

Can you terminate for off-the-clock activities?

When can you legally terminate a worker for what he or she does on their own time? The answer is an unsatisfying, "It depends."

Assuming it is an at-will employee, who can be fired for any legal, nondiscriminatory reason, the matter comes down to what sounds like a labor-relations question: Is the employee criticizing working conditions?

If so, the behavior could be interpreted as engaging in so-called concerted activity to improve working conditions. And that means punishing the employee for off-duty behavior could violate the National Labor Relations Act (NLRA).

That's true even if the employee isn't a union member.

Here's an example. Recently, an energy company employee in Pennsylvania, on his own time, approached a group of anti-fracking protesters at a site unaffiliated with his employer. He was caught on video unleashing a barrage of racial slurs—complete with monkey noises—at a black protester.

The man's employer fired him for breaking company rules against hate speech.

That's an appropriate discipline for off-duty activity and likely will stand up to a legal challenge should the man decide to sue.

On the other hand, when an employee recently hurled a racially hostile name at his supervisor, the National Labor Relations Board said his firing violated the NLRA.

Reason: His speech, however vile, was part of concerted activity designed to improve working conditions—even though a company rule prohibited racial slurs.

Another recent case involved a Florida college professor of media studies who maintains a private blog claiming that mass shootings have been hoaxes. For example, he believes the government faked the 2012 killings at Sandy Hook Elementary School in Connecticut to justify restricting gun ownership.

The college fired him earlier this month for insubordination—he had not reported the blog to his employer as required by college rules.

Because the blog appears unrelated to his job as a professor or working conditions at the college, that termination likely will stand.

Advice: When in doubt, consult your attorney before terminating an employee for any off-the-clock actions.