THE COST OF FREE SPEECH

CAN EMPLOYERS FIRE EMPLOYEES FOR UNWANTED 'SPEECH'?

by David J. Oberly

Kneeling during the national anthem. Charlottesville. James Damore. Nowadays, you can't go 15 minutes watching TV or perusing the Internet without hearing about a new story relating to the exercise of "free speech" with some controversial overtone. Of particular importance, a new trend sweeping the nation is "outing" those who exercise their right to speak their mind on social media for the purpose of influencing and persuading employers of those individuals to terminate the employee's employment in response. Naturally, this issue has sparked the question: can an employer terminate an employee for his or her "exercise of free speech" on subjects that are controversial or not condoned by the organization? The answer to that question is potentially different — and almost certainly more complicated — than you may think.

The First Amendment

A lot of chatter today concerns employees' "First Amendment right to free speech." As Oliver Wendell Holmes Jr. once said: "An employee may have a constitutional right to talk politics, but he has no constitutional right to be employed." Stated differently, while employees have a right to say what's on their mind, those employees don't have a right to keep their jobs after they've announced or exercised their controversial opinions to the public at large.

Many people mistakenly believe that the First Amendment affords comprehensive, across-the-board protection to employees in connection with the exercise of any type of speech, whenever and wherever they want, and no matter how inappropriate or offensive those statements or opinions may be. This argument is misguided, as the First Amendment only protects individuals from *government* suppression of free speech. Conversely, however, the First Amendment affords private individuals essentially no protection from suffering the consequences imposed by other *private* individuals or organizations in connection with their exercise of speech that is inappropriate or offensive — such as hate speech — where the government is not involved.

Translated to the employment context, the First Amendment does not provide employees with protection from discipline taken by their private sector employers in response to an employee's unappreciated expression of public speech. This is especially true if the employee is employed in an "at-will" employment state. As

a general rule, at-will employment significantly limits the rights of private-sector employees while they are on the clock. The parties to an at-will employment relationship can terminate that employment relationship at any time, for any reasons or for no reason at all, as long as those reasons are not contrary to law or any of the specifically enumerated public-policy exceptions in a given state. Critically, among the reasons an employer may permissibly choose to terminate an at-will employee is the employer's dissatisfaction over the manner in which an employee publicly expresses his or her opinions.

Furthermore, while the First Amendment does afford some degree of protection to certain public-sector employees, the protection is a narrow one and extends only to "matters of public concern." Thus, while public employees may be shielded from retaliatory discipline in connection with speech concerning political or social issues of the day, personal grievances or other forms of non-political speech typically fall outside the scope of First Amendment protection. Moreover, even if a public employee focuses his or her speech on an issue of public importance, such speech is nonetheless excluded from First Amendment protection if the speech possesses the potential to disrupt the operational efficiency of the speaker's public employer or if the individual is speaking pursuant to his or her official duties (and thus not as a citizen for First Amendment purposes).

State Law Protections

While the First Amendment affords no safeguards whatsoever in connection with the speech of private employees, the state law of certain jurisdictions may provide some degree of protection to those who work in the private sector. In this respect, some states have enacted statutes that prohibit employers from disciplining employees for legal, off-the-clock speech that does not interfere with the employer's business-related interests. However, it is often easy for an employer to establish interference with the company's business operations in connection with unwanted speech in those jurisdictions that maintain this particular type of statutory protection. In order to take adverse employment action against employees in these jurisdictions, employers must merely demonstrate a nexus between the employee's off-the-clock activity and the employer's business interests or operations. Other states have enacted narrower prohibitions that bar adverse employment actions from being taken against employees in connection with their engagement in political activities. Under these laws — and absent an exception — termination of an employee due to his or her lawful, off-duty politically-motivated speech is illegal. However, many states offer employees neither type of statutory protection. Moreover, while these laws protect lawful, off-duty speech, these protections do not extend to unlawful activity, such as property damage or physical violence associated with protest-related events.

In addition, even in states where such laws have been enacted, employers may still be able to lawfully terminate an employee for unwanted speech when the employee's speech violates company policy. For example, a company may validly point to a violation of its non-harassment policy as the basis for firing an employee when the employee is observed chanting offensive slogans or epithets at a public protest event, as non-harassment policies may extend beyond workplace conduct to off-site activity if such activity creates a disruption in the workplace environment in violation of company policy.

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In Ohio, private employees are not afforded any statutory protections against discipline or termination by an employer who disapproves of an employee's speech (or other forms of expression). Rather, Ohio is an at-will state, which means that employers can fire employees for any reason, or no reason at all, so long as it is not expressly prohibited by law. With that said, Ohio courts have found that a public employee cannot be discharged for speaking on matters of public concern, unless the employee's interest in commenting upon issues of public concern is outweighed by the employer's interest in promoting the efficiency of the public services it performs through its workers.

The National Labor Relations Act

In addition to state law, the federal National Labor Relations Act (NLRA) may also afford private employees some degree of protection against adverse employment-related actions stemming from an employee's controversial or unappreciated speech. Workplace speech is a topic of interest to the National Labor Relations Board, which frequently addresses free speech issues in the context of social media postings.

Under Section 7 of the NLRA, private employees are afforded the right to engage in "concerted activities" for the purpose of "mutual aid or protection." Importantly, this right extends both to unionized workers, as well as non-unionized employees in the private sector. Accordingly, an employer who disciplines or terminates a worker for speech that can be construed as concerted activity will ordinarily run afoul of Section 7. In addition, any employer policy that prohibits workers from discussing the terms and conditions of their employment (such as wages, hours, or working conditions)—or which would dissuade or chill non-supervisory workers from doing so—would also violate Section 7.

Critically, Section 7 affords protection to employees only as it relates to participation in concerted activity for "mutual aid or protection." The term "mutual aid or protection," however, encompasses a remarkably broad array of employee activity. For example, to fall within the scope of this term, workers do not necessarily have to engage in activity that supports fellow employees, but rather merely activity in the furtherance of the interests of employees generally. Accord-

ingly, activity such as participation in a protest which focuses on minimum wage laws or immigration bans would most likely come within the scope of concerted activity, making it a violation of Section 7 to discipline or terminate an employee for taking part in such an event. Conversely, the exercise of speech on matters that might fall under the umbrella of "hate speech" would not be afforded protection under Section 7, and employers may freely discipline or fire workers who are found to have been responsible for such speech — such as overt utterances of white supremacy — without having to worry about running afoul of Section 7. With that said, the NLRB has taken an extremely expansive view of protected activity, and as such, it is not outside the realm of possibility that similar statements might be afforded Section 7 protection if they could arguably be tied to speech regarding certain terms or conditions of employment, such as the relative opportunities afforded between different groups of workers.

The Final Word

Contrary to popular belief, what you say both at work and away from work may very well have a significant impact on your ability to remain gainfully employed. While the First Amendment protects employees' right to speak their minds, the First Amendment does *not* protect workers from suffering the natural and foreseeable consequences of being disciplined or terminated for undesirable or unwanted speech. Importantly, private employers are not required to allow employees to voice their beliefs or opinions publicly if the company or other employees find that speech offensive. While state law may afford employees some degree of protection, these statutes vary significantly in scope across jurisdictions, with many states providing no statutory protection whatsoever in connection with the exercise of free speech by private sector workers. Similarly, while Section 7 of the NLRA may afford some degree of protection under certain circumstances, that protection only arise for speech or activities "for the mutual aid and benefit" of other employees, which usually eliminates overtly racist statements and other non-employment-related exercises of free speech from protection. Ultimately, at the end of the day, private employers have a right to hold employees accountable for the viewpoints they espouse and — although employees generally maintain the right to say what they feel and post on social media as they please — workers must be prepared for the consequences if their speech touches on matters that are controversial or not condoned by their employers, even if such speech or other expression is made outside of the workplace environment.

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