WHETHER EMPLOYEES CAN BE FIRED FOR PARTICIPATING IN PEACEFUL PROTESTS

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Protestors across the country have poured into the streets in the days and weeks following the police killings of George Floyd in Minneapolis, Minnesota and Breonna Taylor in Louisville, Kentucky, among others.[1] These tragic deaths are but the latest chapter in the long struggle for racial justice and systemic reform in the United States.

As the nation is gripped by a groundswell of protests seeking demonstrable and lasting change, many people who find themselves speaking out on these critical issues may be confronted with questions about whether and how participating in these public demonstrations could impact their jobs. We have seen a handful of recent posts commenting on the issue.

This article explores whether employees fired for engaging in peaceful protests would have a valid legal action for wrongful termination, and examines potential legal avenues for bringing such a claim. Ultimately, the answer may depend on whether the individual is a public or private employee and where the individual lives and works.

I. GOVERNMENT WORKERS

Government employees are protected from retaliation for exercising their First Amendment rights to free speech and assembly.[2] This is because public

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1. *See also* Caitlin O'Kane, *"Say Their Names": The List of People Injured or Killed in Officer-Involved Incidents Is Still Growing*, CBS NEWS (June 8, 2020, 7:02 AM), https://www.cbsnews.com/news/say-their-names-list-people-injured-killed-police-officer-involved-incidents/ [https://perma.cc/4QJD-7KL6]; Brentin Mock, *What New Research Says About Race and Police Shootings*, BLOOMBERG (August 6, 2019, 1:28 PM), https://www.citylab.com/equity/2019/08/police-officer-shootings-gun-violence-racial-bias-crime-data/595528/ [https://perma.cc/33YY-MB43].

2. The other avenues discussed below in the section on private employees would also, as a general matter, apply to public employees, but First Amendment protections are unique.

employers, as arms of the government, are bound by the First Amendment and generally cannot abridge freedom of speech by punishing workers for engaging in protected First Amendment activity. The Supreme Court has recognized that "the threat of dismissal from public employment . . . is a potent means of inhibiting speech."[3]

Nevertheless, First Amendment retaliation claims involve a balancing "between 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."[4] In order to impose a restriction, the government must show that its interests, as an employer charged with duties to the public, are thwarted by the employee's otherwise protected speech.[5]

In general, to assert a claim, a government employee must show (1) that he or she spoke on a matter of public concern; (2) that he or she spoke as a private citizen; and (3) the protected speech was a substantial or motivating factor behind an adverse employment action.[6]

As to element (1), courts look to the content, form, and context of the speech to determine whether it pertained to a matter of public concern.[7] The Supreme Court has for decades recognized that the central aim of the First Amendment is to ensure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people,"[8] and that speech addressing an issue of public concern lies at the heart of self-government and is at the "highest rung of the hierarchy of First Amendment values."[9] A "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[10]

Here, it would seem all too obvious that police brutality and racial injustice are matters of public concern. Protests and policy initiatives about these issues dominated the national conversation for weeks, displacing even the COVID-19 crisis from the top of the headlines (and intersecting with it, too).[11] But even in ordinary times, these are fundamental issues affecting our country and our collective future.

3. Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205, Will Cty., Ill., 391 U.S. 563, 574 (1968). This is a relatively recent development. Until the mid-twentieth century, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." Connick v. Myers, 461 U.S. 138, 143–44 (1983).

4. Rankin v. McPherson, 483 U.S. 378, 384 (1987).

5. *Id.*

6. *E.g., Pickering*, 391 U.S. at 565 (finding that a teacher's First Amendment rights were violated when he was dismissed from his position after writing a letter to a local newspaper critical of the Board of Education's handling of a recent tax increase).

7. *Connick*, 461 U.S. at 147–48.

8. Roth v. United States, 354 U.S. 476, 484 (1957); *accord Connick*, 461 U.S. at 145.

9. *Connick*, 461 U.S. at 145.

10. City of San Diego, Cal. v. Roe, 543 U.S. 77, 83–84 (2004).

11. *See* Centers for Disease Control and Prevention, *COVID-19 in Racial and Ethnic Minority Groups*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html [https://perma.cc/9KDV-NDSW] (last visited Oct. 5).

On element (2), government employees should take care to speak only for themselves and not in any official capacity. Employees' statements and activities should be attributed only to themselves and not the entities for which they work.[12] For most workers, joining a protest on their own time without wearing any insignia of their employer should fit the bill. Employees expressing their views on social media may wish to include disclaimers that they speak only for themselves. Government workers should also follow any guidelines that their employers have published to ensure conformity with applicable laws or policies.[13]

Element (3) simply concerns the employer's reason for firing the employee: whether the individual was actually fired—at least in substantial part—because of the protected speech, as opposed to some other, legitimate reason.[14]

If employee establishes these elements, the burden shifts to the government employer to demonstrate that its legitimate administrative interests outweigh the employee's First Amendment rights or that it would have taken the same action even in the absence of the protected conduct.[15]

Whether this balancing applies when an employee suspects that an adverse employment action was taken against her not solely because of her speech but also because of her affiliation with a particular group is the subject of judicial debate. For example, the Second, Sixth, Seventh, and Ninth Circuits have found the *Pickering* balancing test applicable to freedom of association claims.[16] But the Fifth and Eleventh Circuits have found that the "public concern" requirement does not apply to associational claims as imposing such a condition would "exact a toll on First Amendment liberties."[17] This issue becomes moot in the present context; affiliation with Black Lives Matter or a similar group protesting police brutality or advocating for racial equity undoubtedly implicates matters of public concern.

Consequently, absent a compelling justification, it would also impinge upon First Amendment rights for a public entity to claim that its employees can say what they want but just cannot do so in protest with others. This position

12. *See, e.g.*, U.S. Office of Special Counsel, *Hatch Act FAQs*, https://osc.gov/Services/Pages/HatchAct-FAQ.aspx#tabGroup26 [https://perma.cc/9FPR-FSW4] ("*May a federal employee use a Facebook or Twitter account in his official capacity to engage in political activity?* No. Any social media account created in a federal employee's official capacity should be limited to official business matters and remain politically neutral. Any political activity must be confined to the employee's personal Facebook or Twitter account, subject to the limitations described in other related questions.").

13. *See, e.g.*, *id.* (detailing social media policy for federal employees through a series of questions and answers)

14. *Connick*, 461 U.S. at 145.

15. *E.g.*, Hudson v. Craven, 403 F.3d 691, 695 (9th Cir. 2005); Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009).

16. *Hudson*, 403 F.3d at 697–98.

17. *Id.*; *see also* LaPosta v. Borough of Roseland, No. CIV.A.06CV5827, 2009 WL 2843901, at *2 (D.N.J. Sept. 1, 2009) (recognizing that "a circuit split exists as to whether the 'public concern' requirement typically applied to freedom of speech claims also applies to claims based upon a plaintiff's freedom of association" and noting that the Third Circuit had yet to rule on the issue).

would blunt much of the force of core political speech by depriving it of its collective nature. After all, the First Amendment expressly provides a right not only to freedom of speech but the "right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[18]

There remains an important key distinction between speech and conduct. While some conduct is considered expressive and entitled to protection, the First Amendment does not shield public employees from facing consequences for engaging in violent acts or behavior—even as part of a political protest—or otherwise breaking the law.[19] And for some government employees, the employment consequences of breaking the law may be far-reaching.

II. PRIVATE EMPLOYEES

Unfortunately, private employees are entitled to lesser protection because private employers are not typically covered by the First Amendment.[20]

A. Federal Laws

We are not aware of any nationwide law that would definitively protect employees from retaliation for protesting about societal issues.

Statutes such as Title VII (42 U.S.C. § 2000e-3(a)) and the National Labor Relations Act (29 U.S.C. §§ 157-158) do apply to protests and organizing surrounding certain *workplace* practices and conditions but would not extend to other areas such as police brutality, racial profiling, and wider social reform.[21]

42 U.S.C. § 1981 presents a potentially promising, if perhaps largely untested, avenue to protect protesters speaking out against racial injustice. As opposed to Title VII, the statute's substantive protections extend beyond the workplace or any other particular context to broadly cover various forms of racial discrimination:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white

18. U.S. CONST. amend. I.

19. Notably, federal employees subject to the Hatch Act are prohibited from engaging in some conduct related to political fundraisers. *See* U.S. Office of Special Counsel, *Hatch Act FAQs*, "Federal Employees: Fundraising," https://osc.gov/Services/Pages/HatchAct-FAQ.aspx#tabGroup26

20. Pub. Utilities Comm'n of D.C. v. Pollak, 343 U.S. 451, 461 (1952).

21. While Sumner v. U.S. Postal Serv., 899 F.2d 203 (2d Cir. 1990), loosely indicates that protected activity under Title VII includes "protesting against discrimination by industry or by society in general," an employee must still be protesting about "discriminatory employment practices." *Id*. at 209; 42 U.S.C. § 2000e-3(a) (retaliation protection for employees who have "opposed any practice made an unlawful employment practice by this subchapter"). Thus, police officers are not protected by Title VII when they complain about discrimination in their department's policing practices as opposed to its employment practices. *See* Wimmer v. Suffolk Cty. Police Dep't, 176 F.3d 125 (2d Cir. 1999) (complaints that department discriminated in its law enforcement function against members of the general public); Abreu v. N.Y.C. Police Dep't, 329 Fed. Appx. 296, 298 (2d Cir. 2009) (same: racial profiling complaint would not qualify); Catapano-Fox v. City of New York, No. 14 Civ. 8036, 2015 WL 3630725, at *5 (S.D.N.Y. June 11, 2015).

> citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

These rights "are protected against impairment by nongovernmental discrimination and impairment under color of State law."[22] And, courts have read in protections against retaliation for those who seek to vindicate the rights provided in § 1981 by complaining about or taking action against purposeful racial discrimination or by advocating for the rights of racial minorities.[23]

Protesting an unlawful race-based killing by the police would seemingly qualify as opposing conduct coming within the prohibitions of § 1981:[24] denial of the full and equal benefit of laws "for the security of persons," and a "pain" or "punishment"—deprivation of life without due process—that would not have been exacted upon a similarly-situated white citizen.

The question remains as to whether an individual must be opposing discriminatory conduct by the defendant in order to be protected from retaliation by that defendant. In other words, in an employment case, is an employee shielded from retaliation for protesting general social conditions involving alleged intentional race discrimination in violation of § 1981? Must the employee's advocacy instead relate to employer conduct? Must there be a nexus to the workplace?

Viewed from a broad perspective, imposing liability under these circumstances appears consistent with the statutory purpose of eradicating racial barriers and ensuring that non-white citizens[25] have equal rights and opportunities. Allowing employers to fire workers who stand up against discriminatory practices prohibited by § 1981 would exert a significant chilling effect and curtail efforts to redress those practices. Loss of private employment acts as just as much of a deterrent to the exercise of one's rights to speak out on certain matters as is loss of government employment.[26] If employees are protected from discrimination for interracial associations that extend beyond the workplace,[27] they should also be protected from retaliation for engaging in anti-racist advocacy extending

22. 42 U.S.C.A. § 1981 (West).

23. *See, e.g.*, CBOCS W. Inc. v. Humphries, 553 U.S. 442 (2008); Barrett v. Whirlpool Corp., 556 F.3d 502, 512 (6th Cir. 2009) ("Section 1981 also prohibits discrimination based on association with or advocacy for non-whites").

24. *See generally* Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684, 693 (2d Cir. 1998) ("to be actionable under § 1981, the retaliation must have been in response to the claimant's assertion of rights that were protected by § 1981."); Caplan v. L-Brands/Victoria Secret Stores, LLC, 210 F. Supp.3d 744, 754–55 (W.D. Pa. 2016) (employee-plaintiff must have "complained about or protested incidents of race discrimination" prohibited by § 1981).

25. For the expansive meaning of "non-white" in the context of § 1981, *see* St. Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987); *see also* "42 U.S.C. § 1981: A Recipe for Race Relations and Reconciliation in the Wake of Charlottesville," Sanford, Heisler, Sharp, LLP (Feb. 14, 2018), https://sanfordheisler.com/race-relations-and-reconciliation-in-wake-of-charlottesville/ [https://perma.cc/E8NK-Q22B].

26. The essential difference is the nature of the right. Under the First Amendment, public employees have a free-standing prerogative to speak on matters of public concern. The speech is valued and protected in its own right. In § 1981 cases, anti-retaliation protections are a corollary to the underlying anti-discrimination protections of the statute. If employees are deterred from opposing and protesting racial discrimination, efforts to bring such practices to light and attempt to redress them will be curtailed.

27. *See, e.g.*, *Barrett*, 556 F.3d at 512–13 (holding that where an employee is discriminated against for interracial association, the locus and degree of the association is irrelevant).

beyond the workplace, as long as the conduct or practices the employee is protesting against come within the ambit of § 1981.[28]

We have identified a handful of cases that could reflect on the question of whether § 1981 protects employees who protest against societal race discrimination. In *Beckwith v. Career Blazers Learning Ctr. of Wash. D.C., Inc*.,[29] the plaintiff was fired for participating in the Million Man March. The court held that plaintiff had no § 1981 retaliation claim because the March "was not a protest against unlawful discriminatory employment conditions he was experiencing but rather a day of national atonement by black men."[30] The court cited an Eighth Circuit decision, *Evans v. Kansas City, Mo. Sch. Dist*., rejecting a claim by a teacher fired for complaining about the school's educational rather than employment practices.[31] But it is arguably improper for cases such as *Evans* and *Beckwith* to lump § 1981 together with Title VII—given § 1981's broader scope.

Looked at differently, *Beckwith* is distinguishable: A march about self-responsibility does not protest racial discrimination prohibited by § 1981. *Caplan v. L-Brands/Victoria Secret Stores, LLC*,[32] suggests that there could be a viable claim where § 1981 is implicated. There, the plaintiff alleged that she was fired for Facebook posts unrelated to her employment, including one depicting LA Clippers owner Donald Sterling as racist.[33] The district court appeared to accept the principle that an employee could have a valid claim for protesting racial discrimination unrelated to the workplace.[34] However, it held, plaintiff's particular

28. In relation to employee claims, § 1981 does cover certain non-workplace-related activity, protecting white employees from being fired for being in interracial relationships or selling their homes to black coworkers. This may be seen as associational discrimination—covered by a line of precedent including Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986)—but has also been referred to as *retaliation* for not engaging in "purposeful racial discrimination in a contractual or marital context." Albert v. Carovano, 851 F.2d 561, 572–73 (2d Cir. 1988). Such cases might support a cause of action for retaliation against employees who protest intentional race discrimination, such as race-based assaults and killings. *Albert* does clarify that these precedents do not extend to "retaliation by another as a consequence of the plaintiff's support of political or other causes favored by minorities. Support for members of minority groups protesting investment or curricular policies, protesting a college official's statement that apartheid in South Africa is not similar to the Holocaust, or protesting generalized perceptions of racist attitudes, simply does not implicate Section 1981 rights." *Id*. at 573. As the *Alberts* court observed, "§ 1981, however generously construed, does not prohibit discrimination on the basis of political affiliation." *Id*. (citing Keating v. Carey, 706 F.2d 377, 384 (2d Cir. 1983)). One can certainly argue for a distinction between supporting protests or political activity by others and engaging in racial justice protests oneself, with the latter directly seeking to vindicate the § 1981 rights of racial minorities; but it is uncertain how such an argument would fare. At least one district court has interpreted the *Alberts* passage narrowly, as suggesting "that a § 1981 retaliation claim cannot be based on mere protest of general perceptions of racial attitudes, but instead must relate to racial discrimination in a 'contractual or marital context'"; thus, that court held, § 1981 thus did not cover a claim by an Amtrak employee who objected that an Amtrak police officer treated African-American teenagers in Penn Station more harshly based on their race. Washington v. Nat'l R. Passenger Corp., No. 01 Civ. 4201, 2003 WL 22126544, at *3-4 (S.D.N.Y. Sept. 12, 2003). *Washington* predates key cases such as *CBOCS* and does not consider provisions of § 1981 relating to non-contractual discrimination—i.e., (i) equal protection of the laws and (ii) "like punishment, pains," etc.

29. 946 F. Supp. 1035 (D.D.C. 1996).

30. *Id.*

31. 65 F.3d 98, 101–102 (8th Cir. 1995); *See also Washington*, 2003 WL 22126544.

32. 210 F. Supp.3d 744 (W.D. Pa. 2016), *aff'd* 704 Fed. Appx. 152 (3d Cir. 2017).

33. *Id.*

34. *Id.*

Facebook posts, viewed objectively, could not be seen as protesting racially-discriminatory acts that would come within the proscriptions of § 1981.[35] The Third Circuit questioned this determination, observing that an issue of fact likely existed; the plaintiff's message, though not clear, "could properly be construed as mocking a racist business owner,"[36] and, thus, arguably opposing racist business practices.[37]

Ninth Circuit precedent on § 1981 retaliation—to the extent it remains good law—suggests a possible limitation which could preclude or significantly restrict a claim in these circumstances. It indicates that to give rise to a claim, the employer must retaliate "with the intent to perpetuate the original act of discrimination, or with some other racially discriminatory motive in mind."[38] Even if this rule does not cabin a claim to those workers retaliated against for complaining about discrimination *by their employers*, having to prove a racially-discriminatory motive presents a substantial additional hurdle. Ordinarily, a retaliation plaintiff only has to establish a *retaliatory* motive, i.e. that the termination or other adverse act at issue was prompted by his or her protected activity; there need not be any actual discrimination involved.[39]

Even if such a claim were indeed available, the limitations of a § 1981 remedy may be arbitrary and unforgiving. At least in the Second Circuit, protestors must likely be raising grievances about intentional discrimination rather than latent structural inequities or a disparate impact on non-white individuals[40]—although such issues are a constructive extension of the dialogue prompted by recent events. It can be difficult to parse out protestors' individual motivations and messages. For example, on what side of the coin would a plea to eliminate qualified immunity for police officers fall? Nevertheless, where the protests are prompted by and largely focus on an intentional act of violence upon an unarmed African-American man, we would expect that courts would take a lenient view and at least deny summary judgment on this issue.

Ultimately, while a § 1981 retaliation claim is an avenue to be explored in future litigation, the law in this area is unsettled and we do not believe that protesters can rely on it at this time.[41]

35. *Id*. at 753–55.

36. *Caplan*, 704 Fed. Appx. at 154.

37. The Third Circuit nonetheless upheld summary judgment to the employer on the basis that the plaintiff was properly fired for engaging in other, non-protected conduct.

38. Manatt v. Bank of Am., NA, 339 F.3d 792, 800 (9th Cir. 2003) (citing London v. Coopers & Lybrand, 644 F.2d 811, 819 (9th Cir. 1981)).

39. The Second Circuit expressly rejected the *Manatt/London* requirement of racial motivation in Choudhury v. Polytechnic Inst. of N.Y., 735 F.2d 38, 43 (2d Cir. 1984). Moreover, the *Manatt/London* rule may be effectively abrogated by Supreme Court cases such as *CBOCS*, 553 U.S. 442 (§ 1981 retaliation) and Jackson v. Birmingham Bd. of Ed., 544 U.S. 167 (2005) (Title IX retaliation).

40. *See Catapano-Fox*, 2015 WL 3630725, at *2, 5.

41. It is worth noting that there could be a discrimination claim if the employer discriminates between protesting workers based on a protected category or characteristic—for example if it tolerates protest activity by white employees but penalizes black employees for engaging in similar activity. *See also infra* note 69, discussing a Title VII case against Whole Foods for selectively enforcing its dress code policy against black workers and their advocates who wore Black Lives Matter masks during their shifts.

B. State and Local Protections

Certain states and municipalities, however, have enacted additional employment protections that explicitly cover political protests or may be construed to do so.

1. Statutes Protecting Political Activity and/or Private Off-duty Conduct

For example, California Labor Code § 1101 prohibits employers from forbidding or preventing employees from engaging or participating in politics and from trying control or direct their political activities or affiliations.[42] Section 1102 directly states: "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."[43] Similarly, California Labor Code §§ 96(k) and 98.6 protect employees from retaliation for "lawful conduct occurring during non-working hours away from the employer's premises."[44] In our view, a peaceful political protest would plainly qualify for these protections.

Jurisdictions such as Colorado, North Dakota, and Louisiana may have similar protections that could shield employees from being fired for engaging in lawful, peaceful protests. Other states and cities may also have comparable laws.[45]

But not all statutes of this type actually cover political protests. Details matter. For example, New York Labor Law § 201-d(2)(a,c) prohibits employers from retaliating against most workers for their "political activities" or "legal recreational activities" "outside of working hours, off of the employer's premises and without use of the employer's equipment or other property."[46] While these provisions might appear to include political protests, we are not aware of any authority interpreting them in this manner. "Political activities" are narrowly defined by the statute as: "(i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group." § 201-d(1)(a).[47] For employees in New York State, unless also doing one of these things during a protest or rally (e.g.: campaigning for a particular candidate, fundraising for Black Lives Matter), § 201-d(2)(a) will not apply.[48] And, at least

42. Cal. Lab. Code § 1101 (West).

43. Cal. Lab. Code § 1102 (West).

44. Cal. Lab. Code § 96(k), 98.6 (West).

45. *See, e.g.*, Restatement of Employment Law § 7.08, Reporters Notes comment b. *See also* Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 253-58 (2017), avail at: https://illinoislawreview.org/wp-content/uploads/2017/01/Bodie.pdf [https://perma.cc/89NQ-7VD8].

46. N.Y. Lab. Law § 201-d (McKinney).

47. *See also* Wehlage v. Quinlan, 55 A.D.3d 1344, 1345 (N.Y. App. 2008).

48. N.Y. Lab. Law § 201-d(2)(a) (McKinney)

one court has held that picketing and protesting is not a form of "recreational activity" under § 201-d(2)(c) because it is not done for purposes of leisure.[49]

We would take issue with this ruling and believe that an argument to the contrary may be properly presented in an appropriate case. Enumerated, but non-exclusive, examples of "recreational activity" under the statute include "sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material."[50] It is arguable that what constitutes recreation or leisure is largely in the eye of the beholder. For many, joining compatriots in political protest may be more pleasurable in its own right than something such as physically strenuous exercise.[51] Moreover, the court's interpretation would lead to bizarre results. It seems highly incongruous—even downright irrational—for the law to protect employees for watching TV, jogging, bodybuilding, or playing board games but to allow them to be fired for political protests and organizing. This could also lead to arbitrary line-drawing. What if employees are reading articles or watching documentaries on serious social and political issues? Are only "frivolous" shows and beach reading covered? Is there more protection for people who watch news coverage about protests than the actual protesters themselves? Such line-drawing discounts the breadth of the human experience and subjectively values some individuals' preferences and way of being and interacting with the world over others'. Accordingly, engagement on important matters facing our country should not automatically fall outside of the sphere of "recreational activity."[52]

2. Statutes Prohibiting Discrimination Based on Political Affiliation

Some jurisdictions such as Washington D.C. and several counties in Maryland also protect employees from discrimination based on political affiliation, by including political affiliation among the protected categories in their anti-discrimination laws.[53] Again, whether such a law can be extended through creative lawyering to apply to protest activity will depend on applicable statutory definitions and their interpretation by courts. In D.C., for example, "political affiliation" is narrowly defined as "the state of belonging to or endorsing any political

49. Kolb v. Camilleri, No. 02-CV-0117A, 2008 WL 3049855, at *12–13 (W.D.N.Y. Aug. 1, 2008).

50. N.Y. Lab. Law § 201-d(1)(b) (McKinney)

51. On the latter point, one recalls a scene from BACK TO THE FUTURE III (Universal Pictures 1990) in which Doc Brown, a time traveler in the Old West, explained that in the future, people got around by automobile but would still run "for recreation. For fun." One of his bemused listeners incredulously responded, "Run for fun? What the hell kind of fun is that?"—prompting a chorus of laughter from likeminded denizens of the era.

52. While *Kolb* likened picketing to prior Second Circuit and Appellate Division precedents concluding that "dating" is not a form of recreational activity under the statute (*see Kolb*. at *13, citing cases), these cases are apparently based on a conclusion that people date for purposes of building and sustaining romantic relationships rather than as a pleasurable diversion. However, some individuals may very well date for purposes of leisure. Conversely, people may often exercise or read books not for isolated in-the-moment enjoyment but for longer-term health, educational, or self-improvement goals.

Ultimately, to be successful under § 201-d(2)(c), a practitioner would likely either have to prevail at the New York Court of Appeals or find a way to persuasively distinguish the dating cases.

53. Additional laws may apply to certain government employees.

party,"[54] understood to mean only those groups that nominate candidates in recognized public elections, and thus would not include affiliations with advocacy groups and organizations such as Black Lives Matter.[55]

3. Anti-retaliation Provisions of Omnibus Discrimination Statutes

As opposed to an employment discrimination law like Title VII, some jurisdictions have omnibus anti-discrimination laws that cover a variety of subjects. The New York City Human Rights Law broadly prohibits employers from retaliating in any manner against any person for opposing *any* practice forbidden by the statute, not just an employment practice.[56] The question remains as to whether an employee's protests cover a practice forbidden by the statute (and whether the underlying practice the employee is opposing must occur in or have a nexus to New York City). The closest we can see here is the provision against interference with protected rights: "It shall be an unlawful discriminatory practice for any person to coerce, intimidate, threaten or interfere with, or attempt to coerce, intimidate, threaten or interfere with, any person in the exercise or enjoyment of, or on account of such person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected pursuant to this section."[57] Arguably, race-based police brutality and extrajudicial killings might fit within this proscription in certain circumstances. A claim that an employee fired for anti-racist protests has been retaliated against for opposing practices forbidden by § 8-107(19) would be a creative approach that tests the scope of the statute's protections.

4. Common Law Claims

Lastly, there could potentially be a common law claim (non-statutory claims created by judicial case law and the body of historical precedent). Some jurisdictions allow causes of action for wrongful termination in violation of public policy.[58] Whether such an action could cover workers fired for participating in political protests depends on the applicable case law in their jurisdictions.[59]

54. D.C. Code § 2-1401.02.

55. Blodgett v. Univ. Club, 930 A.2d 210, 221 n.10 (D.C. 2007); *see also* McCaskill v. Gallaudet Univ., 36 F. Supp.3d 145, 153-54 (D.D.C. 2014).

56. N.Y.C. Admin. Code § 8-107(7).

57. N.Y.C. Admin. Code § 8-107(19).

58. *See, e.g.*, Adams v. George W. Cochran & Co., 597 A.2d 28, 34 (D.C. App. 1991) ("We therefore hold… that there is a very narrow exception to the at-will doctrine under which a discharged at-will employee may sue his or her former employer for wrongful discharge when the sole reason for the discharge is the employee's refusal to violate the law, as expressed in a statute or municipal regulation."); Tameny v. Atl. Richfield Co., 27 Cal.3d 167 (1980); Pierce v. Ortho Pharma. Corp., 84 N.J. 58 (1980); *but see* Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 89–90 (N.Y. 1983) (noting that at-will employment "may be freely terminated by either party at any time for any reason or even for no reason"; and declining to recognize a common law exception for abusive or wrongful discharge).

59. For example, in the District of Columbia, the public policy exception to at-will employment is strictly limited to violations of an officially declared or identifiable public policy. *See, e.g.*, Odutola v. Branch Banking & Tr. Co., 321 F. Supp. 3d 67, 75–76 (D.D.C. 2018) ("Not only must a plaintiff plead a 'clear mandate of public

Employees may have an argument that the analysis should be informed by the policies behind the First Amendment and § 1981 and by Restatement of Employment Law § 7.08.

This section of the Restatement states:

> (a) Employees have protected interests in personal autonomy outside of the employment relationship. Such interests include:
>
> (1) engaging in lawful conduct that occurs outside of the locations, hours, and responsibilities of employment and does not refer to or otherwise involve the employer or its business;
>
> (2) adhering to political, moral, ethical, religious, or other personal beliefs or expressing such beliefs outside of the locations, hours, and responsibilities of employment in a manner that does not refer to or otherwise involve the employer or its business; or
>
> (3) belonging to or participating in lawful associations when that membership or participation does not refer to or otherwise involve the employer or its business.[60]

These provisions would plainly cover off-duty political protests that do not involve the employer.

In addition to the tort of wrongful discharge (against public policy), another possible common law vehicle for a Restatement § 7.08 argument is the implied contractual covenant of good faith and fair dealing.[61] Nevertheless, the drafters of the Restatement recognize that the proposed basis for liability "is a departure from existing law." Reporter's Note, comment f.[62]

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In short, depending on the jurisdiction, there could be local state, county, or city law that would apply to employees retaliated against for participating in peaceful protests. There may be numerous angles worth pursuing but only select jurisdictions provide clear protections.

policy,' but this public policy must be one that is not already protected by another statute.") (citation omitted); Golden v. Mgmt. & Training Corp., 319 F. Supp. 3d 358, 379 (D.D.C. 2018) ("[I]n the absence of any identified public policy, the Court clearly cannot conclude that the public policy relied upon is 'firmly anchored' in the Constitution or a statute or regulation.") (citation omitted).

60. Under § 7.08(c), an exception to liability exists if the employee's activities interfere with the employer's legitimate business interests.

61. *See generally* Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995); Wieder v. Skala, 80 N.Y.2d 628 (1992) (carving out exception to employment-at-will doctrine for the ethical rules of the legal profession, inherent in the legal employment relationship; thus, a lawyer terminated for carrying out his duty to report ethical violations had a cause of action for breach of contract/covenant of good faith and fair dealing); Starishvesky v. Hofstra Univ., 161 Misc. 2d 137 (N.Y. Sup. Ct. 1994); Melzer & Tracey, *Employers Should Owe a Duty of Loyalty to Their Workers*, CARDOZO L. REV. *de novo* 112, 116, 121 n.42 (2020).

62. The architect of the Restatement proposal, Professor Matthew Bodie, has observed that the "effort to extend the wrongful-discharge tort into political speech and expression appears to be dead," although the issue may be somewhat more nuanced than that. *See* Bodie, *supra* note 45, at 250–53.

III. POTENTIAL LEGAL PITFALLS FOR PROTESTERS

Under federal law on Title VII, even where protests would ordinarily qualify as protected activity supporting a retaliation claim, "disruptive or unreasonable" protests do not; anti-retaliation laws do not provide a license to engage in violence, insubordination, and the like.[63] This line of case law generally refers to conduct that disrupts the workplace, but would also extend to violent or destructive behavior in the public sphere.

Likewise, employees who engage in protected political protests may be fired for skipping work without permission or if their activities significantly disrupt their employer's business.[64] New York Labor Law § 201-d, even if it does not directly apply, also counsels that employees should engage in political activity "outside of working hours, off of the employer's premises and without use of the employer's equipment or other property."[65]

Bearing this in mind, commentators suggest that protestors engage in common sense measures such as protesting during non-work hours (or seeking permission to protest during work time),[66] informing their employers about their activities, not wearing employer uniforms or insignia, and not engaging in any conduct that they would not want captured on film and viewed by their employers (in the age of cellphone cameras, mass coverage, and social media).[67]

If an individual is concerned about whether his or her employer has a stated policy about participating in protests or speaking out publicly on a pressing issue, it also may be good idea for to review the employer's handbook or manual in advance. The employee may want to follow up with a supervisor or with HR about any questions or concerns.

Of further note is the intersection of increased protest activity with the still-raging COVID-19 pandemic. In addition to weighing how they are best able to advocate for racial justice, individuals may find that the ongoing public health crisis looms large over both individual and collective decisions. In the era of COVID-19, employers are taking an even more active interest in how employees' private behavior can have ramifications within the workplace. To the extent possible, employees should follow proper social distancing protocols and guidelines, even while protesting, and be proactive about safeguarding their health and that of their coworkers. This includes self-monitoring for any COVID-19 symptoms and staying home from work if they feel sick or know they have been exposed to

63. *E.g.*, Matima v. Celli, 228 F.3d 68, 79 (2d Cir. 2000).

64. *Can I Be Disciplined or Fired for Participating in a Political Protest?*, LEGAL AID AT WORK, https://legalaidatwork.org/factsheet/your-rights-as-protester-political-protests-by-employees/ [https://perma.cc/469Y-2CBW] (last visited Oct. 5) (discussing California statutes protecting employees who engage in political protests).

65. N.Y. Lab. Law § 201-d (McKinney). *See also* Restatement of Employment Law § 7.08 (2015).

66. Employees who take time off to attend a protest should do so in accordance with their employers' policies. For example, employees should not use sick leave that may only be used for medical reasons.

67. *See, e.g.*, Monica Torres, *Can You Lose Your Job for Participating in Protests?*, HUFFINGTON POST, (June 5, 2020, 5:20 PM), https://www.huffpost.com/entry/can-you-lose-job-protests_l_5ed90ce4c5b697d4c4442597 [https://perma.cc/9ALQ-KTZY].

the virus. Such vigilance can help mitigate additional employer scrutiny and concerns about outside protests.

IV. CONCLUDING REMARKS

As protests and other advocacy efforts continue over the months and years to come, new legal battles are likely to emerge. Indeed, they already have.[68]

It is difficult to anticipate, however, whether there will be many lawsuits brought by employees fired or otherwise retaliated against for their participation in political protests. Even if an individual lives in a jurisdiction where there is no law that protects political protesting, there could be alternative solutions such as a media, public relations, organizing, or lobbying strategy. Many employers would not want to terminate employees for exercising their First Amendment rights. This is especially true if the employer has made public statements condemning racial injustice and police brutality—as many companies have in recent months.[69] In most circumstances, it would be hypocritical for such an employer to turn around and fire its workers for entering the conversation and expressing similar views.

And, if workers are fired or otherwise retaliated against for workplace-related organizing and advocacy for the rights of employees who engage in outside protests, laws such as the National Labor Relations Act may then be implicated.[70]

In the end, it is simply unwise for employers to fire workers for engaging in peaceful protests. Such terminations needlessly jeopardize employee relations

68. A currently pending petition for *certiorari* presents the question of whether, under the First Amendment, a Black Lives Matter protest organizer can be held personally liable in negligence for a violent act, committed by an unknown third-party individual, that the organizer in no way incited, authorized, or intended. *See* https://www.supremecourt.gov/DocketPDF/19/19-1108/137177/20200305143219760_19-%20Petition.pdf [https://perma.cc/LXP4-8XAB] (filed Mar. 5, 2020); Doe v. McKesson, 945 F.3d 818 (5th Cir. 2019); https://www.scotusblog.com/case-files/cases/mckesson-v-doe-2/ [https://perma.cc/BT8G-X2V8]. The petition is currently distributed for the conference of October 9, 2020.

69. A similar point has been made in the coverage of a recently filed lawsuit against Whole Foods, brought by employees who allege that the company unlawfully discriminated and retaliated against them by selectively targeting them for wearing "Black Lives Matter" face masks at work. *See, e.g.*, Adrian Ma, *Cambridge Whole Foods Employees Sue Over Black Lives Matter Masks*, BOSTONOMIX (July 20, 2020), https://www.wbur.org/bostonomix/2020/07/20/class-action-whole-foods-black-lives-matter [https://perma.cc/JYA8-NAFV].

70. *See Concerted Activity*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/concerted-activity [https://perma.cc/FKY4-2RVF] (last visited Oct. 5). In contrast, without a sufficient nexus to the workplace, advocacy for outside political causes will not qualify. Complaints, protests, and related activity must relate to a "labor controversy"—workplace issues such as wages, benefits, and other working conditions. *See id*. The NLRB recently released an August 13, 2020 memo advising that the NLRA "does not protect employee political advocacy that has no nexus to a specifically identified employment concern"—"employee terms and conditions of employment." Accordingly, the Act's protections for employee activities towards "mutual aid or protection" did not extend to legislative advocacy for police reform, undertaken with no "connection to any employment concern of any employee" but rather "in the interest of the community at large and in furtherance of [the employee-claimant's] own political agenda . . . ." NLRB, *UFCW Local 1994 MCGEO Advice Response Memo* (Aug. 13, 2020), https://apps.nlrb.gov/link/document.aspx/09031d458323780c [https://perma.cc/6Z8P-U8KB].

and public relations. Further, many workers may have legal recourse for being subject to such conduct.