

TUESDAY, MAY 18, 2021

PERSPECTIVE

## Investigating racial bias complaints in the age of ‘cancel culture’

By Daphne Pierre Bishop

For nearly a decade, there has been a groundswell of cultural and social movements seeking to rectify racial injustice, largely fueled by social media. The Black Lives Matter movement started in 2013 after George Zimmerman, a self-proclaimed neighborhood watchman, was acquitted for killing Trayvon Martin, an unarmed Black teenager, in Florida. BLM gained broad support in 2020, after video of a Minnesota police officer killing an unarmed Black man named George Floyd became public. According to a Pew Research Center survey conducted in June 2020, 67% of adults in the U.S. expressed support for the BLM movement.

Increased awareness of societal racial injustices led to increased opposition to perceived racism and calls for accountability. “Canceling” was a term coined and popularized on social media as a public call for accountability, in the form of boycotting of individuals and/or entities for allegedly engaging in behaviors or expressing opinions in conflict with, or not supportive of, the cause of racial justice. These calls for accountability resulted in highly publicized firings — including of employees who were not previously public figures — in industries such as entertainment, sports and finance. At the same time, a counter-movement against “cancelling” grew amid concerns that people were getting punished unfairly by what they referred to as a “cancel culture” for expressing unpopular opinions or for not supporting social movements such as BLM. Indeed, by September 2020, Pew Research

Center found that overall support for BLM had decreased to 55%, suggesting there has been some backlash against the movement.

Concerns about cancel culture have spilled over into workplaces and can potentially derail employer responses to employee complaints about racial misconduct. As social awareness of issues impacting underrepresented groups has increased, some employees have felt empowered to voice concerns about discrimination and/or harassment at work. However, employers and investigators should be aware that increased attention to these issues has also created a culture of fear for some employees who feel afraid that saying the wrong thing will get them fired from their jobs. Employers and investigators must endeavor to find a balance between impartially investigating concerns raised by employees and treating employees who are accused of misconduct fairly, as discussed below. Here are some ways that employers and investigators can meet these challenges:

*Take employee complaints seriously, but make sure any punishment that is imposed fits the crime.*

As the workforce becomes more aware of racial justice issues, employees are more likely to raise complaints about “microaggressions,” relatively minor acts committed against racial minorities that do not typically involve egregious acts of overt racial discrimination or harassment. Microaggressions can be unspoken, and are often perpetrated without awareness of the perpetrator. Indeed, the perpetrator does not even have to have acted with bad or malicious intent.

Employers should not ignore microaggressions, as they can

rise to the level of unlawful discrimination or harassment and are harmful to employee morale. At the same time, employers should resist the urge to rush to judgment against perpetrators of alleged microaggressions. Rather, the decision to discipline an employee should be made after a thorough investigation has been completed. When investigating microaggressions, investigators should not try to guess or make assumptions about whether specific actions were taken or comments were made due to racial bias. Rather, allegations of microaggressions should be methodically and thoroughly investigated like every other complaint of race discrimination or harassment. Comparative evidence is critical in these investigations: Are there similarly situated employees of a different race than the complaining party? How are they treated?

In instances when allegations have been substantiated, any discipline that is imposed should be commensurate with the employee misconduct and employer practices of handling comparable violations. Termination is not the only option; rather, employers can impose a variety of consequences, ranging from suspension without pay; education, training and coaching; demotion; written warning; and loss of bonus or pay decreases (if legally permissible). It is also advisable to be as transparent as possible about the investigation process, so that employees can feel assured that any discipline imposed by employers is reasonable under the circumstances.

*Beware of investigating off-duty conduct or protected political expression.*

Employees who are alleged to have engaged in conduct in violation of the employer’s dis-

crimination or harassment policy may feel that they are the subject of “cancel culture” because they are being investigated for what they consider to be an expression of personal opinion. When making the decision about whether to launch an investigation, employers should carefully consider whether the alleged misconduct violates company policies and if the alleged conduct is work-related. For example, if an employee complains that they feel offended because a co-worker has posted



**Daphne Pierre Bishop, AWI-CH,** is a Partner & Chair of the Internal Investigations Practice Group at CDF Labor Law LLP, a California-based labor and employment law firm. Daphne’s practice focuses on providing internal investigation services as a neutral third-party investigator or a strategic advisor. She can be reached at [dbishop@cdflaborlaw.com](mailto:dbishop@cdflaborlaw.com) or (213) 612-6300.



#AllLivesMatter (as opposed to #BLM) on their personal social media account, that would not likely violate employer policies. Under those circumstances, an investigation would not be necessary and could even invoke a complaint by the alleged wrongdoer that they are being retaliated against for engaging in lawful protected political speech.

Be sensitive to changes in language regarding race.

Employers and investigators who investigate race-related complaints should be sensitive to shifts in how we talk about race. Some employees are increasingly expecting their employers to be “woke” – which means having an awareness of social and political issues, especially racial and

social justice. One of the easiest ways for an investigator to lose credibility with some witnesses is to use outdated language or concepts. There are a plethora of online resources with which investigators should familiarize themselves to help avoid missteps. On the other hand, investigators should be sensitive to the fact that not everyone

is familiar and comfortable with the changing cultural landscape, and some employees may respond to these cultural changes with fear and defensiveness. To that end, investigators should be adept at having difficult conversations and able to approach these topics with an appropriate level of empathy and curiosity. ■