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## **Racial Diversity and Employment Policies: Enforcement of First Amendment, Title VII, the NLRA, State Labor Laws**

Anti-Discrimination Policies, Restrictions on Activities Outside Employment and Social Media

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WEDNESDAY, DECEMBER 1, 2021

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Today's faculty features:

Dawn Siler-Nixon, Partner, **FordHarrison**, Tampa, FL

Clifford B. Glover, III, Attorney, **Jackson Lewis P.C.**, Potomac, MD

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# **BLM and Employment Policies: Enforcement of First Amendment, Title VII, the NLRA, State Labor Laws**

Anti-Discrimination Policies, Diversity Initiatives, Restrictions on Activities Outside Employment and Social Media

**Clifford B. Glover, III**

**12.01.2021**

Jackson Lewis P.C. • Baltimore

(410) 415 2019 • [Clifford.Glover@jacksonlewis.com](mailto:Clifford.Glover@jacksonlewis.com)

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# History of BLM

- Blacklivesmatter.com: “#BlackLivesMatter was founded in 2013 in response to the acquittal of Travon Martin’s murderer. Black Lives Matter Global Network Foundation, Inc. is a global organization in the US, UK, and Canada, whose mission is to eradicate white supremacy and build local power to intervene in violence afflicted on Black communities by the state and vigilantes. By combating and countering acts of violence, creating space for Black imagination and innovation, and centering Black joy, we are winning immediate improvements in our lives.”
- Dictionary.com: “A political and social movement originating among African Americans, emphasizing basic human rights and racial equality for Black people and campaigning against various forms of racism.”
- Encyclopedia Britannica: an “international social movement, formed in the United States in 2013, dedicated to fighting racism and anti-Black violence, especially in the form of police brutality. The name *Black Lives Matter* signals condemnation of the unjust killings of Black people by police (Black people are far more likely to be killed by police in the United States than white people) and the demand that society value the lives and humanity of Black people as much as it values the lives and humanity of white people.”

# History of BLM

- Started on July 13, 2013, the day of the acquittal of George Zimmerman in the shooting death of Trayvon Martin.
  - #BlackLivesMatter
- Other deaths/events that have bolstered the BLM movement since then:
  - Eric Garner, Michael Brown, Laquan McDonald, Tamir Rice
  - Walter Scott, Freddie Gray, Sandra Bland, The Charleston Nine
  - Alton Sterling, Philando Castille, Korryn Gaines, Sylville Smith
  - Unite the Right Rally
  - Ahmaud Arbery, Breonna Taylor, Christian Cooper, George Floyd
  - Joseph Rosenbaum, Anthony Huber

# History of BLM

- There has been a lot of confusion over BLM as a global movement.
  - Decentralized?
  - Legal Organization?
  - Membership group?
  - Nonprofit?
- BLM refers both to various organized groups and the movement in general.
- “Hashtag Activism”
- BLM can often refer to a Twitter hashtag, a slogan, a social movement, a political action committee, or a loose confederation of groups advocating for racial justice.
- This loose structure has contributed to confusion in the press and the courts.

# History of BLM

- Black Lives Matter Network Foundation, Inc.
  - National group with organized chapters.
  - Encourages protest and political action.
  - Nonetheless decentralized and stresses local organization.
  - **“We are expansive.** We are a collective of liberators who believe in an inclusive and spacious movement. We also believe that in order to win and bring as many people with us along the way, we must move beyond the narrow nationalism that is all too prevalent in Black communities. We must ensure we are building a movement that brings all of us to the front.”

# History of BLM

- Doe v. McKesson, 272 F.Supp.3d 841 (M.D. La. 2017)
  - Facts: Baton Rouge Police Department officer responded to a demonstration that took place on July 9, 2016.
  - DeRay McKesson led the peaceful demonstration.
  - Eventually some people in the demonstration looted a store and began throwing objects at the responding officers.
  - An unknown and unidentified person in the crowd picked up and threw a piece of concrete at the officer, striking the officer in the head and causing serious injury.
  - Officer sued McKesson and “Black Lives Matter” for damages alleging that McKesson incited a riot on behalf of “Black Lives Matter.”
  - “Black Lives Matter” was described in the Complaint as a “national unincorporated association,” of which McKesson is a “leader and co-founder.”
  - Plaintiff further alleged that the unidentified demonstrator who threw the object that allegedly struck plaintiff was a member of Black Lives Matter and was under the control and custody of McKesson and Black lives Matter. Therefore, according to allegations, McKesson and Black Lives Matter are liable for damages.

# History of BLM

- Doe v. McKesson, 272 F.Supp.3d 841 (M.D. La. 2017) – Procedural Posture at Trial Court Stage
  - McKesson files Rule 12(b)(6) motion for failure to state claim, Rule 9 motion asserting that “Black Lives Matter” is not an entity that has the capacity to be sued.
  - Plaintiff responds with Motion to Amend, seeking leave to amend his complaint to add “#BlackLivesMatter” and “Black Lives Matter Network, Inc.” as defendants and to supplement Complaint with additional factual allegations.

# History of BLM

- Doe v. McKesson, 272 F.Supp.3d 841 (M.D. La. 2017) – Trial Court Decision
  - Trial Court finds: (1) “Black Lives Matter” is a social movement that lacks the capacity to be sued, and (2) any amendment to the Complaint would be futile because (a) “#BlackLivesMatter” – a *hashtag* – lacks the capacity to be sued and (b) Plaintiff failed to state a plausible claim for relief against Black Lives Matter Network, Inc.

# History of BLM

- Doe v. McKesson, 272 F.Supp.3d 841 (M.D. La. 2017) – Trial Court Decision
  - Court takes judicial notice that Black Lives Matter is a social movement, citing precedent from other courts that have taken notice of the character, nature, or composition of various social movements.
  - Court notes that the phrase “black lives matter” has been utilized by various entities wishing to identify themselves with the “Black Lives Matter” movement.... “Black Lives Matter,” as a social movement, *cannot* be sued, however, in a similar way that a person cannot plausibly sue other movements such as the Civil Rights movement, the LGBT rights movement, or the Tea Party movement.
  - “Plaintiff alleges that “# BlackLivesMatter” is a national unincorporated association [that is domiciled in California]. The Court judicially notices that the combination of a ‘pound’ or ‘number’ sign (#) and a word or phrase is referred to as a ‘hashtag’ and that hashtags are utilized on the social medial website Twitter in order to classify or categorize a user’s particular ‘tweet,’ .... The Court also judicially notices that ‘# BlackLivesMatter’ is a popular hashtag that is frequently used on social media websites.... Plaintiff therefore is attempting to sue a *hashtag* for damages in tort. For reasons that should be obvious, a hashtag – which is an *expression* that categorizes or classifies a person’s thought – is not a ‘judicial person; and therefore lacks the capacity to be sued.
  - Plaintiff did not allege facts needed to show at the Complaint stage that McKesson or the tort were related to Black Lives Matter Network, Inc.

# History of BLM

- Doe v. McKesson, 935 F.3d 253 (5<sup>th</sup> Cir. 2019) – Appeals Court Decision
  - “We think that the district court was incorrect to take judicial notice of a mixed question of fact and law when it concluded that Black Lives Matter is a ‘*social movement*, rather than an organization or entity of any sort.’ The legal status of Black Lives Matter is not immune from reasonable dispute; and, indeed, it is disputed by the parties—Doe claiming that Black Lives Matter is a national unincorporated association, and McKesson claiming that it is a movement or at best a community of interest. This difference is sufficient under our case law to preclude judicial notice. ...
  - “Officer Doe has not shown in his complaint a plausible inference that Black Lives Matter is an unincorporated association. His only allegations are that Black Lives Matter: (1) was created by three women; (2) has several leaders, including McKesson; (3) has chapters in many states; and (4) was involved in numerous protests in response to police practices. He does not allege that it possesses property, has a formal membership, requires dues, or possesses a governing agreement. As such, the complaint lacks any indication that Black Lives Matter possesses the traits that Louisiana courts have regarded as indicative of an intent to establish a juridical entity. We have no doubt that Black Lives Matter involves a number of people working in concert, but “an unincorporated association .... does not come into existence or commence merely by virtue of the fortuitous creation of a community of interest or the fact that a number of individuals have simply acted together.” Therefore, we find that the district court did not err in concluding that Officer Doe’s complaint has failed plausibly to allege that Black Lives Matter is an entity capable of being sued.”
  - Decision reversed and remanded on other grounds by U.S. Supreme Court in *McKesson v. Doe*, 141 S.Ct. 48 (2020).



## BLM and Employment Policies: Enforcement of First Amendment, Title VII, the NLRA, State Labor Laws

Dawn Siler-Nixon

FordHarrison

[dsiler-nixon@fordharrison.com](mailto:dsiler-nixon@fordharrison.com)

# TITLE VII AND EEO

# EEO Compliance Checklist

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- EEOC policy is easily accessible.
- Training on anti-discrimination laws, duties and policies.
- Grooming/personal appearance policies.
- Diversity Training.
- Platform/forum for discussion.
- Data mine.
- Diverse/Balanced Slates.
- Education on BLM and Systemic Racism

# EEOC Resolution

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***THEREFORE, BE IT RESOLVED THAT*** -- *The EEOC condemns the violence that has claimed the lives of so many Black persons in America and joins in mourning the senseless deaths of George Floyd, Breonna Taylor, Ahmaud Arbery, and countless others; expresses our heartfelt sympathy to their families; and commits to redouble our efforts to address institutionalized racism, advance justice, and foster equality of opportunity in the workplace.*



# EEO Policy

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At (ABC COMPANY), we take pride in providing equal employment opportunities to everyone regardless of their race, ethnicity, beliefs, religion, marital status, gender, gender identity, citizenship status, age, veteran status, disability and any other protected category.

ADD – Anti-Racism/Sexism – ABC COMPANY affirms its commitment to recognizing, addressing and eradicating all forms of racism, ethnic oppression and sexism. We focus on engaging and collaborating in providing goods and services to our clients, vendors and guests. We work to reduce racial injustices and sexism both within ABC COMPANY and the broader community we serve. ABC COMPANY and its employees are united in our pursuit to end racial and ethnic bias and gender discrimination and harassment and to empower our employees towards this collective goal. ABC COMPANY will not tolerate any type of racism or sexism by or towards its employees by employees, guests, vendors, visitors or clients.

# Changes in Policies and Procedures

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## Grooming/Personal Appearance Policies

- “Creating a Respectful and Open World for Natural Hair” - CROWN ACT
- 12 States have legalized Black hair in 2021



## Title VII now prohibits discrimination based on sexual orientation and transgender status

- *Bostock v. Clayton County, Georgia*



# Gateway Conduct

- Anti-harassment policies shouldn't only be limited to legal compliance
- Develop comprehensive policies that address “gateway conduct”
  - Microaggressions
  - Unconscious Bias
  - Code Switching
  - Gaslighting
- Diversity Glossary/Reference Guide



# Balanced/Diverse Slate Initiatives

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Changes in the “Rooney Rule”

The “Mansfield Rule”

The goal is not to have a racial quotas, which would violate Title VII, but rather to ensure equal opportunity



# Affirmative Action Plans

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For private employers, race-conscious affirmative action plans are authorized under certain circumstances

- *United Steelworkers v. Weber*

## **Weber** Requirements:

- clear imbalance in traditionally segregated job categories
- No unnecessary harm to those outside protected class.
- Mirror the purposes of Title VII.
- Temporary

“The Commission encourages voluntary affirmative action and diversity efforts to improve opportunities for racial minorities in order to carry out the Congressional intent embodied in Title VII.” **EEOC**

# The EEOC and Diversity Initiatives

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The EEOC's Compliance Manual  
Section 15

Title VII permits diversity efforts  
designed to open up opportunities for  
everyone



# Diversity Training

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- Unconscious/Implicit Bias



‘Unconscious bias’ is a fundamental element of the EEOC’s recent initiative called **Eradicating Racism and Colorism from Employment (E-RACE)**, an enforcement effort that focuses on filing lawsuits challenging ‘subtle’ discrimination and educating employers. EEOC

# Diversity Training

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- Third-Party Intervention -
  - Direct Intervention – confront the individual and call out the racist behavior.
  - Distraction Intervention – interrupt the behavior
  - Delegate – an appropriate third party can intervene
- BLM and Historical/Systemic Racism

## Listen and Learn

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TOWN HALL MEETINGS



## The ABA Labor and Employment Section's "21 Day Racial Equity Habit Building Challenge"

[ABA-Wide 21-Day Racial Equity Habit-Building Challenge](https://www.americanbar.org/aba-section/divisions/labor-employment/21-day-racial-equity-habit-building-challenge/) © (americanbar.org)

# FREE SPEECH?



# Private Sector Considerations

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- Terms of Employment Contracts and Employee Handbooks
- Title VII/Section 1981 Discrimination
- Concerted Activity



# BLM isn't Partisan or Political

Office of Special Counsel Advisory Opinion – Using BLM terminology is “not inherently political activity.” Even though BLM “popularly associated more frequently with one political party versus another,” that does not make it a “partisan political party.” Federal employees can engage in BLM activity at work, but not combined with “political activity” while at work.



# Dress Code Policy: Can I or Should I?



# Dress Code Policy: Can I or Should I?

## Policy:

- Specify what is allowed and what is prohibited
- No slogans
- No images
- Cross Reference Anti-Discrimination/Harassment Policy
- Redistribute policy



# Dress Code Policy: Can I or Should I?

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Consistency is the Key –

*Suverino Frith, et al. v. Whole Foods Market Inc. and Amazon.com Inc.*, Case No. 1:20-cv-11358-ADB, in the U.S. District Court for the District of Massachusetts: Race discrimination and retaliation because of wearing Black Lives Matter masks and other apparel to work. Inconsistent application of dress code policy.

*Ma'Kiya Congious v. Whataburger*, Texas Workforce Commission Civil Rights Division: Race discrimination and retaliatory discharge because of wearing Black Lives Matter mask to work.

*Amalgamated Transit Union Local 85 et al. v. Port Authority of Allegheny County*, in the U.S. District Court for the Western District of Pennsylvania: Uniform policy banning workers from wearing masks that say "Black Lives Matter" violated the workers' freedom of speech.

*Home Depot*, Case No. 18-CA-273796 (<https://www.nlr.gov/case/18-CA-273796>).

# Public Sector Protections: Considerations

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- What was the context of the speech?
  - Was the employee on duty or off duty?
- Was the employee speaking as an employee or as a private citizen?
  - *Garcetti v. Ceballos*
  - *Lane v. Franks*
- Was the speech concerning a matter of public concern?
  - *Pickering v. Board of Education*
- Does the employer's interest in avoiding workplace disruption outweigh the employee's interest in the speech?

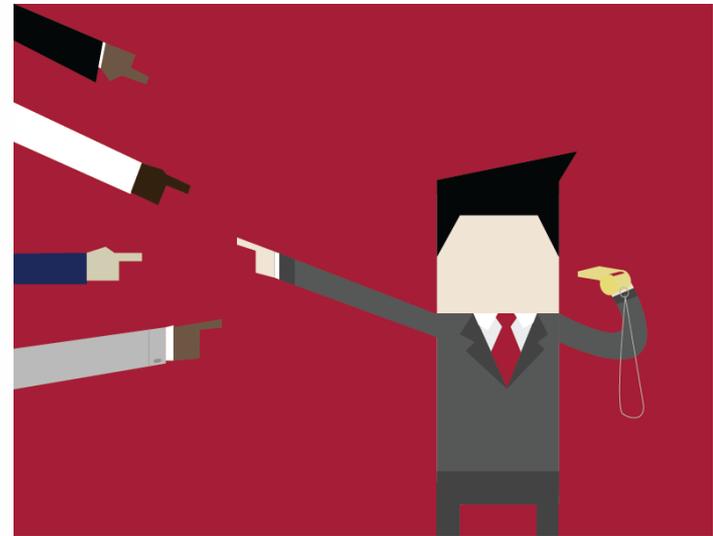


# The First Amendment and Whistleblowers

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A major implication of the *Garcetti* decision is a lack of First Amendment protections for whistleblowers

Federal and state whistleblower laws have been enacted to protect whistleblowers to an extent



# State Speech Considerations

State With Political Speech Protections		
CA	CO	DC
LA	MN	MT
NE	NJ	NY
SC	WI	

## Private Employers –

Political speech  
Political Affiliation  
Political Expression  
Non-discrimination  
Forced political protection

## Public Employers –

Political speech  
Political Expression  
Non-discrimination  
Forced political protection  
*Hefferson v. City of Paterson*  
*Turner v. City of Philadelphia Police Department*

# **The National Labor Relations Act**

**29 U.S.C. §§ 151-169**

# NLRA

- Section 7: 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

# NLRA

- Examples of Section 7 rights:
  - Forming or attempting to form a union among the employees of a company.
  - Joining a union whether the union is recognized by the employer or not.
  - Assisting a union to organize the employees of an employer.
  - Going out on strike to secure better working conditions.
  - Refraining from activity on behalf of a union.
- Examples of NLRA Rights:
  - Talking about working conditions with coworkers, the public, the media, or a union (but not making statements that are deliberately or maliciously false or engage in conduct that is extremely profane, vulgar, or disruptive to workplace order).
  - Taking action with one or more employees to improve working conditions by, for example, raising work-related complaints directly with an employer or a government agency, or seeking help from a union.
  - Joining a union or taking steps on non-working time to help a union become the representative of employees, and helping a union bargain for a contract to set wages and other conditions of work.
  - Choosing not to do any of these things.

# NLRA

- Many people believe that the NLRA only applies to union activities.
  - No!
- The NLRA applies to all “protected concerted activity” by employees regardless of whether the employee is in a union or not.

# NLRA

- Prior to the change of the presidential administration, the National Labor Relations Board, which enforces the NLRA through its General Counsel, changed the standard for determining whether the NLRA protects employees who engage in abusive language or other egregious conduct while otherwise engaging in protected concerted activity.
- *General Motors, LLC and Charles Robinson*, 14-CA-197985 and 14-CA-208242

## Prior to *General Motors*

- NLRB had previously determined that the NLRA protected employees in the following circumstances:
  - Employee unleashed a barrage of profane ad hominem attacks against the owner of an employer during a meeting in which the employee also raised concerted complaints about compensation
  - Employee posted on social media a profane ad hominem attack against a manager, where the posting also promoted voting for union representation
  - Employee shouted racial slurs while picketing.
- In all three cases, NLRB found that an employer violated NLRA by discharging employee. Board assumed that the Section 7 protections and abusive conduct were analytically inseparable.

## Prior to *General Motors*

- Setting-specific standards
  - Board presumed that discipline based on abusive conduct in the course of Section 7 activity violates Section 8(a)(3) and (1) (or, when no union activity is involved, just Section 8(a)(1)) unless the Board determines, under one of its setting-specific standards, that the abusive conduct lost the employee the protection of the Act.
    - Outbursts to management in the workplace: *Atlantic Steel* test: (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice.
    - Social media posts and most cases involving conversations among employees in the workplace: totality of the circumstances.
    - Picket-line conduct: *Clear Pine Moldings* standard: whether, under all of the circumstances, non-strikers reasonably would have been coerced or intimidated by the abusive conduct.
- These standards have not led to predictable, equitable results, and at times have conflicted with employers' obligations under federal, state, and local antidiscrimination laws.

# NLRA

- New standard for cases involving abusive conduct
  - *Wright Line* Standard
    - General Counsel must make an initial showing that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity.
    - If the General Counsel has made his initial case, the burden of persuasion shifts to the employer to prove it would have taken the same action even in the absence of the Section 7 activity.
    - If the evidence as a whole establishes that the reasons given for the employer's action are pretextual, then the employer fails by definition to show that it would have taken the same action for those reasons.
- This standard is similar to burden-shifting approaches in analysis of discrimination claims.
- New standard widely believed to make it easier to discipline and terminate employees for abusive conduct.

# NLRA

- Application of the NLRA depends upon whether the employee is engaged in protected concerted activity.
  - Employees critical on social media of employer for not making Juneteenth a paid holiday.
    - What if the employee was acting alone?
    - What if employee includes abusive or offensive language in the post?
  - Employee comes to work wearing a Black Lives Matter pin or Make America Great Again hat, and other employee complains of the conduct. Employees engage in a heated exchange that disrupts the workplace.
    - What if employee is raising issue on behalf of other employees?
    - Regulation of uniforms?
    - Is the employer's policy equally enforced?

# **Social Media and the Enforcement of Employer Policies**

# Social Media

- Particularly given current events, employers need to be careful and deliberate when deciding whether and how to discipline an employee for offensive social media posts.
- Employers must weigh protections under the NLRA, discrimination laws, and state laws prohibiting adverse employment action for political speech.
- Nevertheless, employers maintain broad discretion to discipline employees for comments made on social media, as long as policies are applied in a nondiscriminatory way.

**Back to the NLRA!**

# NLRA and Social Media Posts

- Both unionized and nonunionized employers must ensure that they comply with the NLRA when developing and implementing policies.
- The NLRB scrutinizes social media policies, especially those that may be perceived as discouraging employees from discussing terms and conditions of employment with fellow employees and third parties or otherwise infringing on their Section 7 rights.

# Social Media

- To be concerted activity, the NLRB typically reviews social media posts or other electronic messages for substantial evidence that the posts or messages:
  - Concerned employment terms and conditions.
  - Were intended for or in response to a coworker's post or message.
- Social media posts are unlikely to be considered concerted activity if they contain only:
  - Unspecified criticisms about the employee's employer.
  - Unspecified comments about a union.
  - An unspecified response to a work-related post of another unidentified person who cannot be confirmed to be a coworker.
- *In re: World Color (USA) Corp.*, 360 NLRB 227 (2014)
- The keys in determining whether the NLRA protects a social media post are: (i) intention to be in concert with other employees, or (ii) concerns terms and conditions of employment!

# Social Media

- Types of posts that may warrant disciplinary action or termination:
  - Hate speech of any kind regarding any protected class.
  - Speech that is severe enough to constitute a hostile work environment.
  - Threats to employee health and safety.
  - Speech that damages the company's clients, customers, or community at large.
- General rule of thumb: if a statement made inside the workplace would justify discipline, it likely would justify discipline if expressed outside the workplace.

# Social Media

- *Ellis v. Bank of New York Mellon Corp.*, 2020 U.S. Dist. LEXIS 88567 (W.D. Pa. May 20, 2020); *aff'd* 837 Fed. Appx. 940 (3rd Cir. 2021)
  - Plaintiff comments on local news story about a councilman who had been arrested for driving a car through a crowd of demonstrators protesting the death of a Black man who was shot by local police.
  - “Total BS. He should have taken a bus to plow thru [sic].”
- After termination for violation of bank’s social media policy, Plaintiff claims reverse race discrimination under Title VII.
- Court grants summary judgment, finding that the adverse employment action did not occur under circumstances that could give rise to an inference of unlawful discrimination.

# Social Media

- Employers can be held liable for things employees say online
  - *Roy v. Correct Care Solutions, LLC, et al.*, 914 F.3d 52 (1<sup>st</sup> Cir. 2019) (ruling reasonable jury could infer hostile work environment from Facebook messages sent by correctional officer to plaintiff regarding rumors at work.)
  - *Fisher v. Mermaid Manor Home for Adults, LLC*, 192 F.Supp.3d 323 (E.D.N.Y. June 29, 2016) (ruling that a reasonable jury could find that an Instagram post, comparing the Plaintiff to a fictional chimpanzee from the Planet of the Apes movie, created a hostile work environment.)

# Social Media

- Employers should be reminded to update and/or review their social media policies.
- Key components:
  - Compliance with related policies and agreements
    - Includes other policies, including EEO, collective bargaining, and employment contracts.
    - Be sure to specifically list the most important employer policies.
  - Restricting personal use of social media?
    - *Ceasers Entm't d/b/a Rio All-Suites Hotel & Casino*, 368 NLRB No. 143 (Dec. 16, 2019) (overruling prior decision in *Purple Communications, Inc.*, 361 NLRVB 1050 (2014) which held employees who are provided access to employer email system have a right to use systems to communicate about union matters and terms and conditions of employment during nonworking time.)
    - Rare exception where use of system is only reasonable way for employees to engage in protected Section 7 communications with each other during nonworking time in the workday.
  - Business use of Social Media
    - Should be very specific to guide how employers would like to be branded.
  - Reminder of employee's obligation to use social media responsibly.

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Thank **you.**