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BLOGS

Archives;Discipline;Discrimination;Harassment;Hiring & Firing;Social Media & Technology;Workplace Policies

What Would You Do With Donald Sterling?

By now, you've probably heard of the audio recording of racist statements by L.A. Clippers owner Donald Sterling that has gone viral. Yesterday, the NBA commissioner announced that Sterling will be banned for life from the NBA and fined \$2.5 million, the highest fine permitted by the NBAs constitution and bylaws. It also appears that Sterling stands to lose his ownership stake in the Clippers.

Sterling's statements were recorded by a former girlfriend during a conversation in Sterling's home and later leaked to TMZ. There has been near-universal support for the NBAs swift and decisive action against Sterling, but some have raised concerns about the fact that Sterling's statements were made in a private conversation and that the recording of his comments may have been surreptitious and unlawful.

Unlike the standard employer-employee relationship, the NBAs relationship with Donald Sterling as the Clippers owner is governed by the NBAs constitution and bylaws. These documents appear to permit the NBA to take yesterdays actions against Sterling. But what about in the employment world? What would you do if your company's owner or a key employee was caught on tape making racially discriminatory remarks?

An employer in this situation would need to strike the right balance between its legal obligations to respect employee privacy on the one hand and, on the other hand, to provide a workplace free of discrimination and harassment. In balancing these issues, its important to remember that an employer can still be liable for discriminatory and harassing conduct even if it takes place away from the office. In addition, if the bad actor is an owner or executive, it will be difficult to separate out their personal comments or actions from the effect that activity has on the company's reputation and the work environment. When it comes to a Sterling type situation, my two cents is that an employer is probably relatively safe in disciplining or terminating a key employee for this conduct so long as the employer played no role in any secret tape recording. In a different high profile incident, this is the approach that an employer took last year after a its executive was charged with slapping a toddler on a plane and making a racial slur.

Keep in mind, though, that the way the company acquires information about an employees comments and activities matters. The law on secret tape recordings varies state to state, with some states requiring the consent of all participants. So, before acting, make sure you know whether your company played a role in any secret recording and what laws apply. Also, federal courts have held that that the federal Stored Communications Act protects non-public online posts, such as Facebook wall posts. If an employee walks in to Human Resources with a print-out of a racially charged or other concerning post, the company should be able to review and follow up on the posts. If the company improperly accesses an employees non-public Facebook posts, however such as by falsely posing as a friend or coercing someone to permit access to the posts this could run afoul of the Stored Communications Act. So, check your facts and the law, and be careful out there!