

Effectively Handling Employee Speech and Activism – In and Out of the Office

Presented by

Brandon M. Shelton (Charlotte)

Michael D. Ray (Charlotte)



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Why Is This Topic So Important?

- What employees say, text, post, and tweet – in and outside of the workplace – has practical and legal consequences.



Why Is This Topic So Important?

- Our society/communities (employees) are more polarized than ever, and may not improve soon.



Employee Polarization on Issues

■ By Race



Employee Polarization on Issues

- By Gender



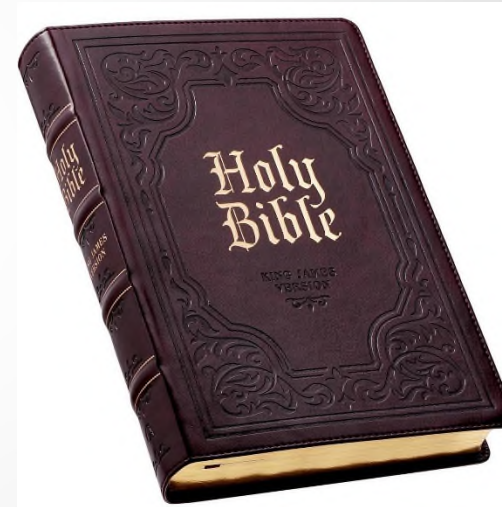
Employee Polarization on Issues

- By Political Affiliation



Employee Polarization on Issues

- By Personal Identity and Beliefs



Primary Focus of Today's Presentation

- How can employers respond to employee speech and still comply with the law?
- How should employers respond to employee speech based upon other non-legal considerations?
 - Employee morale
 - Corporate culture
 - Public perception/relations

Free Speech and Private Sector Employees



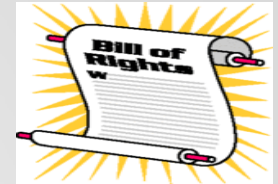
Saul Loeb/AFP/Getty Images

Free Speech and Private Sector Employees

If an employer terminated an employee who posted a selfie inside a government building with the caption “Take back our country!” on their Facebook page, would they have a valid claim for wrongful discharge?

- a. Yes
- b. No

First Amendment



- While the First Amendment covers federal, state, and local government employees, courts have held that First Amendment protections do not generally extend to the employees of private sector employers.



Free Speech and Private Sector Employees



Brendan Smialowski/AFP/Getty Images

Free Speech and Private Sector Employees

- If Ms. Briskman had posted “Dump Trump” on her Facebook page, would she have a valid claim for wrongful discharge?
 - Yes
 - No

Free Speech and Private Sector Employees



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Free Speech and Private Sector Employees

■ Bono's Tweet:

Playing in a charity golf tournament raising money for our nation's Special Forces operators and their families.

Unfortunately had these shoes in my bag. Luckily I had a marker in my bag too ...

Free Speech and Private Sector Employees

- Biles' Tweet:

mouth drop

Don't worry, it's not like we needed a smarter USA gymnastics president or any sponsors or anything ...

Free Speech and Private Sector Employees

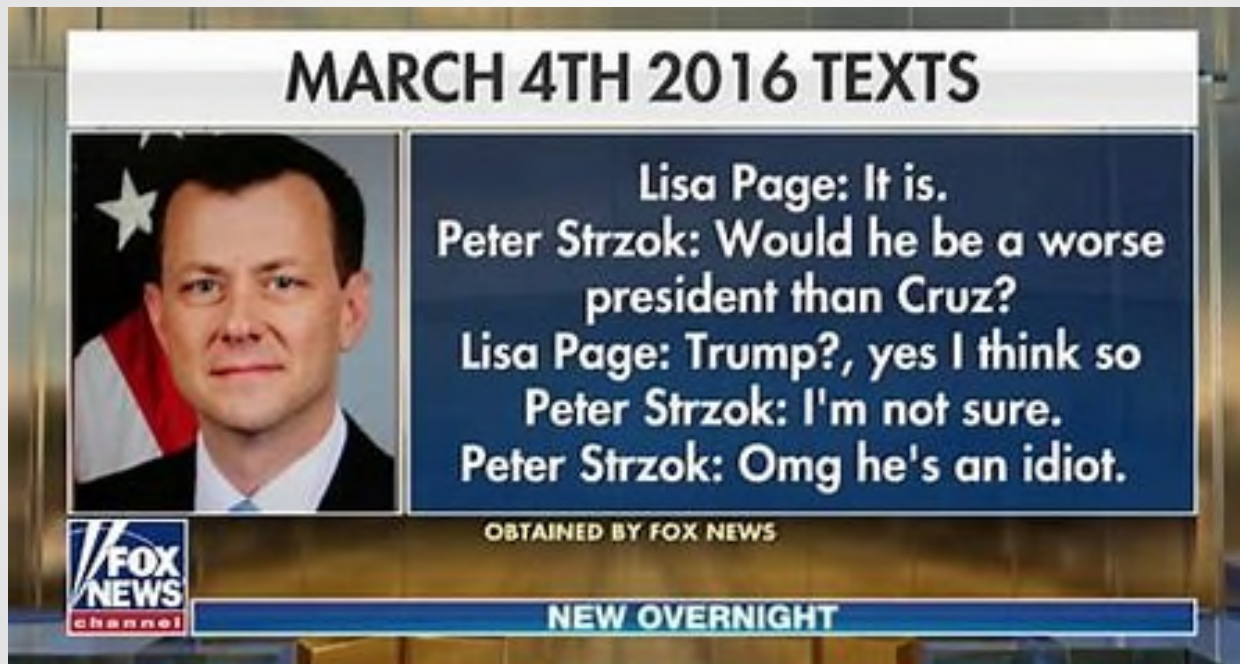
Would you recommend that Mary Bono be disciplined for her tweet?

- a. Yes
- b. No

State Laws About Off-Duty Conduct

- Nearly half of all states have laws impacting employee off-duty conduct and/or political speech.
- Most deal with tobacco use or other unlawful products.
- But, growing number expanding reach of off-duty conduct to include:
 - Social media activity
 - Political speech and activity
 - Outside employment

Free Speech and Public Sector Employees



Public Employers: When Is Speech Protected?

- Speaking as private citizen regarding matter of public concern balanced against government employer's interest.
 - 1) Whether the speech was made pursuant to an official's duties;
 - 2) Whether the speech was on a matter of public concern;
 - 3) Whether the government's interests as employer in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests;
 - 4) Whether the protected speech was a motivating factor in the adverse employment action; and
 - 5) Whether the defendant would have reached the same employment decision in the absence of the protected conduct.



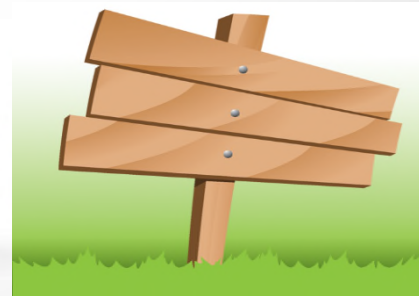
State Laws About Political Speech

- Some state laws impact private sector employee speech
 - California, Colorado, New York, and North Dakota and more prohibit discrimination for an employee's **off-duty political activity**.
 - Some states have **“captive audience” laws** that prohibit employers from taking adverse actions against employees who decline to attend employer held or sponsored political events. Ex: Oregon



More State Laws

- Wisconsin, Illinois, Montana, Nevada, Minnesota, New York, and North Carolina prohibit employers from restricting employees' **off-duty use of “lawful products,”** which may include social media platforms, signage, and other products used to deliver political speech.



In the Carolinas... NC

- North Carolina: prohibit employers from restricting employees' off-duty use of “lawful products”—this can include social media platforms, signage and other products used to deliver political speech
 - Employer defense: the employer must show the activity adversely affects the employee's ability to fulfill her job responsibilities

In the Carolinas...SC

- South Carolina prohibits discrimination on the basis of political activity or beliefs. S.C. Code Ann. 16-17-560.
- “It is unlawful to ... discharge a citizen from employment or occupation ... because of political opinions or the exercise of political rights ... guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of [South Carolina].”
- *Culler v. Blue Ridge Elec.*, 309 S.C. 243 (1992) (terminating employee for refusing to donate to political action fund would give rise to wrongful discharge claim).

Social Media Speech and the NLRA

- “The National Labor Relations Act protects the rights of employees to act together to address conditions at work.... [t]his protection extends to certain work-related conversations conducted on social media.”



Impact of NLRA on Political Speech

- Political speech may be protected under the National Labor Relations Act (NLRA) as “concerted activity” if it pertains to employees’ working conditions.



NLRA: Protected Concerted Activity (PCA)

- NLRA protects union activity
- But also “concerted activity” for “mutual aid or protection” (even when unrelated to union activity)
- To be protected, conduct must be “both concerted and for mutual aid or protection”
- And must be done in a way that does NOT result in loss of protection

Is the Conduct Concerted?

- “Engaged in with or on the authority of other employees” and “not solely by and on behalf of the employee himself”
 - Historic bright line – Concerted – 2 or more vs. “individual gripe”
- But seemingly individual conduct
 - Only speaker and listener – seeks to “incite” or “induce group action” – an “indispensable preliminary step to self-organization”
 - Logical outgrowth of group action – individual bringing “truly group complaints to attention of mgmt.”
 - Individual compliant made in front of a group
- Core focus – “totality of evidence indicates SOME linkage to group action” – intent to band together to improve working conditions

Inherently Concerted

- Discussion of “vital categories of workplace life” considered inherently concerted without more
 - Wages
 - Work schedules (hours)
 - Job security
- Focus for current GC – expansion to:
 - Workplace safety and health
 - Racial discrimination – BLM cases
 - Other?

For Mutual Aid or Protection

- Using an “objective standard” – subjective motives irrelevant
- Requires link between conduct and workplace concern
 - Is there an “effort to improve lot as employees”
- But includes use of channels outside immediate employee-employer relationship – political activity and social activism
 - Support of employees of other employers

PCA and Political or Social Subjects

- Concerted political/social justice advocacy having a “direct nexus” to “specifically identified concerns as employees” is PCA
- Protection for means utilized may depend on employer control of the issue
 - May be subject to lawful and neutral work rule
 - Solicitation distribution
 - Attendance policy

Loss of Protection of the Act?

- Partial strike
- Intermittent strike (but under attack)
- Strike conduct that would reasonably coerce or intimidate non-strikers
- Knowingly false or maliciously untrue
- Public disparagement of product without link to labor dispute
- Looking at: place of discussion, subject, nature of employee outburst and any employer ULP provocation – “opprobrious conduct”

Test of Discrimination: *Wright Line*

- Two-part “test of causation”
- General Counsel must show
 - Employee engaged in union or PCA
 - Employer knowledge
 - Animus against union or PCA
- Employer must prove – would have “taken same action even in the absence of the protected conduct”

But *Lion Elastomers* Decision

- When misconduct is part of the *res gestae* of the PCA, issue is “whether conduct is so egregious ... to take it outside protection of Act”
- Recognizing a fundamental difference between misconduct committed “during Section 7 conduct” and during ordinary work

Multi-Factor Analysis

- In determining if employer's discipline or discharge violates Section 8(a)(1) of the NLRA, courts have looked at whether:
 - 1) the activity that the employee engaged in was "concerted by meaning of Section 7 of the NLRA;
 - 2) the employer knew of the concerted nature of the employee's activity;
 - 3) the concerted activity was protected by the NLRA; and
 - 4) the discipline or discharge was motivated by employee's protected, concerted activity.



One Early Example From the NLRB



- A car salesman posted two sets of photos on Facebook the same day.
- One involved photos from a related Land Rover dealership “which did not involve fellow employees” where LR was accidentally driven over a wall and into a pond by a 13-year-old allowed to get behind the wheel.
- The other was “mocking comments and photos with co-workers about serving hot dogs [chips and bottled water] at a luxury BMW car event.”
- A week later, the salesman was fired.
- The question came down to which post caused the termination.
- After trial testimony, the Board held the salesman was fired solely for the photos posted of the LR incident that was not concerted activity and so was not protected – **BUT this credibility determination could have gone the other way.**

Second Example From the NLRB



- One employee, Lydia, criticized the work performance of five other employees.
- The five employees posted on Lydia’s Facebook page saying things like “stop with ur lies about me.”
- Employees were fired after Lydia complained to employer saying this was bullying and in violation Company policy.
- The Board found that the Facebook conversation was concerted activity and was protected by the NLRA.
- **The Board said it did not matter where the conversation happened – whether online or “around the water cooler” – because the “result would be the same” as these were concerted statements made in response to statements about their job performance.**
- “It is irrelevant ... discriminatees were not trying to change their working conditions.”

Tips for Employers

- Employers should not maintain policies that strictly prohibit political activity in the workplace.
- Employers should not selectively enforce policies to avoid claims alleging an employee was targeted based on his or her specific political views.
- Employers should maintain policies that promote civility in the workplace.
- Employers should maintain policies that prohibit harassment and discrimination.
- Employers may restrict political speech to “non-work time,” including meal and rest periods.
- Employers should create a culture rooted in tolerance and respect for all political views.

Handbook Drafting Tips

- The more general the rule is written, the more likely it will be found to be unlawfully overbroad.
- When drafting the rule, focus on the employer's legitimate interests and make that statement clear.
- Give lawful examples of what is prohibited.
- Use disclaimers – start with a general disclaimer regarding NLRA rights (understanding that may not be enough) and then use a specific disclaimer to adequately capture the type of lawful activity exempted from the rule.

Key Takeaways

- Activity protected by the law (federal or state law)
- Was statement or conduct associated with employer
 - Term(s) and condition(s) of employment or reasonably related
 - Conflict of interest or appearance of the same
- Violate a policy
- Assess impact on culture and values
- Appropriate level of discipline, if any



- **Brandon M. Shelton | Ogletree Deakins**

201 South College Street, Suite 2300 | Charlotte, NC 28244 | Telephone: 704-405-3121
brandon.shelton@ogletree.com | www.ogletree.com | [Bio](#)

- **Michael D. Ray | Ogletree Deakins**

201 South College Street, Suite 2300 | Charlotte, NC 28244 | Telephone: 704-405-3133
michael.ray@ogletree.com | www.ogletree.com | [Bio](#)