

BY ERIN MULVANEY PUBLISHED: JUL 25, 2017

Donald Trump's Twitter Bashing of Jeff Sessions Raises Hostile Work Questions



PARIS, FRANCE – JULY 13, 2017 : The President of United States of America Donald Trump at the Elysee Palace for an extended interview with the french President.

“Time will tell” whether “beleaguered” Sessions stays on the job, Trump says.

President Donald Trump has not been discreet in expressing his dissatisfaction with certain key members on his team. Recent taunts blasted to his millions of followers on Twitter about Jeff Sessions essentially equates to a public—and very negative—performance review.

Trump called the U.S. attorney general “[beleaguered](#)” and “[weak](#)” and questioned why [he hasn’t launched investigations](#) into “leaks” and into alleged crimes by Hillary Clinton, among other public scoldings in speeches and on social media.

It appears Trump could be carrying out [a deliberate campaign to pressure Sessions to quit](#), amid the mounting scrutiny and public attention from an investigation into his campaign’s ties with Russia. Asked on Tuesday whether Sessions would remain attorney general, [Trump said](#): “We will see what happens. Time will tell.”

[The backlash against Sessions](#) flared up when [Trump told The New York Times](#) he would not have picked Sessions for attorney general if he knew he would step aside from overseeing the Russia investigation.

How would this public scolding fly in the corporate world? When does a boss cross a line in publicly tweeting about a subordinate’s performance? What happens when an employer gives a performance review via social media?

Such behavior could be legally problematic and, at a minimum, bad business practice, labor and management experts said. Depending on the circumstances, sharing a performance review or bullying a subordinate could lead to harassment, hostile workplace, defamation or invasion of privacy claims.

Harassment, as defined by the [U.S. Equal Employment Opportunity Commission](#), generally applies to a protected status, such as race, sex, religion or other such issues protected under federal and state discrimination laws. No specific federal law defines a hostile work environment.

The use of social media in the workplace to lodge complaints [has become a growing area of interest for employment law experts](#) and [the EEOC](#). Laws governing speech on social media, both for employees and employers, is evolving and employers could see increased liability with discrimination claims, according to a paper [prepared by a team from Reed Smith](#) for the U.S. Chamber Institute for Legal Reform in 2014.

Generally, social media use is treated like any other communication under the law, said Felicia Davis, a Paul Hastings associate in Los Angeles who focuses on employment matters.

“We haven’t developed a body of law regarding social media,” Davis said Tuesday. “Generally there is no separate cause of action for just being a nasty boss or creating a bad work environment for everyone.” She added, “I think one of the problems is that the law evolves so much more slowly than technology.”

Davis said such behavior is only actionable if the comments speak to a protected characteristic under federal or local laws. A suggestion from Trump the CEO that Sessions was “too old” to do well in his job—Sessions is 70, for the record—could be a problem. Just because a boss can say something doesn’t necessarily mean he or she should say it. Davis said:

“Publicly talking about a subordinate is not a good business practice. Even if it does not create a legal liability, it may not be very professional or a sign of good leadership and could create morale problems.”

She also said an employee could consider a defamation claim if a boss said something knowingly untrue. What the boss said, however, would have to be proven false.

In the private sector, Trump’s behavior could be tantamount to “constructive discharge” under certain circumstances, said Jay Holland, chairman of Joseph Greenwald & Laake’s labor, employment and whistleblower practice.

This issue comes up when an employer makes working conditions so intolerable that a subordinate quits—essentially a termination—because of the hostile work environment. This type of discharge comes up regularly in private-sector employment litigation, Holland said.

Holland said it does not appear this scenario is applicable to the Trump and Sessions social media conflict because there is no discriminatory language or proof of retaliation for protected activity. There’s isn’t a lot known—publicly at least—about the communication between Sessions and Trump.

Trump's social media behavior—if he were a CEO—would raise other legal questions.

“It could still be defamatory or an invasion of privacy,” Holland said. “The employer in that scenario could be the subject of tort claims.”

An employer has a qualified privilege to share performance reviews with people who need to know about performance within the company. Yet, posting something publicly about an employee negates that privilege and could qualify as an invasion of privacy.

Holland said he worked on a nonpublic case where an employer shared a performance review outside the organization with individuals in the larger community. That disclosure resulted in defamation claims.

“It is becoming more and more of a problem,” he said. “Across the board you do see employees posting comments, sometimes publicly, sometimes not. As to both employers and employees, it is an area that is rife with risk and ongoing issues.”