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Gregory A. Hearing

Birds, Knees and Tweets: Understanding When Employers May Limit Employee Speech When Charged Speech is the Norm

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Notes:

Please silence your cell phones.

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Agenda

- Birds, Knees and Tweets
- In the News
- Scope of the First Amendment
- Instructive Social Media cases
- Common Employee Misconceptions
- Private Sector Employers
- National Labor Relations Act
- Whistleblower Statutes
- Statutes Prohibiting Retaliation
- Conclusion

BIRDS

Briskman v. Akima LLC

Briskman v. Akima LLC

- Facts
  - Juli Briskman made national news in October 2017 when a picture of her riding a bicycle and holding up her middle finger as President Trump's motorcade passed by went viral
  - When Ms. Briskman returned to work the following week, Akima LLC, her employer and a government contractor, terminated Ms. Briskman's employment
    - Akima cited its social media policy on obscenity as Ms. Briskman shared the image on Facebook and Twitter
    - Additionally, Akima feared blowback from the Trump administration
  - On April 4, 2018, Ms. Briskman filed suit in Fairfax County Circuit Court, in Virginia

Briskman v. Akima LLC

- Briskman's complaint alleged a claim for wrongful termination, arguing that Akima terminated Briskman's employment because it feared repercussions from the Trump administration
- Akima argued in its motion to dismiss and at the hearing on the motion that, as a private employer, Akima could not violate Briskman's First Amendment rights
  - Moreover, Akima argued that politics were not a factor in its decision and Akima would have terminated Briskman for the same behavior toward President Obama
  - Furthermore, they argued that the termination did not violate the public policy exception to Virginia's at-will employment statute, even though Akima is a federal contractor, as there are no facts to support that the government coerced Akima to do anything
    - Briskman did not plead any facts to support government action
- Siding with Akima, the Judge dismissed the wrongful termination claim

KNEES

NFL National Anthem Protests

NFL National Anthem Protests

- For teams such as the Dallas Cowboys, the negative fan response required action in order to prevent further economic loss
- At the start of the 2017 season, the Dallas Cowboys' owner, Jerry Jones, told players that they may no longer take a knee during the national anthem and threatened to bench any player who did so
- Mr. Jones' actions prompted Local 100 of the United Labor Unions to file an unfair labor practice charge against the Cowboys with the National Labor Relations Board
- The union claimed the threat to bench players chilled protected concerted activity
- Local 100 eventually withdrew the charge
    - Success for the union would have required a showing that the players were protesting the terms and conditions of employment
        - Not ongoing political and social issues

The NFL'S History of Prohibiting On-Field Speech

- In 2012, the NFL prohibited Tim Tebow from wearing John 3:16 on his eye-black
- In 2015, DeAngelo Williams fined for wearing "Find the Cure" eye-black for breast cancer awareness
- In 2015, the NFL fined William Gay for wearing purple cleats to show support for domestic violence awareness
- In 2016, the NFL prohibited Dallas Cowboys players from wearing a decal on their helmets honoring five police officers killed in the line of duty

http://www.espn.com/nfl/story/_/id/13991743/nfl-fines-pittsburgh-steelers-deangelo-williams-william-gay-uniform-violations
http://www.jacksonville.com/sports/college/florida-gators/2010-04-17/story/message-out-eye-black-college-football-and-nfl
https://www.cbssports.com/nfl/news/nfl-wont-let-cowboys-wear-decals-supporting-dallas-police-in-regular-season/

TWEETS


Donald J. Trump
@realDonaldTrump
Follow
Meryl Streep, one of the most over-rated actresses in Hollywood, doesn't know me but attacked last night at the Golden Globes. She is a.....
RETWEETS
37,861
LIKES
124,285
3:27 AM - 9 Jan 2017


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@realDonaldTrump
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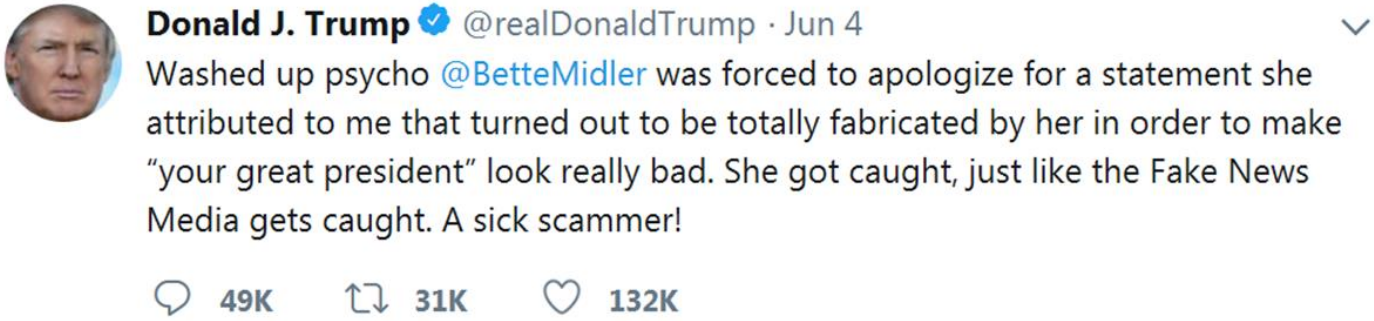
The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!
RETWEETS
8,836
LIKES
34,707
9:12 AM - 4 Feb 2017


Donald J. Trump @realDonaldTrump · Jun 4
Washed up psycho @BetteMidler was forced to apologize for a statement she attributed to me that turned out to be totally fabricated by her in order to make "your great president" look really bad. She got caught, just like the Fake News Media gets caught. A sick scammer!
49K
31K
132K

Donald J. Trump @realDonaldTrump · Jun 3

....Kahn reminds me very much of our very dumb and incompetent Mayor of NYC, de Blasio, who has also done a terrible job - only half his height. In any event, I look forward to being a great friend to the United Kingdom, and am looking very much forward to my visit. Landing now!

25K 31K 151K

Show this thread

Knight First Amendment Institute at Columbia University v. Trump

- Issue was whether President Trump's Twitter account was a public forum and, if so, whether blocking users from his account based on their expressed political views violated their First Amendment right to free speech
- The United States District Court for the Southern District of New York granted Plaintiff's motion for summary judgment finding that the Twitter account was a public forum and blocking users based on their political views amounted to unconstitutional viewpoint discrimination under the First Amendment and violated the organization's right to read replies of blocked users
- In particular, the Court held that President Trump could not silence Twitter users who commented on his Tweets simply because he disagreed with their viewpoints
- President Trump appealed the trial court's order to the 2nd Circuit which affirmed the lower court decision
- President Trump appealed but the appeal was later dismissed as moot

Current Climate of Extreme Political Polarization and Impassioned Social Movements

- Speech issues have permeated our news over the past two years due to the current political and social climate in the U.S.
- Individuals often express their speech through extreme or conventional methods
- The extreme, and often times illegal, methods of expression are the most news worthy
- 2020 summer riots
- January 6, 2021, Capitol riot

- Some employees now feel emboldened to express political and social speech when they may have otherwise not done so in the past
- The presence of masks in public and work environments due to COVID-19 allows for a novel method of expression
- Sometimes employers permit political and social content on masks, sometimes they do not

- The anonymity which masks provide allows individuals to feel more comfortable expressing their opinions even in the workplace where they are recognized by co-workers

Recent Instances of Employers Limiting Expression

- Whole Foods prohibited employees from wearing Black Lives Matter facemasks and disciplined employees who violated its policy
- The employees brought a class action lawsuit against Whole Foods alleging race based discrimination and retaliation under Title VII
- Whole Foods filed a motion to dismiss the claims for failure to state a claim and the U.S. District Court for the District of Massachusetts dismissed the lawsuit
- The employees appealed the trial court's ruling to the U.S. Court of Appeals for the First Circuit where the Court recently ruled that Whole Foods' sudden enforcement of its previously unenforced dress code did not constitute race based discrimination under Title VII
- Similar lawsuits recently brought against other private employers have also been unsuccessful

Recent Instances of Employers Limiting Expression

- A New Jersey town recently fired a police officer for posting on Facebook that Black Lives Matter protesters are "terrorists"
- The town suspended another police officer who responded to the Facebook post
- The Kissimmee Police Department, which serves Kissimmee, Florida, terminated a police officer for Facebook posts regarding the January 6, 2021, Capitol riot and the BLM movement
- The officer posted the following:
  - "The silent majority will rise!! Day one of the Revolutionary War!! Hang on, it's only just begun."
  - "I'm selling my white privilege card ... it hasn't done a damn thing for me. No inheritance, no free college, no free food, no free housing ect. [sic] I may even be willing to do an even trade for a race card. Those seem way more useful and way more widely accepted."

Recent Instances of Employers Limiting Expression

- A Miami police officer violated Department policy when he wore a Trump 2020 face mask
- The mask read "TRUMP 2020 NO MORE BULLSHIT"
- Conduct exacerbated by fact that the officer wore the mask at a polling place during early voting for the 2020 presidential election
- The Department disciplined the officer with a written reprimand
- It does not appear that the officer filed a grievance or lawsuit in response to the discipline

Recent Instance of Employers Limiting Expression

- In August 2021, this same officer was photographed displaying what appeared to be a hand signal used by white nationalists
- The photo was posted on Twitter and then subsequently removed when someone noticed the hand signal
- The Department removed the officer from duty pending an internal investigation
- The progress and/or outcome of the investigation has not been made public at this time

- Public employers who allow some political or social expression should be prepared to allow the expression of opposing viewpoints
    - For instance, a public employer who allows employees to wear masks supporting a particular social or political viewpoint should also allow employees to express opposing viewpoints
- Recently, a federal court found that a port authority's rule against BLM masks violated the port authority employees' First Amendment free speech rights
    - The court considered the fact that the port authority had a history of allowing its employees to wear various political and social buttons
    - Also, the court found that subsequent blanket prohibition of masks containing any form of messages was intended to prohibit BLM masks and actually infringed on employees' speech rights further than original ban of only BLM masks

- Other recent public employer disciplinary actions are not close calls when the employee's behavior is illegal

- For instance, two police officers with the Rocky Mountain Police Department in Virginia were terminated after their arrest for participating in the January 6, 2021, riot at the U.S. Capitol
  - They are not alone
  - Law enforcement officers and other government employees from across the country have been arrested for their involvement in the Capitol riot
  - Repercussions from their employers have followed, some opting to resign instead of facing termination

- On September 20, 2021, a former police officer in Houston, Texas pleaded guilty for his role in the Capitol riot
  - The officer previously resigned from the Houston Police Department once the Department commenced its investigation into a tip that he was at the Capitol on January 6, 2021

First Amendment Speech Protections

- The First Amendment protects against government infringement of free speech
- Provides protection at the federal, state, and local level
- Requires government action
- This protection is extended to public entities, including but not limited to, public school districts, police and fire departments, and government agencies
- Basically, the First Amendment extends to all public sector employers

Government Action

- The First Amendment protects against infringing government action
- If a private entity or person prohibits protected speech, without a nexus to government action, there is no violation of the First Amendment
- Must have either direct government action or close nexus to government action

- Example: a private security firm contracted with the government to provide security at a federal park

    - A security guard asking a visitor to leave because the visitor is wearing a political candidate's shirt is a violation of the First Amendment because the guard is acting on behalf of the government

Public Sector Employers

- Just because public sector employees' speech is protected by the First Amendment, this does not mean that such employees are free to say whatever they want whenever they want
- In determining whether a public employee's speech is entitled to constitutional protection, the court must first determine "**whether the employee spoke as a citizen on a matter of public concern**. If the answer is **no**, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006).

Public Sector Employers

- In Garcetti, the U.S. Supreme Court further explained that "when public employees make statements **pursuant to their official duties**, the employees are **not speaking as citizens** for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."
- Public sector employers may limit speech as citizens on matters of public concern when there is an "adequate justification" for treating an employee differently than other citizens

Case in Point:
Snipes v. Volusia County, 704 F. App'x 848 (11th Cir. 2017)

- Facts
  - The plaintiff, a police officer with the Beach Patrol in Volusia County, Florida, posted an insensitive comment regarding Trayvon Martin on social media
  - Additionally, Snipes sent racial and vulgar text messages to fellow officers the day after the Zimmerman verdict
  - Snipes' actions occurred while on-duty
  - Due to the racially charged nature of the speech, the proximity in time to the Zimmerman verdict, and the potential for rioting, Volusia County terminated Snipes' employment
  - Snipes filed suit in federal court claiming Volusia County violated his First Amendment right to free speech
  - The district court granted summary judgment in favor of Volusia County and Snipes appealed

Snipes v. Volusia County

- 11th Circuit
  - The 11th Circuit held that Volusia County had a legitimate interest in avoiding riots and protests
  - Volusia County's legitimate interest trumped Snipes' First Amendment rights
  - Therefore, Volusia County did not violate Snipes' First Amendment right to free speech when it terminated his employment

Alternative Case in Point:
Rankin v. McPherson, 483 U.S. 378 (1987)

- Facts
  - Upon learning of the assassination attempt on President Ronald Reagan, an administrative employee at the county Constable's office made the comment that "if they go for him again, I hope they get him"
  - The employee was not a sworn peace officer and the comment was made in a room not readily accessible to the public
  - However, the Constable terminated her employment after the employee confessed to making the comment
  - The terminated employee filed suit in federal court stating the Constable violated her First Amendment right to free speech

Rankin v. McPherson

- The U.S. District Court for the Southern District of Texas granted summary judgment for the Constable
- On appeal, the 5th Circuit disagreed and remanded the case for trial
- On remand, the court held a hearing and once again ruled that the statements were not protected
- On the second appeal, the 5th Circuit reversed the lower court's ruling, holding that the plaintiff's comments addressed a matter of public concern, and thus required a showing that the employee's comments were outweighed by the Constable's interest in maintaining efficiency and discipline in the workplace
- Further finding that, because McPherson's comments were only overheard by one co-worker and her job duties were so ministerial, there was hardly any potential for undermining the Constable office's mission
- The U.S. Supreme Court affirmed the 5th Circuit's ruling
- The Supreme Court found that, under the circumstances, the Constable's interest in discharging McPherson was outweighed by her First Amendment right to free speech

Impact of Social Media on the Limitations of Public Employees' First Amendment Speech Rights

- In *Rankin v. McPherson*, the Court emphasized the fact that only the employee's co-worker heard the comment in a private conference room
- In *Snipes v. Volusia County*, the employee's comments were broadcast on social media
- *Snipes* and other cases involving social media reveal that courts analyze speech posted on social media with greater scrutiny as the speech is readily available to the public
- This availability allows the speech to have a greater impact on public employers' ability to operate efficiently

Detroit Firefighters' New Year's Eve Incident

- Discipline not challenged
- Homeowner filed lawsuit against the firefighters and the Department

Instructive Social Media Cases:

- Dible v. City of Chandler, 515 F. 3d 918 (9th Cir. 2008):
  - Police officer terminated for operating a website featuring explicit material regarding the officer and his wife
  - Officer filed suit in the District of Arizona, where the court granted summary judgment for Defendant and the officer subsequently appealed to the 9th Circuit
  - The 9th Circuit affirmed the lower court, holding that a police officer terminated for operating a sexually explicit website did not have a viable First Amendment claim as the Defendant's interest in efficient operation of the police department outweighed the officer's interest
- Yoder v. University of Louisville, No. 3:09-CV-00205, 2012 WL 1078819 (W.D. Ky. Mar. 30, 2012), aff'd, 526 F. App'x 537 (6th Cir. 2013):
  - The Western District of Kentucky found that a nursing student's First Amendment claim failed where the student posted patient information on the student's MySpace page in violation of the school's confidentiality agreement

Instructive Social Media Cases:

- Bland, et al v. Roberts, 730 F.3d 368 (4th Cir. 2013):
  - The 4th Circuit found that liking a political candidate's campaign page is protected speech under the First Amendment and the modern day equivalent of placing a political candidate's yard sign in one's yard
- Munroe v. Central Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015):
  - High school English teacher posted derogatory comments such as "lazy a*****e" and "dresses like a street walker" regarding her students on her blog, causing significant parental backlash
  - After the school district terminated her employment, the teacher filed a lawsuit claiming Defendant violated her First Amendment right to free speech
  - The Eastern District of Pennsylvania granted summary judgment for Defendant and the teacher appealed
  - The 3rd Circuit upheld her termination, finding that the school district's interest in efficiently providing a public service outweighed the teacher's interest in making such speech

Instructive Social Media Cases:

- Grutzmacher, et al. v. Howard Cty., et al., 851 F.3d 332 (4th Cir. 2017):
  - Plaintiff, a former Battalion Chief with the Howard County, Maryland Department of Fire and Rescue Services was terminated for politically motivated Facebook posts such as "lets all kill someone with a liberal … then maybe we can get them outlawed too" (directed towards gun control politics)
  - Plaintiff's post led to a slew of other inappropriate posts from subordinates, some posts of which Plaintiff "liked"
  - The Department terminated Plaintiff's employment for the fallout out and disruption that he caused the Department through his social media activities
  - Plaintiff then filed suit in the District of Maryland claiming that the Department retaliated against him for exercising his First Amendment right to free speech
  - The District Court granted summary judgment for the Department and the Plaintiff appealed
  - The 4th Circuit upheld Plaintiff's termination, finding that the Department's interest in efficiently providing a public service outweighed the Plaintiff's interest in making such speech and noting that his position as a Battalion Chief increases the potential for disruption

Instructive Social Media Cases:

- Liverman v. City of Petersburg, 844 F.3d 400, 407 (4th Cir. 2016):
  - Police chief issued a general order regarding social media which prohibited the dissemination of any information "that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees"
  - Two officers disciplined for posting comments critical of the Department's use of rookies for instructor and special assignment roles
  - Officers brought § 1983 action against the City and police chief
  - United States District Court for the Eastern District of Virginia granted both parties' motions for summary judgment in part and denied each in part
  - The District Court found that one of the officers spoke on a matter of public concern which outweighed the City's interests while the other officer spoke to a personal matter
  - The 4th Circuit held that both officers spoke on a matter of public concern and that the City's general order unconstitutionally restricted their speech

Instructive Social Media Cases:

- Venable v. Metro. Govt. of Nashville, 430 F. Supp. 3d 350 (M.D. Tenn. 2019):
  - Venable, a Metropolitan Nashville and Davidson County Police Department ("MNPD") police officer, posted comments on his Facebook account regarding the police shooting of Philando Castille in Falcon Heights, Minnesota
  - Venable's comments included, but were not limited to, the following:
    - "Yeah, I would have done 5," in response to a comment that Castile was shot 4 times.
    - "You don't shoot just one. If I use my weapon, I shoot to kill and stop the threat."
    - "It's real and it's what every cop is trained to do. Move to Mexico."
    - "Stop bitching about the people who protect you."
  - Venable's comments led to immediate complaints to MNPD from across the country

Instructive Social Media Cases:

- Venable v. Metro. Govt. of Nashville (Cont.):
  - MNPD placed Venable on administrative leave and then terminated his employment
  - Venable responded by filing a lawsuit in the Middle District of Tennessee in which he included a § 1983 claim that MNPD violated Venable's First Amendment right to free speech
  - In dismissing Venable's § 1983 claim after consideration of the *Pickering* balancing test, the Court held that, although Venable's comments "touched on matters of public concern," MNPD's interests outweighed Venable's speech interests
  - Specifically, the Court found that "MNPD could reasonably predict that Venable's comments would be disruptive to its mission and affect officer morale. The comments were made directly in response to a police shooting at a time when police shootings were a hot topic of debate among members of the public and the subject of nationwide protests."

Instructive Social Media Cases:

- Bennett v. Metro Gov. of Nashville and Davidson Cty, Tenn., 977 F. 3d 530 (6th Cir. 2020):
  - A Tennessee emergency dispatcher used a misspelled racial slur (a version of the "N" word) in responding to a comment on her Facebook post regarding President Trump's 2016 election victory
  - The dispatcher's behavior was compounded by her failure to recognize the impact of her post on her co-workers
  - The Metro Government terminated her employment after a disciplinary hearing
  - The dispatcher subsequently filed suit in federal court in the Middle District of Tennessee
  - The trial court held a trial regarding several factual issues and the court ultimately determined that the dispatcher's speech was protected
  - Metro Government appealed the decision to the 6th Circuit
  - In relying on the *Pickering* balancing test, the 6th Circuit found that the dispatcher's speech was not protected as it significantly impacted her ability to work with other employees in the Emergency Communications Center and detracted from the employer's mission

Common Employee Misconceptions About Free Speech

- Many employees, and Americans in general, mistakenly believe that the First Amendment affords limitless free speech protection
- In fact, when most people are told they are prohibited from saying something, the immediate response is a reference to the First Amendment right to free speech
- However, the First Amendment does not:
  - Protect all forms of speech
  - Prohibit action by private entities or individuals
  - Prohibit action by private sector employers

Types of Speech NEVER Protected

- True threats
- Fighting words
- Calls to illegal action
- Obscenity
- Child pornography
- Defamation
- Perjury
- Plagiarism
- Solicitation to commit a crime
- Blackmail

Private Sector Employers

- Private sector employers enjoy great freedom in limiting the speech of their employees
- The First Amendment does not apply to private sector employers
- Private sector employers are free to limit many forms of employee speech including:
  - Political speech
  - Disparaging speech (beware of NLRA)
  - Speaking as a representative of an employer without permission
  - Use of curse words (beware of NLRA)
  - Social and personal topics
  - Most other forms of speech
- Private sector employers do not have to give at-will employees notice of the types of speech the employer may find terminable

Speech Protected in the Private Workplace

- While private employers enjoy great freedom in the types of speech they can prohibit or find terminable both within or outside of the workplace, private sector employees maintain limited speech rights upon which an employer may not infringe
- Such areas of protection are narrow in scope, arising from statute, not state or federal constitutional provisions
- Examples of such statutes:
  - National Labor Relations Act
  - Whistleblower statutes
  - Statutes prohibiting retaliation

National Labor Relations Act ("NLRA")

NLRA

- President Franklin D. Roosevelt signed the NLRA into law in 1935
- The NLRA protects a narrow scope of speech in the private workplace
- Section 7 protects employees' right to engage in concerted activity regarding the terms and conditions of employment
- Section 8 prohibits employers from interfering with employees' Section 7 rights and prohibits employers from discriminating against employees who exercise such rights
- Employers may not prohibit employee participation in legal forms of concerted activity such as engaging in speech regarding the terms and conditions of employment

Employee Rights

- Examples of protected speech:
  - Speech regarding wages
  - Speech regarding workplace issues and concerns
  - Speech regarding efforts to unionize
  - Speech regarding workplace safety
  - Any other form of speech concerning the terms and conditions of employment

Case in Point:
National Labor Relations Board v. Pier Sixty, 855 F. 3d 115 (2d Cir. 2017)

- Facts
  - Pier Sixty operates as a catering company in New York, New York
  - In 2011, its employees began seeking union representation in what became a tense organizing campaign that included constant threats from management
  - Pier Sixty employee Hernan Perez was upset with his supervisor and management due to their hostility and disrespect toward the employees, including Perez
  - While on his authorized break, Perez posted a profanity laced rant on Facebook regarding his boss and boss' mother

National Labor Relations Board v. Pier Sixty

- Facts (cont.)
  - Perez's Facebook post contained the following:
    - "Bob is such a NASTY MOTHER F***ER don't know how to talk to people!!!!!! F*** his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!"
  - Perez removed the post three days later, but not before the post was brought to the attention of Pier Sixty management
  - After a brief investigation, Pier Sixty terminated Perez's employment a week later
  - National Labor Relations Board ("NLRB") Charge
    - On the same day as his termination, Perez filed an NLRB charge claiming Pier Sixty terminated his employment in retaliation for his engagement in protected concerted activities
    - After a six-day bench trial, the NLRB found that Perez's post was not so "opprobrious" as to lose NLRA protection

National Labor Relations Board v. Pier Sixty

- 2nd Circuit's Decision
  - NLRB petitioned the 2nd Circuit to enforce its ruling and Pier Sixty cross-petitioned for the court's review
  - The 2nd Circuit agreed with the NLRB's ruling, finding that Pier Sixty violated the NLRA
  - The court cited several reasons for its determination that Perez's post was not so egregious as to exceed the NLRA's protection
    - The subject matter of the post included content regarding the upcoming union election
    - The election was highly contentious and the employer threatened employees who supported unionization
    - Pier Sixty tolerated the widespread use of profanity among its employees
    - The comments were made on Facebook, a website the co-workers use to communicate with each other, and the comments did not occur in the immediate presence of customers and did not disrupt the catered event
- The court also noted that Perez's post pushes the outer limits of the NLRA's protection

Lessons from Pier Sixty

- Courts give the NLRB great deference in enforcing the NLRA
- The more contentious an employment issue is, the more leeway the Board may give employees
- The employer's workplace atmosphere, such as the allowed use of profanity in the workplace, is considered when determining whether speech is so egregious that an employee loses NLRA protection
- The NLRB and courts will consider whether the speech occurred on the clock and the forum of the speech
  - Speech posted online may receive more protection than that uttered in the actual presence of customers, especially when the employee thinks that the post is only viewable by friends
  - Both may consider whether the employee's speech disrupted the employer's business

Other Examples of Protected Offensive Speech

- Cooper Tire & Rubber Co. v. NLRB
  - Employees were actively picketing the employer as vans full of replacement workers, mostly African-Americans, passed the picket line
  - A picketing employee shouted "Hey, did you bring enough KFC for everybody?" and "Hey anybody smell that? I smell fried chicken and watermelon."
  - The company terminated the employee's employment and the employee filed an NLRB charge
  - The NLRB found in favor of the employee and ordered his reinstatement
  - After considering evidence that the employee made no physically threatening gestures and that there was no evidence that the replacement workers heard the employee's comments, the 8th Circuit affirmed the NLRB's ruling

Other Examples of Protected Offensive Speech

- Airo Die Casting, Inc., 347 NLRB 810 (2006)
  - Employees picketing while the employer brought in replacement workers
  - A picketing employee advanced towards the replacements with both middle fingers extended and yelled "f*** you n******"
  - The employer terminated the employee for violating its harassment policy
  - The NLRB found that the employee's speech did not differ from the atmosphere surrounding the picketing and, without any threats or violence, was protected by the NLRA

Other Examples of Protected Offensive Speech

- Consolidated Communications, Inc. v. NLRB
  - Picketing employee grabbed his crotch, presented his middle finger, and yelled "f*** you" at non-picketing employee
  - The employer suspended the employee for his obscene actions
  - The NLRB determined that the suspension violated the NLRA
  - The D.C. Circuit affirmed the NLRB's decision stating that, although the employee's actions were "totally uncalled for and very unpleasant," they could not be objectively perceived "as an implied threat of the kind that would coerce or intimidate a reasonable [replacement] employee from continuing to report for work"

The NLRB's Apparent Shift During the Trump Administration

- Alstate Maintenance and Trevor Greenidge, Case 29-CA-117101 (Jan. 11, 2019)
  - Greenidge was employed as a skycap at an airport and was responsible for assisting passengers with their luggage
  - Upon arrival of a soccer team, Greenidge complained to his supervisor that when "we did a similar job a year prior … we didn't receive a tip for it"
  - The skycaps refused to assist in moving the team's equipment and were discharged
  - The question brought before the Board on appeal from the Administrative Law Judge was whether Greenidge's complaint constituted concerted activity protected by the NLRA
  - The Board narrowed the definition of "concerted activity" when it focused on whether Greenidge's activities were concerted when he complained in a group setting, ultimately finding that there was no indication that Greenidge's complaint was anything more than a personal gripe to his superiors, regardless of whether it occurred in a group setting

- General Motors, Case 14-CA-208242
  - On September 5, 2019, the NLRB issued a notice seeking amicus briefs regarding whether it should reconsider its standards for profane outbursts and offensive statements of a racial or sexual nature
  - The Board specifically referenced the Pier Sixty, LLC and Cooper Tire & Rubber Co. decisions in its notice
  - In its decision, the Board departed from Pier Sixty and Cooper Tire
  - The Board determined that "abusive conduct is not protected by the [NLRA] and should be differentiated by conduct that is protected"
- BUT, the Republican majority over the five member Board ended in August 2021
- Employers should expect the Board to revert back to its former leniency on abusive conduct so long as the conduct relates to protected concerted activities
  - With the NLRB's General Counsel currently expressing her opinion that participation in political and social justice advocacy, such as the Black Lives Matter movement, qualifies as protected concerted activity, the pendulum may swing much farther than Pier Sixty in future Board decisions

- Case In Point:
  - Home Depot USA, Inc. & Antonio Morales Jr., No. 18-CA-273796, 2022 WL 2115188 (June 10, 2022):
    - Home Depot maintained a dress code policy which prohibited employees from displaying causes or political messaging unrelated to workplace matters on their orange aprons
    - Morales, an employee at a New Brighton, Minnesota store, displayed "BLM" on his apron
      - When questioned by the store manager, Morales advised that the message was meant to display his support for African Americans and George Floyd
      - The store manager directed Morales to remove the message
      - Morales refused to remove "BLM" from his apron, opting to resign instead

- Case In Point:
- Home Depot USA, Inc. (Cont.):
  - Morales then filed a ULP against Home Depot
  - Because the ULP involved "BLM" messaging, the NLRB General Counsel filed a complaint against Home Depot
  - In ruling for Home Depot, the ALJ explained that BLM labels do not have "an objective, and sufficiently direct, relationship to terms and conditions of employment" to qualify for protection under the NLRA
  - The General Counsel subsequently appealed the ALJ's decision to the Board where the appeal currently awaits the Board's review

- Case In Point:
- Tesla Inc., 370 NLRB (2022):
  - Tesla maintained a policy which required employees to wear all black clothing
  - Some Tesla employees started wearing union buttons and insignia in the workplace
  - Enforcing its facially neutral dress code, Tesla instructed employees to cease wearing union insignia
  - The Union then filed a ULP against Tesla, claiming that the restriction violated employees' Section 7 rights
  - The Board agreed with the Union, finding that any policy which prevented employees from wearing union insignia, even a facially neutral policy, violated the NLRA when the employer failed to show "special circumstances" for the rule
  - This decision reverses the Board's Trump era decision in *Wal-Mart Stores, Inc.*, 368 NLRB 146 (2019) which found that facially neutral employer dress code policies which limited employees' display of union insignia where lawful

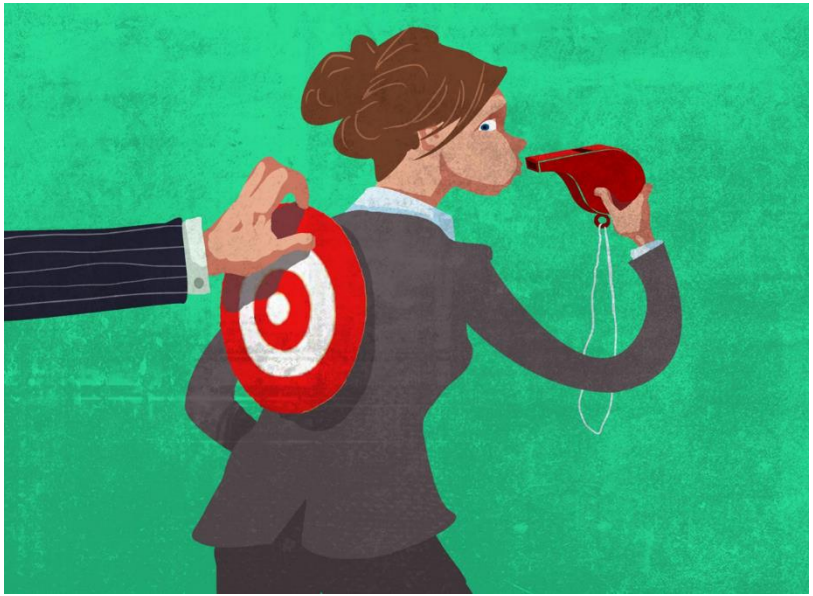
- Case In Point:
- Lion Elastomers LLC, 372 NLRB (2023):
  - In considering whether employee speech is protected, the Board departed from its *General Motors* decision, reverting back to prior Board precedent which gives employees greater freedom to engage in disrespectful and profane speech (think *Pier Sixty*)
  - Specifically, the Board reinstated three tests for determining whether employee speech is protected under the NLRA:
    1. **Conduct Directed at Management in the Workplace** – The Board considers (1) where the speech occurred; (2) the subject mater of the speech; (3) the nature of the employee's outburst; and (4) whether the employee's speech was provoked by a ULP
    2. **Social Media Posts and Conversations Among Employees** – The Board considers the totality of the circumstances surrounding the employee's speech
    3. **Employee Speech at the Picket Line** – The Board considers whether the employee's speech would have reasonably coerced or intimidated non-strikers

Statutes such as whistleblower and anti-retaliation statutes protect employee speech as well

Whistleblower Statutes

- Florida's Public Whistleblower's Act ("FPWA")
  - Fla. Stat. § 112.3187
- Florida's Private Sector Whistleblower Act ("FWA")
  - Fla. Stat. § 448.102
- Such statutes protect employee speech within the very narrow scope of the activity protected by the statute
  - Therefore, the FWA may protect an employee who discloses actual employer violations of a law, rule, or regulation so long as the disclosure is made in writing to any appropriate government agency
  - Similarly, the FPWA may protect a public sector employee who discloses an actual or suspected violation of law, rule, or regulation so long as the disclosure is made to the appropriate authority
  - Failure to strictly comply with whistleblower statutes may leave the employee's speech unprotected and subject the employee to lawful termination

Instructive Whistleblower Cases



Instructive Whistleblower Cases (Private Employer):

- Juarez v. New Branch Corp., 67 So. 3d 1159 (Fla. 3d DCA 2011):
  - Employee terminated after filing a police report and obtaining a restraining order against a co-worker (the owner's spouse) after the co-worker attacked the employee
  - The employee filed a lawsuit against her former employer alleging that her employer terminated her in violation of Sec. 448.102, Florida Statutes (Florida's Private Sector Whistleblower Act)
  - The trial court granted summary judgment in the employer's favor
  - The employee appealed the trial court's ruling to Florida's Third District Court of Appeal

Instructive Whistleblower Cases (Private Employer):

- Juarez v. New Branch Corp. (Cont.):
  - In its de novo review, the Third DCA explained that the portion of Sec. 448.102 at issue was "subsection (3) of the statute, which prohibits retaliation by employers against employees who object to an activity, policy, or practice of their employer that violates a law, rule or regulation pertaining to the employer's business"
  - The employee argued that she "satisfied the requisite elements under subsection (3) because: (1) she 'object[ed]' by filing a police report and obtaining a restraining order; (2) the violence committed by Erazo was an activity, policy, or practice of New Branch; (3) workplace violence is a hazard prohibited by the federal Occupational Safety and Health Act ("OSHA"); and (4) OSHA is a law applicable to New Branch's business."
  - The Third DCA acknowledged that, because workplace violence is a hazard prohibited by OSHA and OSHA applies to the employer, the employee met elements 3 and 4

Instructive Whistleblower Cases (Private Employer):

- Juarez v. New Branch Corp. (Cont.):
  - However, the Third DCA found that the employee did not meet elements 1 and 2
  - The Court found that the employee failed to engage in activity protected by Sec. 448.102
    - The employee "objected" by filing a police report and obtaining a restraining order, **not by filing a complaint with OSHA**
    - The objection further failed because it was against the employee, **not the employer**
  - The Court also noted that the employee failed to offer any evidence that her co-worker's attack was "an activity, policy, or practice" of the employer, nor did the employee offer any evidence the attack was committed within the scope of the co-worker's employment or in furtherance of the employer's business

Instructive Whistleblower Cases (Public Employer):

- Lavallee v. Chronister, 8:20-CV-2159-CEH-TGW, 2021 WL 3912188 (M.D. Fla. Sept. 1, 2021):
  - Sheriff's Deputy terminated after internal investigation into the Deputy's use of force during two incidents.
  - The Deputy brought claims against his employer under state and federal law including a claim for retaliation pursuant to Florida's Whistle-blower's Act.
  - The Deputy alleged in his Complaint that he disclosed during the internal investigation that key information was withheld from certain deputies' statements, exculpatory evidence was omitted from the investigative summary and report, another deputy violated procedure, members of the Review Board panel had a conflict of interest, and that the Deputy was pressured into admitting guilt in order to avoid termination.

Instructive Whistleblower Cases (Public Employer):

- Lavallee v. Chronister (Cont.):
  - The employer filed a motion to dismiss several counts of the Complaint, including the claim for retaliation.
  - The employer argued that the Deputy failed to engage in protected activity under Fla. Stat. § 112.3187(5)(a) because the Deputy's disclosures "did not involve a violation or suspected violation of any federal, state, or local law, rule or regulation."
  - The Deputy countered the employer's argument by arguing that his disclosures fell under Fla. Stat. § 112.3187(5)(b) which protects disclosure of "[a]ny act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency."

Instructive Whistleblower Cases (Public Employer):

•Lavallee v. Chronister (Cont.):

- The court found that Plaintiff alleged "statutorily protected activity under the FWA" sufficiently to survive the motion to dismiss.
- In denying the employer's motion to dismiss as to the whistleblower claim, the court also found that the Deputy's disclosures to Internal Affairs and the Pre-Disciplinary Review Board constituted disclosures to an "appropriate local official."
  - The court relied on the Florida Attorney General's prior opinions in which "a transit authority's board of directors, a county's inspector general, and a town's ethics commission [qualified] as other appropriate local officials under the Act." (internal citations omitted).
- The court also found that the Deputy's disclosure did not need to be signed and in writing to satisfy the statute.
  - In arriving at its conclusion, the court distinguished disclosures at the Deputy's own initiative from those made pursuant to the internal affairs investigation and in connection with the Disciplinary Review Board Hearing.
- Ultimately, the court granted summary judgment for the employer, finding that the disclosures were made to excuse the employee's conduct, not to "blow the whistle." The court also found that the employer had legitimate, non-retaliatory reasons for the termination.

Statutes Prohibiting Retaliation

- Statutes such as Title VII prohibit retaliation
- Such statutes allow employees to voice their concerns to their employer regarding potential violations of such statutes without the fear of repercussion so long as there is an objective good faith basis for the belief regarding potential violations
- For example:
  - Title VII protects an individual reporting discrimination even if the individual is not the target of the discrimination and is only aware of its occurrence
  - If the employer terminates the individual based on his/her complaint, the individual may sue for retaliation under Title VII
  - Therefore, Title VII protects speech such as reporting discriminatory behavior
  - It also protects speech regarding behavior that is not discriminatory so long as the reporter had an objective good faith belief that the conduct was discriminatory

Conclusion

- The First Amendment does not apply to private sector employers
- Therefore, private employers may limit the majority of employee speech in the workplace
- However, such employers must avoid infringing on an employee's statutorily protected speech such as speech regarding the terms and conditions of employment
- The First Amendment does apply to public sector employers and they must be careful not to infringe on an employee's First Amendment right to free speech
- If an employer is unsure whether it may prohibit a certain type of speech, then it should consult a labor and employment law practitioner

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Questions?

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