook post but did not take any adverse employment action against her.

To support an inference of discrimination, the court of appeals noted that a comparator must be "similarly situated" to Ellis in all material respects, and neither purported comparator satisfied that standard. Ellis' social media post was far more egregious and far more likely to harm BNY Mellon's reputation, the court wrote. Neither Manns nor Reed said anything as extreme as Ellis. Reed expressed frustration with a white co-worker but did not threaten that co-worker with violence. Manns opined that men who hurt women should commit suicide. Though inappropriate and ill-advised, neither post encouraged mass violence against protesters, the court noted.

The other material distinction between Ellis and the purported comparators, as recognized by the district court, was that the two Black employees "worked in different positions, in different departments, had different responsibilities, and reported to different supervisors than Ellis did." The court also rejected Ellis' counterargument that the differences between her and the comparators were pointless as BNY Mellon required all employees to follow its social media policy. "This argument might carry some force if the policy prescribed standard punishments, regardless of who a violator is or where she works, but instead it gives decision-makers broad discretion over how to discipline employees," the court responded.

While Ellis' reverse race discrimination failed in this instance, claims involving social media

posts are more common under the National Labor Relations Act (NLRA). Section 7 under the NLRA, provides: "… that employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The NLRA protects certain forms of employees' political advocacy, regardless of whether the employees are unionized. The National Labor Relations Board (NLRB) views political discussions as "protected concerted activity" to the extent that they relate to terms or conditions of employment. Using social media platforms to gripe about working conditions may be protected concerted activity when "two or more employees take action for their mutual aid or protection regarding terms and conditions of employment," according to the NLRB. For example, discussion about political candidates' views on the minimum wage would be protected by the NLRA because it affects employees' pay.

That said, the NLRA does not protect political advocacy that is not tied directly to employment-related concerns. Employers can restrict this general political advocacy by lawful and neutrally applied work rules, such as those prohibiting use of social media during work hours or engaging in activity that violates a neutral code of conduct policy.

Turning back to the Facebook post by Ellis, while it could qualify as general political activity, to the extent that it was not a message between two or more employees and did not discuss the terms and conditions of employment at BNY Mellon, it would likely not be protected under the NLRA. The takeaway here is that employers continue to retain tremendous discretion in disciplining and policing the off-work conduct of its employees when the conduct violates an employer policy and has the tendency to harm the reputation of the business. So, to all employees who think an innocuous rant on Twitter or Facebook is harmless, you may want to think twice before posting.

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