**The College of Labor and Employment Lawyers**
**Regional Program of Fifth and Eleventh Circuits**
**New Orleans, Louisiana**
**February 17, 2018**

# Through the Looking Glass -- Protection of Controversial Employee Speech In and Outside the Workplace

**Rod Tanner**
**Tanner and Associates, PC**
**6300 Ridglea Place, Suite 407**
**Fort Worth, Texas**
**817.377.8833 (phone)**
**rtanner@rodtannerlaw.com**

The polarization of our political climate, dysfunction in government, income inequality, immigration policies, racial tensions, Black Lives Matter, and the #MeToo movement provoke intense feelings among employees throughout the country. It is not surprising that there has been a renewed focus on employee speech, in an outside the workplace, in recent years. This outline presents an overview of the constitutional and statutory protections of employee speech concerning controversial topics.[1]

## I. Employee Speech in the Public Sector

### A. First Amendment Jurisprudence

#### 1. The Government's Burden

The government's burden in justifying a discharge based on speech varies from case to case depending upon the nature of the employee's expression.
*Connick v. Myers*, 461 U.S. 138, 150 (1983)

#### 2. Employers' Reasonable Mistakes

a. An employer's reasonable mistake as to the nature of an employee's conduct can affect its liability to the employee.

- An employer who reasonably but mistakenly believes that an employee is engaging in unprotected conduct or speech, and disciplines the employee accordingly, does not violate his/her First Amendment rights.
  *Waters v. Churchill*, 511 U.S. 661, 679-80 (1994)

- Conversely, if an employer reasonably but mistakenly believes an employee is engaging in protected speech and still disciplines the employee, the employer has violated his/her First Amendment rights.
  *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016)

#### 3. Employees' Rights When Speaking on Matters of Public Concern

a. Courts must balance the interests of the employee, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.
*Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)

[1] The author gratefully acknowledges the contributions to this paper of Chuck Hairston, Of Counsel to Tanner and Associates, PC, and Lu Carlson.

- The issues must be of public concern for the *Pickering* balancing test to apply (*Connick v. Myers*, 461 U.S. at 147)

- Whether the issue discussed is of a public concern is determined by examining the "content, form, and context of a given statement, as revealed by the whole record" (*Connick* at 146-47)

- The standard for determining whether expression is of public concern is the same standard used to determine whether a common law action for invasion of privacy is present. (*Connick* at 143, n. 5)

- Matters of public concern include issues "relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Lane v. Franks*, 573 U.S. ____, 134 S. Ct. 2369, 2380 (2014)

- The speech does not need to be made publicly to be regarded as addressing a matter of public concern. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 414 (1979)

b. Employers' Interests

The employer's interest in regulating employees' speech must differ significantly from the interest in regulating speech of the general public. (*Pickering* at 568, 573)

i. "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." (*Connick* at 150)

ii. Employers' legitimate interests include --

- Efficiency
- Avoiding impediments to employees' proper performance of their daily duties
- Avoiding interference with employer's regular operation
- Maintaining Discipline
- Maintaining harmony among coworkers
- Loyalty
- Confidence
- Avoiding impropriety or appearance thereof

iii. In balancing the interests of the employer and the employee, consider

- Whether close working relationships are essential to fulfilling the employee's public responsibilities and the potential effect of the employee's activity on those relationships;
- Whether the employee's activity may be characterized as hostile, abusive, or insubordinate; and
- Whether the activity impairs discipline by superiors or harmony among coworkers.

c. Employers' interests in a *Pickering* balancing test --

- When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. (*Connick* at 151-52)

- An employer is not required to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. (*Connick* at 152)

- Courts have consistently given substantial weight to government employers' reasonable predictions of disruption. *Waters v. Churchill*, 511 U.S. 661, 673 (1994)

d. Matters of public concern include --

- School board's funding and allocation of acquired funds (*Pickering*)
- Racially discriminatory employment policies (*Givhan*)
- Politics (*Rankin*)
- Tenure (*Wetherbe v. Tex. Tech Univ. Sys.*, 699 Fed. Appx. 297 (5th Cir. 2017))

**4. Expression by Employees on Matters of Personal Interest**

a. "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest … a federal court is not the appropriate forum in which to review the wisdom of a personnel decision ..." (*Connick*, 461 U.S. at 147)

b. This does not mean that such speech is completely devoid of First Amendment protection; in these instances, employees have as much protection as an ordinary citizen. (*Connick*, 461 U.S. at 147)

c. Matters of personal concern typically include internal office grievances, expression of frustration with superiors, et cetera. S*ee, e.g., Alvez v. Bd. of Regents of the Univ. Sys. of Ga.*, 804 F.3d 1149 (11th Cir. 2015); *Graziosi v. City of Greenville Miss.*, 775 F.3d 731 (5th Cir. 2015)

**5. Rights of Employees When Speaking Pursuant to Official Duties**

a. When public employees make statements pursuant to their official duties**,** they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.
*Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)

b. "Restricting speech that owes its existence to a public employee's professional responsibilities ... simply reflects the exercise of employer control over what the employer itself has commissioned or created." (*Garcetti*, 547 U.S. at 422-23)

c. However, truthful testimony under oath by a public employee outside the scope of her ordinary job duties, when compelled by a subpoena, is speech as a citizen for First Amendment purposes and warrants application of the *Pickering* analysis, even if the testimony concerns matters learned during the course of employment.
*Lane v. Franks*, 573 U.S. ____, 134 S. Ct. 2369, 2378-2379 (2014)

d. The *Garcetti* exception to First Amendment protection for speech that owes its existence to a public employee's professional responsibilities must be read narrowly to encompass speech that an employee made in accordance with or in furtherance of the ordinary responsibilities of her employment, not merely speech that concerns the ordinary responsibilities of her employment.
*Alves*, 804 F.3d at 1162 (citing *Garcetti*, 547 U.S. at 21-22)

e. Factors to consider when determining whether speech was made in an employee's capacity as a citizen or in his official capacity (*Garcetti* at 420-21)
   i. Whether the employee expressed views inside the office or publicly;
   ii. The subject matter of the relevant communication;

iii. Whether or not the statements were made pursuant to an official duty.

f. Examples of expression pursuant to official duties --

- Writing an official memorandum (*Garcetti*)
- Preparing an incident report and discussing the issue with the local newspaper at the direction of a supervisor
  *Moss v. Harris Cnty. Constable Precinct One*, 8513d 413 (5th Cir. 2017)

**6. First Amendment Implications When Employees' Expressions Are Unrelated to Their Employment and the Employer's Mission**

a. A government employer who bans employee speech so broadly that even topics and audiences unrelated to the employee's line of work are prohibited cannot justify such a policy under a *Pickering* balancing test. *U.S. v. Nat'l Treasury Empl. Union*, 513 U.S. 454 (1995)

b. Examples of speech unrelated to employee's work --

- A mail handler giving speeches about the Quaker religion
- An aerospace engineer lecturing about black history
- A microbiologist reviewing dance performances
- A tax examiner writing articles about the environment

*NTEU*, 513 U.S. at 461-62

**B. Drafting Restrictions on Employees' Speech**

1. Creating internal policies and procedures that are receptive to employee criticism may reduce the likelihood of employees voicing their concerns in public. (*Garcetti*, 547 U.S. at 424)

2. The government must be able to satisfy a *Pickering* balancing test to maintain a statutory restriction on employee speech. *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 564 (1973)

3. The courts impose a heavier burden on employers who attempt to preemptively restrain speech through their policies than those who defend disciplinary action (*NTEU*, 513 U.S. at 467-68)

4. The interest of the employer in regulating speech must not be speculative.

> "When the Government defends a regulation on speech as a means to ... prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'... It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."
> *Turner Broadcasting System v. FCC*, 512 U.S. 622, 664 (1994)

## C. Lawful and Unlawful Restrictions on Employee Speech

1. Policies that have not passed constitutional muster --

Section 501(b) of the Ethics in Government Act of 1978
(Held unconstitutional in *NTEU*, 513 U.S. at 457)

- Section 501(b) was amended in 1989 to prohibit all federal employees from accepting compensation for speaking or writing on any issue, regardless of the subject matter or the line of work of the employee or the audience. (*Id.*)

- The government's purpose for this restriction was to avoid circumstances wherein members of Congress and those in the highest levels of the judicial and executive branches would receive money from groups seeking influence. (*Id.* at 457-58)

- Instead of limiting the receipt of honorariums to members of Congress or high ranking judicial and executive officers, the source of the concern, Congress extended the act to encompass all employees of all three branches of government. (*Id.* at 458)

- Congress' interest in promoting the integrity of, and popular confidence in and respect for, the federal government did not justify prohibiting acceptance of compensation for unrelated speech by the vast majority of lower-level federal employees, absent evidence of corruption among them. (*Id.* at 463-64, 473)

- The court held that, "A blanket burden on the speech of nearly 1.7 million federal employees requires a much stronger justification than the Government's dubious claim of administrative convenience." (*Id.* at 474)

The Nevada Highway Patrol's Canine Unit, which allowed "NO direct contact between K9 handlers, or line employees[,] with ANY non-departmental and non-law enforcement entity or persons for the purpose of discussing the Nevada Highway Patrol K9 program or interdiction program, or direct and indirect logistics therein."

*Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017)

- The court reasoned that the prohibition was so broad that it could include all kinds of expression, including speech on matters of public concern. (*Id.* at 862-64)

- The court then engaged in a *Pickering* analysis and found that the employees' interests in free speech outweighed the employer's. (*Id.* at 865-66)

A social media policy implemented by the Police Department of the City of Petersburg, which included a provision prohibiting 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."
*Liverman v. City of Petersburg*, 844 F.3d 400, 404 (4th Cir. 2016)

- The court found that this provision, in its "astonishing breadth," regulated the employees' ability to speak on matters of public concern (particularly the operation and policies of the department). (*Id.* at 407-08)

- Applying a *Pickering* analysis, the court determined that the employees' interests in free speech outweighed the employer's interests. (*Id.*)

2. Employment policies that have passed constitutional muster --

Allowing firefighters to speak to public officials on work-related issues without prior approval, so long as they first notify members of their chain of command.
*Davis v. Phenix City*, No. 08-11498, *3 (11th Circuit, October 15, 2008)) (unpublished)

Several policies in the City of Greenville, Mississippi Police Department, under which an employee was discharged after making disparaging remarks about her supervisor on Facebook, including:

- "Employees will cooperate, support, and assist each other at every opportunity. Employees will not maliciously criticize the work or the manner of performance of another. It is the duty of every officer and employee to refrain from originating or circulating any

malicious gossip to the intended detriment of the department or any member thereof."

- "Insubordination will not be tolerated and is subject to disciplinary action up to, and including, dismissal." The policy defined insubordination as "[a]ny act of defiance, disobedience, dissension or resistance to authority."

- Allowing for "[t]ermination without fault, for such reasons as ... [c]hronic complaining about operations to the extent that supervisors must spend excessive time dealing with problems or issues caused by complaints."

*Graziosi v. City of Greenville Miss.*,
775 F.3d 731, 741 n. 2-4 (5th Cir. 2015)

**D. 42 U.S.C. § 1983**

1. Section 1983 actions may not be brought against a state or state agencies because they are not regarded as persons. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989)

2. Such actions may be brought against state officers in their official capacity to recover prospective or injunctive relief because "official-capacity actions for prospective relief are not treated as actions against the State." *Id.* at 71 n.10 (citing *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14 (1985); *Ex parte Young*, 209 U.S. 123, 159-160 (1908)

3. To establish a Section 1983 violation of an employee's First Amendment right to freedom of expression, the plaintiff must show that

- He or she suffered an adverse employment action;

- His/her speech involved a matter of public concern;

- His/her interest in speaking outweighs the employer's interest in promoting efficiency in the workplace; and

- His/her speech motivated the employer's adverse employment action. *Gibson v. Kilpatrick*, 838 F.3d 476 (5th Cir. 2016)

4. Qualified Immunity Defense

    a. The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
    *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)

    b. An employer may escape liability under 42 USC § 1983 if it shows that its conduct was objectively reasonable in light of the clearly established law at the time of the incident.
    *Connelly v. Tex. Dep't of Criminal Justice*,
    484 3d 343, 346 (5th Cir. 2007)

    c. The plaintiff bears the burden of negating the qualified immunity defense once a defendant has properly raised it.
    *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008)

## E. Title VII's Prohibition of Hostile Work Environments

1. Workplace speech that creates a hostile environment based upon race, ethnicity or color violates Title VII. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66-67 (1986)

    a. The mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to warrant sanction under Title VII. The statute requires that the use of ethnic or racial epithets must be sufficiently severe or pervasive to create an abusive environment." (*Id.* at 67)

2. Workplace speech violating Title VII may lose the protection of the First Amendment.
    *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (citing 42 U.S.C. § 2000e-2)

3. The law is not settled regarding the interplay between the First Amendment right to freedom of expression and Title VII protection from hostile work environments.

    a. Racist speech can create a hostile work environment for other employees.
    *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675

(7th Cir. 1993) (single use of racial epithet by supervisor in the presence of subordinates impacts workers more severely than comments by a co-worker)

b. Some courts have found that offensive speech did not create a hostile work environment for other employees.

*Dawson v. City of Chicago*, 648 F. Supp.2d 1057, 1069 (N.D. Ill. 2009) (single use of racial epithet by a co-worker was insufficient to establish a hostile environment claim)

*Liddell v. Northrop Grumman Shipbuilding, Inc.*, 836 F. Supp.2d 443, 461 (S.D. Miss. 2011) (two racial epithets uttered by a single employee was insufficient to establish a "regular pattern of frequent verbal ridicule or insults sustained over time" to warrant a severe or pervasive hostile environment claim)

c. Cases noting the unresolved implications of the interplay between the First Amendment and Title VII --

- *Booth v. Pasco County*, 757 F.3d 1198, 1212 (11th Cir. 2014) (recognizing that antidiscrimination laws are not categorically immune from First Amendment challenge, but rejecting constitutional challenge for several reasons)

- *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 n.7 (5th Cir. 1995) (Jones, J.) (rejecting, in dicta, the notion that Title VII trumps First Amendment concerns)

- *Lyle v. Warner Bros.*, 38 Cal. 4th 264, 297 (2006) (Chin, J., concurring) (reasoning that First Amendment can protect speech regarded as harassment under anti-discrimination laws)

## II. Private Employers, Political Activities, and National Labor Relations Act

### A. National Labor Relations Act

- Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

- Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of

their own choosing, **and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3). (emphasis added)

- To be protected under Section 7 activity must be both *concerted* and for the purpose of *mutual aid or protection*. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014).

- An activity is concerted when an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985). This includes "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB 882 (1986), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

- Examples of protected concerted activity

    - Sharing personal wage information and discussing wages
      *Jeanette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976)

    - Holding a press conference to complain about dishonest sales tactics the employer demands of its employees because the improper tactics affect their working conditions and pay
      *MasTec Advanced Technologies*, 357 NLRB No. 17 (2011)

    - Refusing to return to work in unsafe conditions
      *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15-17 (1962);
      *Brown & Root, Inc. v. NLRB*, 634 F.2d 816 (5th Cir. 1981)

## B. Political Activities

*Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). Union employees distributed handouts in four parts.

- First part and fourth parts "urged employees to support and participate in the union and, more generally, extolled the benefits of union solidarity." No dispute that these activities were protected under Section 7.

- Second part "encouraged employees to write their legislators to oppose incorporation of the state "right-to-work" statute into a revised state constitution then under consideration, warning that incorporation would 'weake[n] Unions and improv[e] the edge business has at the bargaining table.'" The Board concluded that this was protected because union security is "central to the union concept of strength through solidarity" and "a mandatory subject of bargaining in other than right-to-work states." The Supreme Court: "We cannot say that the Board erred in holding that this section of the newsletter bears such a relation to employees' interests as to come within the guarantee of the *mutual aid or protection* clause."

- Third part "criticiz[ed] a Presidential veto of an increase in the federal minimum wage and urg[ed] employees to register to vote to 'defeat our enemies and elect our friends.'" The Board concluded that this was protected because the federal minimum wage "inevitably influences wage levels derived from collective bargaining, even those far above the minimum" and that "concern by [petitioner's] employees for the plight of other employees might gain support for them at some future time when they might have a dispute with their employer."

- The Court with respect to the third part: "We think that the Board acted within the range of its discretion in so holding. Few topics are of such immediate concern to employees as the level of their wages. The Board was entitled to note the widely recognized impact that a rise in the minimum wage may have on the level of negotiated wages generally, a phenomenon that would not have been lost on petitioner's employees. The union's call, in the circumstances of this case, for these employees to back persons who support an increase in the minimum wage, and to oppose those who oppose it, fairly is characterized as concerted activity for the 'mutual aid or protection' of petitioner's employees and of employees generally."

- The Court also rejected the employer's argument that it could properly prohibit distribution of the handouts in nonworking areas of the facility during nonworking time:

- **Key Points**

    - The scope of the *mutual aid or protection* clause of Section 7 reaches beyond activities that go directly to the specific employer-employee relationship at issue and encompasses

activities that a given employer has no ability to influence or control as long as they relate to the employees' wages and working conditions.

- Employers cannot prohibit distribution of protected information absent a countervailing interest.

- **Illustrative Cases**

*NLRB v. Motorola*, 991 F.2d 278 (5th Cir. 1993). Fifth Circuit denied petition for enforcement of portion of Board order related to finding of Section 8(a)(1) violation where employer prohibited distribution of literature related to anti-drug testing political advocacy (CAPP), including passage of Austin ordinance restricting or prohibiting such testing. The Court concluded:

"The practical effect of the Board's order, as Motorola suggests, is to authorize any political splinter group with employee members to disseminate literature at the workplace as long as the group's agenda includes some issue relevant to that workplace. Many of the subjects of these single issue organizations are highly controversial and could inject into the workplace a level of hostility and animosity among employees that most employers work hard to eliminate. We believe that the facts in this case reach that "point of attenuation" posited by the Supreme Court in *Eastex*. Employees acting as members of outside political organizations cannot demand the same § 7 rights as employees engaged in self-organization, collective bargaining, or in self-representation in disputes with management simply because the organization focuses on a workplace issue. The Act is not intended to protect entities so far removed from the normal employer-employee relationship. Thus, we deny enforcement of the portion of the Board's order dealing with Motorola's ban of on-premises literature distribution by employee members of CAPP, because they enjoyed no rights under § 7 to distribute it."

**********

*Blue Circle Cement v. NLRB*, 41 F.3d 203 (5th Cir. 1994). Fifth Circuit granted NLRB's petition for enforcement of Board order related to finding of Section 8(a)(1) violation where employer discharged employee involved in environmental advocacy group Earth Concerns of Oklahoma (ECO) for using company equipment to copy Greenpeace environmental literature related to dangers of hazardous waste. The advocacy happened at a time when the employer was attempting to obtain regulatory approval to burn hazardous waste to fuel its kiln. The Court distinguished *Motorola* as follows:

"In the present case, by contrast, all of [employee's] activities, whether taken on behalf of the union and/or ECO, in opposing the Blue Circle, plan to burn hazardous waste were directly aimed at changing his employer's policy on this issue. Saunders' opposition to the Blue Circle plan was supported by Local D421 and Blue Circle employees. The employees were attempting to change Blue Circle's plan to burn hazardous waste. The action at issue was not initiated solely by an outside organization as was the case in Motorola, but rather by [employee] while "wearing two hats." He undertook "virtually inseparable" activities on behalf of both ECO and Local D421. *Motorola* does not support Blue Circle's position."

- **NLRB Memorandum GC 08-10 (July 22, 2008)**

  Protections of Section 7 extend "beyond the confines of the employment relationship to concerted political advocacy when the subject of that advocacy has a direct nexus to employee working conditions."

  Employee complaints to a hospital accreditation commission concerning staffing levels and the number of patients assigned to each staff member were protected they closely related to the conditions under which the employees worked.
  *Misericordia Hospital Medical Center*, 246 NLRB 351, 356 (1979), *enfd*. 623 F.2d 808 (2d Cir. 1980)

  - Assuming advocacy has a direct nexus to employee working conditions, how may an employee pursue it without losing protection of the Act?

    - Non-disruptive political advocacy for or against a specific issue related to a specifically identified employment concern, that takes place during the employees' own time and in non-work areas, is protected.

    - On-duty political advocacy for or against a specific issue related to a specifically identified employment concern is subject to restrictions imposed by lawful and neutrally-applied work rules.

    - Leaving or stopping work to engage in political advocacy for or against a specific issue related to a specifically identified employment concern may also be subject to restrictions imposed by lawful and neutrally-

applied work rules. Employees who skip work to attend demonstrations generally are not protected.

- **Unprotected Political Advocacy**

  - Distribution of purely political tracts that called for the election of a particular slate of candidates without reference to any particular employment-related issues was not protected.
    *Firestone Steel Products Co.*, 244 NLRB 826, 827 (1979), *enfd.* 645 F.2d 1151 (D.C. Cir. 1981)

  - Nurse's complaint to state agency about patient care quality had nothing to do with their employment conditions.
    *Waters of Orchard Park,* 341 NLRB 642, 643-644 (2004)

  - Advocating the creation of a workers' party was unprotected.
    *Ford Motor Co.*, 221 NLRB 663, 666 (1975), *enfd. mem.* 546 F.2d 418 (3d Cir. 1976)

## C. Application to Current Events

### 1. Black Lives Matter

Mission statement from blacklivesmatter.com:

The Black Lives Matter Global Network is a chapter-based, member-led organization whose mission is to build local power and to intervene in violence inflicted on Black communities by the state and vigilantes.

- Given lack of economic component, question is likely to be whether connection to employment concern is too "attenuated" to warrant protection under the Act.

- Most likely to fall within protection where connection is made to safety issue at employer or in industry.

### 2. Immigration Controversies

*Kaiser Engineers*, 213 NLRB No. 108 (1974)

- At issue was forced resignation of employee, an engineer involved in group representing interests of engineers, based on a letter sent by the group to three US Senators and two Congressmen regarding another company seeking approval from the Department of Labor to obtain resident visas for foreign engineers. The group objected to the issuance of the visas based on concerns that that "importing" engineers

would cause some to become "redundant" as market conditions softened.

- The Board concluded the letter met the standard for protected activity under the *mutual aid or protection* clause because it related to concerns about job stability for the engineers at Kaiser.

- Given the more direct connection to jobs, immigration advocacy appears to have a clearer path to protected activity under the NLRA than BLM.

**D. Loss of Section 7 Protection**

- Political advocacy can lead to heated discussions.

- Workplace confrontations

  - *Atlantic Steel Co.*, 245 NLRB 814 (1979)

  - Involved employee conduct toward supervisor at work

  - Board reasoned that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act.

  - Whether conduct is severe enough to lose protection depends on (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice

  - *Atlantic Steel* factors do not apply to off-duty conduct. Board applies precedent related to defamatory and disloyal statements to determine loss of protection. *Three D, LLC*, 361 NLRB No. 31 (2014) (involving Facebook posts); *see also Electrical Workers Local Union No. 1229*, 346 U.S. 464 (1953)

### E. Employment Policies

- In addition to violating Section 8(a)(1) by taking an adverse action against an employee who has engaged in protected activity under Section 7, an employer can also violate the Act by adopting certain work policies.

- A work rule that would reasonably tend to chill employees in the exercise of their Section 7 rights violates Section 8(a)(1).
  *Hyundai America Shipping Agency*, 357 NLRB 860, 861 (2011), *enfd. in relevant part*, 805 F.3d 309 (D.C. Cir. 2015)

  "Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement."
  *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998),
  *enfd.* 203 F.3d 52 (D.C. Cir. 1999)

- If a rule expressly restricts Section 7 rights, it is unlawful. If the rule does not expressly restrict § 7 activity, the Board must show either:
  Employees would reasonably construe the language to prohibit Section 7 activity;
  The rule was promulgated in response to union activity; or
  The rule has been applied to restrict Section 7 rights.
  *Lutheran Heritage Village-Lavonia*, 343 NLRB 646, 647 (2004)

- Any ambiguity in a work rule must be construed against the employer.
  *DirecTV*, 359 NLRB 545, 546 (2013)

## III. Off-Duty Conduct Protection Statutes

Various state statutes protect employees from disciplinary action based on legal speech and activity outside of the workplace. These statutes vary widely among the states, and some states do not have any statutory protections for off duty conduct. Two examples are highlighted below.

New York Labor § 201-d(2) (2016) – Discrimination Against the Engagement in Certain Activities

> "[I]t shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

- An individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal [exceptions];
- An individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property;
- An individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property; or
- An individual's membership in a union or any exercise of rights granted under Title 29, USCA, Chapter 7 or under article fourteen of the civil service law.

[followed by certain exceptions]

**********

Colorado 24–34–402.5(1), C.R.S. (2014) – Unlawful prohibition of legal activities as a condition of employment.

> "It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours ... [specifying certain exceptions]".

## Selected Cases

### *U.S. Supreme Court Decisions*

*Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)

A teacher was discharged after he wrote a letter to the editor of a local newspaper criticizing the school board and superintendent. Determining that this constituted speech by a citizen on a matter of public concern, the U.S. Supreme Court established a balancing test for determining whether an employer's restrictions on an employee's speech violated the employee's First Amendment rights.

*Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548 (1973)

The Supreme Court upheld the Hatch Act, 5 U.S.C. § 7324(a)(2), which prohibits most employees in the executive branch of the federal government from engaging in certain political activities. The Court reasoned that the interests of (apparent) impartial execution of the laws and avoiding the creation of a political machine were sufficiently compelling to pass the *Pickering* balancing test, and reasoned that the statute was not unconstitutionally vague.

*Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)

A teacher arranged to speak with her employer privately about racially discriminatory policies. The Court held that a public employee does not forfeit his First Amendment protection against governmental abridgment of freedom of speech if she arranges to communicate privately with her employer rather than to express his views publicly.

*Connick v. Myers*, 461 U.S. 138 (1983)

In response to an unwanted transfer, a district attorney created and distributed among her co-workers a questionnaire concerning mainly internal office affairs. The Court determined that a *Pickering* analysis is inapplicable to cases involving public employees who are not speaking on matters of public concern.

*Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66-67 (1986)

Creation of a hostile environment based on racial harassment violates Title VII.

*Rankin v. McPherson*, 483 U.S. 378 (1987)

A data-entry employee in a county constable's office was discharged for privately remarking to a coworker, after hearing of an attempt on the President's life, "if they go for him again, I hope they get him." The Court examined the content, form, and context of her statement and concluded that it constituted speech on a matter of public concern. The Court then held that the government's asserted interests did not outweigh the employee's free speech rights as there was no evidence she interfered with the efficient functioning of the office, discredited it by speaking in public, or destroyed her working relationship with the constable.

*R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992)

The City of St. Paul prosecuted a white teenager under its *Bias-Motivated Crime* ordinance for burning a cross on a black family's lawn. The Court held that the ordinance violated his First Amendment right to freedom of expression. In dicta, the Court identified certain circumstances where speech might violate applicable law and lose the protection of the First Amendment (including workplace expressions that violate Title VII).

*Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)

The Court held that Title VII of the Civil Rights Act is violated when employees are exposed to discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

*Waters v. Churchill*, 511 U.S. 661 (1994)

An employer believed an employee was gossiping about personal matters, but instead she had been speaking to others about matters of public concern. The Court held that the employer had not violated the employee's free speech rights by reason of its reasonably mistaken belief about the nature of the speech in question.

*U.S. v. Nat'l Treasury Empl. Union*, 513 U.S. 454 (1995)

Section 501(b) of the Ethics in Government Act of 1978 was amended to prohibit a member of Congress, federal officer, or other government employee from accepting an honorarium for making an appearance or speech or writing an article. The Court determined that the important interest of avoiding impropriety or its appearance was not served when the prohibition was applied to the vast majority of rank and file government employees, and the interest of administrative convenience was not strong enough to justify the lack of a nexus requirement.

*Garcetti v. Ceballos*, 547 U.S. 410 (2006)

A district attorney asserted that the employer retaliated against him for writing a memorandum in the course of performing his duties. The Court held that the *Pickering* balancing test does not apply to public employees when they are speaking pursuant to their official duties.

*Lane v. Franks*, 573 U.S. ___, 134 S. Ct. 2369 (2014)

The Court held that a public employee who testifies truthfully under oath, compelled to appear by a subpoena, outside the scope of his ordinary job duties does so as a citizen and not an employee for First Amendment purposes.

*Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016)

A municipal employer believed that a police officer was supporting a particular candidate for election, which was protected activity, when actually he had just spoken with the campaign manager and delivered a sign to his bedridden mother. The employer discharged the officer and the employee brought a civil action against the city under 42 USC § 1983. The Supreme Court

held that the employer violated the First Amendment by discharging the employee based on its reasonable but mistaken belief the employee had engaged in protected speech.

***Fifth Circuit Decisions***

*Graziosi v. City of Greenville Miss.*, 775 F.3d 731 (5th Cir. 2015)

The City of Greenville, Mississippi discharged Graziosi, a police sergeant, after she had made disparaging remarks on Facebook concerning the Chief of Police. Following *Connick*, the Fifth Circuit concluded that the officer was speaking as a citizen on a matter of personal rather than public concern and thus was the *Pickering* balancing test was not applicable. The court reasoned that even if she were considered to be speaking on matters of public concern, the government's interest in maintaining discipline and close working relationships in the police department, while preventing insubordination, would have outweighed her free speech rights.

*Gibson v. Kilpatrick*, 838 F.3d 476 (5th Cir. 2016)

A police chief sued the mayor, claiming retaliation for speaking out against the mayor's misuse of city funds. The Fifth Circuit found that while the police chief had acted in his official capacity in exposing the mayor's misconduct, he spoke as a citizen when he asserted that the mayor had retaliated by discharging him. The court determined that the lawsuit against the mayor constituted a matter of private concern as the chief had addressed employment grievances and sought remedies solely for himself. Thus, under *Connick*, the lawsuit was not protected by the First Amendment.

*Anderson v. Valdez*, 845 F.3d 580 (5th Cir. 2016)

A briefing attorney for Texas' Thirteenth District Court of Appeals exposed the chief justice's alleged malfeasance, and the jurist allegedly retaliated by refusing to allow another appellate court justice to hire the attorney. The Fifth Circuit reasoned that under a *Garcetti* analysis, the plaintiff exposed the alleged malfeasance in his capacity as a citizen rather than in his official capacity as a briefing attorney, and that his speech was of a matter of public concern protected by the First Amendment.

*Moss v. Harris Cnty. Constable Precinct One*, 851 F.3d 413 (5th Cir. 2017)

A deputy constable sued Harris County for, among other things, retaliation when he was running for the position. The Fifth Circuit held that some elements of the employee's speech -- which consisted of a report to the county environmental division about a potential chemical leak on the property of a company owned by the constable, and a discussion of the issue with the local newspaper at the request of the plaintiff's supervisor -- was made in his official capacity and therefore was not entitled to First Amendment protection.

*Wetherbe v. Tex. Tech Univ. Sys.*, 699 Fed. Appx. 297 (5th Cir. 2017)

A Texas Tech University professor sued the current and former dean of the business school, alleging retaliation in violation of his First Amendment rights as a result of his outspoken negative views on the issue of tenure. The Fifth Circuit determined that the professor's

expressions regarding tenure, which consisted of numerous articles written over the course of two decades, were made in his capacity as a citizen on a matter of public concern.

*Lumpkin v. Aransas Cnty., Tex.*, No. 17-40060 (5th Circuit, October 13, 2017)

The county employer discharged paralegals in the county attorney's office after private text messages between them and another employee were revealed. The paralegals expressed their negative views about a county attorney running for the position of a county court at law judge which stood in stark contrast to the favorable views about the county attorney they had expressed in deposition testimony. The Fifth Circuit reasoned that the employees' text messages constituted speech on matters of private concern, but their deposition testimony involved a matter of public concern. The Court held that under a *Pickering* analysis, the paralegals' interest in their speech was outweighed by the county's interest in an efficient, harmonious work environment in the county attorney's office.

*DeAngelis v. El Paso Mun. Police Officers' Ass'n*, 51 F.3d 591, 596 n.7 (5th Cir. 1995)

The court rejected, in dicta, the notion that Title VII trumps First Amendment concerns.

*Liddell v. Northrop Grumman Shipbuilding, Inc.*, 836 F. Supp.2d 443, 461 (S.D. Miss. 2011)

Two racial epithets uttered by an employee were insufficient to create a severe or pervasive hostile environment under Title VII.

***Eleventh Circuit Decisions***

*Davis v. Phenix City*, No. 08-11498 (11th Circuit, October 15, 2008)

A firefighter was terminated for speaking to the mayor without giving notice to his chain of command in contravention of policies requiring notice before speaking to public officials. The court held that the policies did not violate his First Amendment rights as the interests of workplace efficiency and avoidance of disruption outweighed the firefighter's interests.

*Booth v. Pasco County*, 757 F.3d 1198, 1212 (11th Cir. 2014)

The court recognized that anti-discrimination laws are not "categorically immune" from First Amendment challenge, but rejected a constitutional challenge for several reasons.

*Alves v. Bd. of Regents of the Univ. Sys. of Ga.*, 804 F.3d 1149 (11th Cir. 2015)

Employees at Georgia State University's Counseling and Testing Center complained about the poor leadership and management of their supervisor, and were terminated within months due to a purported reduction-in-force. The court applied the *Garcetti* analysis and concluded that the employees had spoken in their role as employees on matters of personal concern as their complaints focused mainly on the impact of a manager on their ability to perform their duties.

*Carollo v. Boria*, 833 F.3d 1322 (11th Cir. 2016)

A city manager was discharged after he had reported certain misconduct of city officials to law enforcement agencies and had made public disclosures about the same matter. The Eleventh Circuit held that the city manager had a plausible claim that he had spoken as a citizen and not pursuant to his ordinary job duties when he revealed one of the categories of misconduct, which was sufficient to defeat the city officials' claim for qualified immunity.

***Other Decisions***

*Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993)

A single racial epithet by a supervisor in the presence of his subordinates was found to impact workers far more severely than a comment by a co-worker.

*Lyle v. Warner Bros.*, 38 Cal. 4th 264 (2006)

The concurring justice postulated that the First Amendment can protect speech regarded as harassment under anti-discrimination law.

*Dawson v. City of Chicago*, 648 F. Supp.2d 1057, 1069 (N.D. Ill. 2009)

A single expression of a racial epithet by a co-worker was insufficient to establish a hostile environment claim under Title VII.

*Liverman v. City of Petersburg*, 844 F.3d 400, 404 (4th Cir. 2016)

Two police officers were disciplined after posting complaints to Facebook about the management and operation of the department in violation of a broad social media policy. The court reasoned that the provision suppressed the employees' right to speak on matters of public concern and held that their First Amendment rights were violated.

*Hamm v. Williams*, 2016 WL 5462959 (N.D. Ohio, September 29, 2016)

A police officer's statements on social media were critical of a Black Lives Matter protest relating to the indictments of seven colleagues after a highly publicized shooting of two unarmed African-Americans. Reasoning that the officer's comments addressed a matter of public concern and were entitled to First Amendment protection, the court held that the employer violated his constitutional rights by discharging him.

*Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017))

The Ninth Circuit held that a policy adopted by the Nevada Highway Patrol Canine Unit was so broad it could encompass all kinds of speech, including speech on matters of public concern, and that the employees' interest in freedom of speech outweighed the employer's interests.

*Collins v. Charleston Place, LLC*, 2017 WL 3167330 (D.S.C., July 26, 2017)

The employer discharged plaintiff, a Caucasian hotel employee, after she had engaged in heated conversations with African-American supervisors about Black Lives Matter protests, recent police shootings, race relations, and diversity training. Plaintiff asserted Title VII and 42 USC § 1981 violations, alleging that she was fired because of her race, and a state law claim alleging she was fired for expressing her political opinions. The court found that plaintiff had not met her burden of proof under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) that the employer's proffered reasons for discharging her – namely that she was rude, disrespectful and insubordinate to her superiors – were a pretext. The court reasoned that while the content of her speech on sensitive and controversial topics probably was a factor in the discharge decision, her race and color were not factors. Title VII and Section 1981 do not prohibit viewpoint discrimination.

***NLRA Cases***

*Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)

Employees who distributed leaflets in support of voter registration and opposition to so-called right-to-work legislation were acting for their "mutual aid and protection" because unions have an important interest in defeating so-called right-to-work laws.

*Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)

The Supreme Court held that an employer may enforce reasonable rules covering employee conduct during working time, but that time outside working hours is an employee's time to use as he wishes without unreasonable restraint even though he is on company property.

*NLRB v. Electrical Workers Local Union No. 1229*, 346 U.S. 464 (1953)

The Supreme Court identified various factors to consider in determining whether employees' disparaging remarks about their employer are protected under Section 7.

*NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962)

Employees who leave work in protest over working conditions generally are protected by Section 7 if the employer has control over the matters being protest.

*Brown & Root, Inc. v. NLRB*, 634 F.2d 816 (5th Cir. 1981)

Two employees who refused to return to work in unsafe conditions engaged in protected concerted activity protected under Section 7.

*NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 717-19 (5th Cir. 1973)

A single employee acting on his own behalf is not protected under Section 7.

*Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885 (8th Cir. 2017)

An arbitrator upheld Cooper Tire's discharge of an employee for picket line misconduct including racist statements. But an Administrative Law Judge found that the employer violated

the National Labor Relations Act and the Board adopted the ALJ's findings and conclusions. The Eighth Circuit denied Cooper Tire's petition for review and enforced the Board's order, holding that substantial evidence supported the Board's conclusion that the employee's statements were not violent in character and did not contain any overt or implied threats to replacement workers or their property. Moreover, the employee's statements were not accompanied by any threatening behavior or physical acts of intimidation. The court also held that reinstating the employee would not conflict with the employer's obligations under Title VII where the employee's comments did not create a hostile work environment.

*Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014)

To be protected under Section 7, activity must be both *concerted* and for the purpose of *mutual aid or protection.*

*Ford Motor Co*., 221 NLRB 663, 666 (1975), *enfd. mem.* 546 F.2d 418 (3d Cir. 1976)

The NLRB held that advocating for the creation of a workers' party was not a protected concerted activity under Section 7.

*Jeanette Corp. v. NLRB,* 532 F.2d 916 (3d Cir. 1976)

Section 7 protects non-union employees from discipline for sharing their personal wage information and discussing wages.

*Arthur Young & Co. v. NLRB*, 884 F.2d 1387 (8th Cir. 1989)

The employer discharged two employees after they complained jointly about their pay. The court rejected the employer's contention that the employees were discharged for racially offensive misconduct and enforced an NLRB order based on the company's violation of Section 7.

*Kaiser Engineers*, 213 NLRB 752 (1974), *enfd.* 538 F.2d 1379 (9th Cir. 1976)

The Board held that writing a letter to Congress in opposition to a competitor company's efforts to obtain resident visas for foreign engineers, fearing that an influx of engineers would threaten the job security of American, engineers, was a protected concerted activity.

*Blue Circle Cement v. NLRB*, 41 F.3d 203 (5th Cir. 1994).

Employer violated Section 8(a)(1) by discharging employee involved in environmental advocacy group Earth Concerns of Oklahoma for using company equipment to copy Greenpeace environmental literature on dangers of hazardous waste.

*NLRB v. Motorola*, 991 F.2d 278 (5th Cir. 1993).

Fifth Circuit denied petition for enforcement of part of Board order related to finding of Section 8(a)(1) violation where employer prohibited distribution of literature related to anti-drug testing political advocacy. The court concluded that the political advocacy in question did not merit Section 7 protection.

*Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985)

An activity is concerted when an employee acts with or on the authority of other employees, and not solely by and on behalf of the employee himself.

*Meyers II*, 281 NLRB 882 (1986), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988)

Section 7 protects individual employees who seek to initiate or induce or prepare for group action as well as individual employees who bring group complaints to the attention of management.

*Atlantic Steel*, 245 NLRB 814 (1979)

Identifies factors that determine whether an employee's outburst against a supervisor is protected under Section 7.

*Three D, LLC*, 361 NLRB No. 31 (2014)

*Atlantic Steel* factors do not apply to off-duty conduct (Facebook posts).

*Misericordia Hospital Medical Center*, 246 NLRB 351, 356 (1979), *enfd.* 623 F.2d 808 (2d Cir. 1980)

Employee complaint to an accreditation board regarding staffing levels and the number of patients assigned to each staff member was protected under Section 7 as it closely related to working conditions.

*Firestone Steel Products Co.*, 244 NLRB 826 (1979), *enfd.* 645 F.2d 1151 (D.C. Cir. 1981)

A ban on employees' distribution of political leaflets that called for the election of a particular slate of candidates did not violate Section 8(a)(1) because the leaflets bore no relation to their concerns as employees.

*Waters of Orchard Park*, 341 NLRB 642 (2004)

A nurse's telephone call to the state health department's patient care hotline to complain about the quality of patient care was not protected under Section 7.

*MasTec Advanced Technologies*, 357 NLRB No. 17 (2011)

Employees were engaged in Section 7 activity when they held a press conference to complain about dishonest sales tactics the employer had demanded of them because the tactics affected their working conditions and pay.

*Hyundai America Shipping Agency*, 357 NLRB 860 (2011), *enfd. in relevant part*, 805 F.3d 309 (D.C. Cir. 2015)

In determining whether a work rule violates Section 8(a)(1), the central issue is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights.

*Lafayette Park Hotel*, 326 NLRB 824 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999)

Where employment policies are likely to have a chilling effect on Section 7 rights, their maintenance may be unlawful even absent evidence of enforcement.

*Lutheran Heritage Village-Livonia*, 343 NLRB 646 (200

A work rule is unlawful if it expressly restricts Section 7 rights and identified various factors to consider when the rule does not expressly restrict protected activity.

*DirecTV*, 359 NLRB 545 (2013).

Any ambiguity in a work rule must be construed against the employer.

*NLRB Memorandum GC 08-10 (July 22, 2008)*

Protections of Section 7 extend "beyond the confines of the employment relationship to concerted political advocacy when the subject of that advocacy has a direct nexus to employee working conditions.