

Employment

Caution Advised in Disciplining Workers for Political Expression

Employers can discipline employees for controversial political expression outside of work, but they need to be aware of potential liabilities, attorneys say.

The subject is chronically in the news in today's supercharged political climate, most recently due to a widely reported incident in which a woman raised her middle finger at President Donald Trump's motorcade, saw a photo of the incident spread rapidly online, confessed to her government contractor employer in Virginia that she was the person in the picture, and lost her job.

Private employers have wide latitude to act in such cases, Lawrence Peikes, a partner at Wiggin and Dana LLP in Stamford, Conn., told Bloomberg Law in a Nov. 7 email. While free speech claims do arise from time to time in the public sector, he said, "because the First Amendment does not apply to private employers, a discharge based on purely political speech not involving some other form of protected activity would not be actionable."

In an at-will employment state such as Virginia, an employer is within its rights to fire an employee for conduct such as the recent gesturing incident, Rachel Powitzky Steely, a partner in the Houston office of the law firm Gardere and co-chair of its labor and employment practice, told Bloomberg Law Nov. 8. However, she added that she would ask whether the contractor was following its own policy.

The fired employee's reported action is "akin to verbally yelling at the president" an expletive, San Francisco-based management-side employment attorney Allen Kato told Bloomberg Law in a Nov. 7 email. "At best I would consider this borderline 'political' activity." But even if one considers these actions political, he said, they "should not be considered protected activity in my view. If unprotected, this individual's termination may be lawful."

State-Level Protections for Employees "More troubling to me," Kato said, was the reported firing of a person who participated in the notorious white nationalist march in Charlottesville, Va., in August.

The marcher lost his job at a Berkeley, Calif., restaurant shortly after the event, although the restaurant told the media he voluntarily quit. The worker had "denied engaging in any violence, and was simply exercising his

free speech right to march in support of conservative political principles," Kato said.

If this was true, and the person was fired, he said, the marcher "would have engaged in protected activity under California laws," and thus "the employer may be found liable for a wrongful termination in violation of California public policy that protects an employee's right to engage in political activity." Engaging in or espousing violence, on the other hand, "should not be protected," he said.

Peikes said Connecticut law also "essentially extends First Amendment free speech protections to the private workplace."

"Consequently, employers in Connecticut are prohibited from discharging employees for speaking out on a matter of public concern in the capacity of a citizen," he said. "We certainly see these cases from time to time, although I've not heard of any suits alleging wrongful discharge under the statute for anti-Trump speech."

Aaron Goldstein, a labor and employment partner at the international law firm Dorsey & Whitney, told Bloomberg Law in a Nov. 7 email that several states have laws that prohibit employers from firing workers "for lawful off-duty conduct."

"But most of these laws have exceptions allowing employers to fire employees for lawful activities that conflict with the employer's business interests," he said.

Beware Labor, Discrimination Laws Another area of concern for employers, attorneys say, is the National Labor Relations Act's protections for employees who are engaged in concerted activity to better their working conditions. The National Labor Relations Board has repeatedly found that employees' social media posts, even vulgarly worded ones, fall into this category.

Goldstein cited the NLRB's *Chipotle Services LLC d/b/a Chipotle Mexican Grill* decision in August 2016, in which, he said, the board "ruled that employee policies prohibiting employees from discussing politics in the workplace violate the NLRA because such policies could apply to discussions of workplace issues like wages."

On top of that, he said, "Employers also may not discriminate against employees on the basis of their race, gender, national origin, religion, and several other" classes protected by federal civil rights law. "For example, if an African American employee were to be fired for expressing support for the Black Lives Matter movement, that employee could have a strong discrimination claim against the employer."

Social Media Policy Recommended Cautions notwithstanding, employers should have a policy on disciplining employees who misbehave on social media, even while off duty, in ways that could constitute harassment or damage the employer's customer relations, Steely of Gardere said.

"People truly believe they have an expectation of privacy on their own time," even though social media is

publicly seen, she said. Employers should train their employees to understand why they can't engage in these online behaviors, she said.

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