

PUBLICATION

Politics in the Workplace

May 12, 2017

Employees are complaining that they are being discriminated against or harassed by management or other employees based on their political beliefs because an employee's political beliefs may relate to, or be intertwined with, their gender, race, religion, national origin, or other protected status. Employers need to make certain that what is political expression is not used as a mask to diminish employees' Section 7 rights under the NLRA, which provides:

". . . that 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."

In addition to considering legal issues, an employer should consider how it reacts to political expression, considering its business needs, marketplace, culture and work force. In addition to these factors and legal liability, employers experiencing political turmoil in the workplace face problems of poor employee morale and decreased productivity.

Sometimes employees will say that they have a right to free speech under the First Amendment of the United States Constitution. This is not correct. While certain states have statutes (as will be discussed below) protecting the political expression of employees in certain instances, there is no such federal law.

Let us look at several examples of possible complaints in the workplace:

1. "My supervisor is giving me the silent treatment, and assigning me and a co-worker all of the dirty work because we asked for the afternoon off to attend a rally for a politician who is advocating for a large increase in the minimum wage and certain wage and hour protections."

2. "My supervisor won't stop my fellow employees from harassing me because of my religion and national origin. Several political figures have come to this state and are speaking about closing the borders and deporting people of my religion and national origin. I have been receiving a lot of harsh words from my co-employees."

3. "My supervisor, who is very pro-life, found out that I went to a political rally for a pro-choice candidate. He affronts me privately and in front of other employees trying to convince me of the correctness of his position. It just keeps getting worse. Now he calls me 'baby killer,' and I am afraid for my job."

It is true that absent an employment agreement to the contrary, employers can discipline and/or terminate an employee for any legitimate business reason. The employer can claim that the employee's political expression is disruptive and harmful to morale and business operations. However, the employer needs to be careful not only of particular state laws which protect employees, but because of other federal and state anti-discrimination statutes which prevent discrimination or harassment on account of various protected classifications such as race, gender, religion or sexual orientation, not only where there is direct harassment or discrimination, but where there is disparate and inconsistent application of the employer's work rules or policies (i.e., taking actions which favor or penalize employees because of their political expression). It is sometimes difficult for an

employer (or a court) to ascertain whether the action was taken because of an employee's political expression or because of an employee's protected status (i.e., race, sex, religion, national origin, etc.).

It is important to note that campaigning (soliciting and distributing literature) by employees in the workplace can be prohibited or controlled, provided the employer prohibits solicitation and distribution of literature on working time and in working areas for all non-business reasons. Employers should treat political distribution just as they treat other types of solicitation and distribution. Just as employers have no solicitation/no distribution in the workplace for categories other than political campaigning and expression, such as union avoidance and religious proselytization, employers should review their company's no solicitation/no distribution rules and promulgate such rules before the need arises. Otherwise, the anti-discrimination agency involved or the National Labor Relations Board will contend that the rule was placed into effect merely to stop such expression for political reasons.

In example no. 1 above, there is political activity related to the workplace (i.e., the employees have asked for time off to attend a political rally of a candidate seeking to increase the minimum wage and provide increased overtime payments). If it is found that the employer discriminated against the employees for attending that political event, the NLRB could contend that prohibiting the employees from attending such a rally and/or soliciting and distributing literature related to that rally would be considered a violation of Section 7 of the NLRA (i.e., "protected concerted activity," and the NLRB could require the employer to reverse its decision to discipline or terminate the employee and pay back wages if the employee was terminated).

In the second example above, the employee complains of political harassment, but he really complains of discrimination on the basis of his religion and national origin, because certain employees in the workplace are discriminating against or harassing minority employees because of political candidates' expression of dislike or contempt for such minorities. If an employee were to go to the Equal Employment Opportunity Commission or a state or local anti-discrimination agency and allege discrimination because he or she is one of the oft disparaged minorities, and if the EEOC determines that the employer does not allow such conduct with regard to other majority and non-minority employees, the agency could find disparate treatment, and the employer could be held liable for damages, attorneys' fees and obligation to rehire the discriminated against employee if he were terminated (and provide him back pay).

In the third example above, a pro-life supervisor is belittling and harassing the pro-choice employee because of his support for a pro-choice candidate. The employee in this example is really being called out by his supervisor because the employee and the supervisor differ on the question of abortion, and this confrontation can extend into the area of discrimination on account of religious beliefs. An additional complicating factor in all three of the examples above could be where a union or union organizer is added into this mix.

As mentioned above, there is a state law component (and in some cases a county or city component) to the regulation of political expression in the workplace. Set forth below is a partial list of states within the Baker Donelson footprint.

In **Alabama**, an employer cannot coerce an employee to vote a particular way in an election, and may not seek to examine an employee's ballot. That statute contains examples of prohibited conduct, such as threatening to discharge an employee or reducing the employee's pay, job schedule or compensation.

In the **District of Columbia**, employers cannot discriminate against employees based on the employees' affiliation with or support for a political party, and the law allows a private cause of action on the part of an employee.

In **Florida**, employers cannot terminate or threaten to terminate an employee for voting activities relating to local elections. Also prohibited is any employer action which would hinder an employee's registration to vote or other voting activity.

In **Georgia**, it is against the law to coerce an employee with respect to a recall election or to intimidate employee voters through acts which would cause fear for his or her safety.

In **Louisiana**, it is unlawful to intimidate an employee with respect to his or her political affiliations. An employer may not allow an employee's political contributions to affect that employee's compensation or employment. Further, employers with more than 20 employees cannot prevent its employees from engaging in politics or becoming a candidate or control employees' political activities or threaten to discharge an employee because he or she supports a political organization or candidate.

In **Maryland**, it is forbidden to influence an individual's voting activity through intimidation. Employers may not include in "compensation materials" (i.e., pay envelope, any statement which is intended to influence the political opinions or actions of the employees). Further, it may not display any notice within 90 days of the election that uses threats to influence employees to support or not support a particular candidate, including threats to close the business or reduce compensation should a particular candidate be elected.

Mississippi law states that an employer may not interfere with the political rights of an employee, and the law allows employees a private right of action.

In **North Carolina**, employers may not directly or indirectly terminate or threaten to terminate the employment of any individual because of that employee's voting activities.

South Carolina law prohibits intimidation of an individual because of political opinions or activities. It also prohibits an employer from discharging employees based upon their political opinions or activities.

In **Tennessee**, employers cannot coerce employees to vote for a particular candidate or in any particular way, nor may they discharge employees for failing to vote for a candidate or in a certain way or display or otherwise distribute any statement intended to coerce employees to vote for any candidate or in a certain way.

In **Texas**, it is illegal for an employer to retaliate against an employee for voting a certain way by reducing or threatening to reduce that employee's compensation or benefits.

In **Virginia**, political action committees cannot use funds obtained through actual or implied threat of physical force, job discrimination or financial reprisal. Threats or bribery to influence an employee's vote is prohibited.

The intersection of political expression, discrimination law, Section 7 of the NLRA and various state laws can be confusing. Employers should consult counsel to advise them with respect to how to conduct their businesses so as to minimize legal risk and risks to employee morale and productivity.

If you have any questions concerning these matters, please consult the author or your Baker Donelson Labor and Employment attorney.