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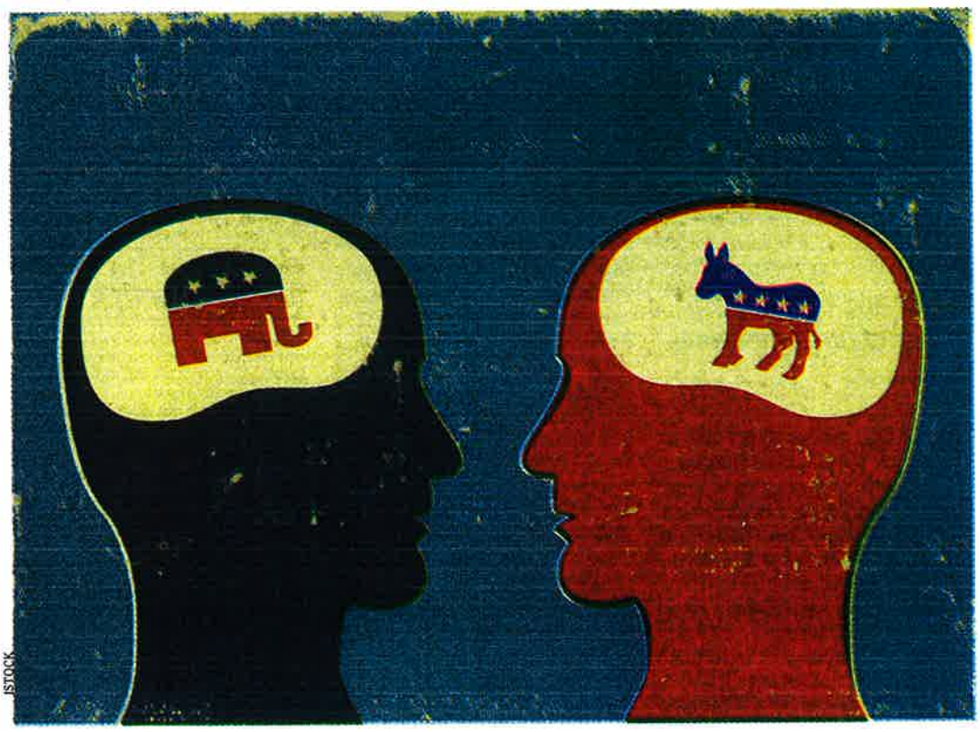
When **Politics** and **Popular Debate** Enter the Workplace



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BY ELISE BLOOM AND JACQUELINE DORN

ONE NEED only watch the daily news, read the front page of any newspaper, or log onto the Internet, to grasp how current political and social controversies in the headlines can invoke passion and popular fiery debate. Over the past several months alone, there has been a host of sensational socio-political topics lighting up the headlines, from the Occupy Wall Street movement that spread from Zuccotti Park across the nation to the slowly intensifying race to the polls for the GOP primaries.

state anti-discrimination laws, and other state statutes, which are important for employers to understand. So what are employers to do when political discourse infiltrates employee discussion around the water-cooler?

The underlying issue raised in answering this question is whether employees' political expression in the workplace—albeit in the form of discourse or other action—is legally protected. If one were to survey the warding an e-mail that compares President Barack Obama to a tar ball washing ashore in the Gulf of Mexico.[1] However, with limited exceptions, it is simply untrue that on-the-job political expression is protected for most private-sector employees.

While the First Amendment may protect political speech for governmental employees in the public sector, it does not afford the same protection for employees in the private sector. This is because the First Amend-

the NLRA is widely known to govern unionized workplaces, it also encompasses some political action in non-unionized workplaces. Both union and nonunion employees have certain rights under §7 of the NLRA "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157 (2011). The line between protected concerted activity and unprotected political activity can be a difficult one to draw. The basic standard derives from the U.S. Supreme Court case *Eastex Inc. v. NLRB*, 437 U.S. 556, 565 (1978), which holds that the "mutual aid and protection" clause of §7 protects employees when they seek to "improve their lot as employees through channels outside the immediate employee-employer relationship," including through political speech and advocacy that "bears a less immediate relationship to employees' interests as employees." The Court warned, however, that political advocacy that is too attenuated from employees' workplace interests will not be protected.[3]

According to the National Labor Relations Board,[4] the basic test to determine the level of protection, if any, of political speech is whether there is a "direct nexus" between the specific issues that are the subject of the speech and employment-related concerns of the employees.[5] Then, if such a nexus exists and the speech falls within the scope of §7, a determination must be made as to whether the means employed make the speech unprotected.[6] Simply put, if the employees' advocacy relates to the terms and conditions of employment (i.e., safety at work, pay or wages, hours of work, etc.) and the means employed are not disparaging, disloyal, threatening or violent, overly disruptive to the workplace, or otherwise unlawful,[7] then an employer should be careful before taking any action that may be viewed as restrictive of

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Already the Republican candidates have fired up the debate on quintessential hot-button issues, including same-sex marriage, the War in Afghanistan, contraception, abortion, and the role of women in the military, just to name a few. This will only intensify with the impending presidential election. And there can be no doubt that socio-political debate will make its way into the workplace. But such colloquy raises issues under the National Labor Relations Act (NLRA), federal and

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general population, chances are that the answers to this underlying question would vary greatly. Indeed, most employees likely believe that their right to freedom of speech is guaranteed under the First Amendment, even on the job.

A few cases that have attracted media attention over the past year demonstrate this common misconception, such as the case of Megan Geller, the Illinois waitress who claimed she was illegally fired because customers complained that she was wearing a Tea Party bracelet while serving them, or the case of two Pennsylvania employees who sued their former employer, the Centers for Rehab Services, because they were fired for forment's protections apply only to government action. There is no federal law that protects all forms of political expression in the workplace by nongovernmental employees.[2] In other words, despite employees' common misperception, it is not illegal for most employers to discipline or fire employees for engaging in political speech or action at work. The limited exceptions come into play in several specific situations.

The Exceptions

The first exception to the general rule occurs when employees engage in political speech that constitutes protected activity under the NLRA. Even though

speech or before disciplining the employees in any manner.

For example, employees' discussion during work hours regarding the 2012 presidential candidates' views on abortion would not be protected, but discussion regarding whether or not the candidates favor proposed legislation that would affect their health care benefits may very well be. An employer who wishes to restrict the latter instance would have to make sure it restricts such speech on-duty *equally* for both proponents and opponents of the proposed legislation. Likewise, the passing out of election buttons for a particular candidate by an employee on the shop floor could be prohibited by an employer, but the same action by an employee during a lunch break where the employee is also encouraging coworkers to vote for this candidate because he or she supports an increase to the federal minimum wage would be protected.

In addition to the NLRA, there are several types of state statutes, including state "free speech" statutes and "off-duty conduct" statutes, that place stringent limitations on an employer's ability to restrict employees' political activities.

Louisiana and California have the broadest protection in the nation on employees' political expression at work. Louisiana prohibits employers from threatening employees if they "support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character." La. Rev. Stat. Ann. §23:961. The Louisiana statute carries monetary fines and imprisonment for up to six months for violations of it. Id. The California Labor Code prohibits employers from adopting or enforcing any policy preventing employees from participating in politics or becoming candidates for public office, and prohibits "[c]ontrolling or directing...the political activities or affiliations of employees." Cal. Lab. Code §§1101, 1102. The statute defines political activity rather broadly to include, among other things, traditional partisan activity, participation in litigation, the wearing of symbolic armbands or paraphernalia, and the association with others for the advancement of beliefs and ideas.[3]

unfolding, the risk of potential discrimination or retaliation claims will undoubtedly increase.

Consider what discrimination claims could arise from employees' comments regarding President Obama, our first African-American president, Hillary Clinton, our female Secretary of State, or even the common conflation between Muslim religious beliefs, al-Qaeda and the War on Terror. Comments referring to "our Black president," "our wimpy (female) Secretary of State," or "those Muslim terrorists," could all form the basis of a complaint alleging a hostile work environment, where severe and pervasive enough.

Likewise, employees' discussion regarding the increasingly heated debate on same-sex marriage and the Defense of Marriage Act[12] could raise issues with regard to more than one protected category, such as religion and "sexual orientation," which is protected under certain state and local laws, including New York.[13] Consider a conservative Christian supervisor in New York who openly discusses his views against same-sex marriage with his employees, one of which is atheist and homosexual. The employee speaks out against the Defense of Marriage Act and Christian conservatism, complains about the supervisor's statements to the human resources department, and then, a month later, starts being assigned less interesting projects by the supervisor. This is the kind of situation that could lead to a retaliation claim under Title VII or the New York State or City Human Rights Laws.

A number of recent cases demonstrate that the risk to employers of such claims is real. For example, in a recent case involving claims of racial discrimination based on political discussions, *Vaughn v. Woodforest Bank*, 665 F.3d 632 (5th Cir. 2011), the plaintiff, a Caucasian woman, alleged that she was fired

ing working hours but does not prohibit political speech during break periods in non-work areas. Give examples of what political expression means, including inappropriate desk calendars, clothing with political expressions, or campaign paraphernalia, like buttons or bracelets.

- Implement a strong, well-publicized anti-discrimination and anti-retaliation policy that prohibits all forms of discrimination, harassment and retaliation in the workplace based on all applicable protected characteristics with clear procedures by which employees can report perceived instances of discrimination or retaliation.
- Provide these policies to all employees in the current workforce and to all new hires as soon as they are hired, and ask the employees to read and sign an acknowledgment of understanding for the policies.
- Make sure that both of these policies are *applied* equally, consistently and neutrally to all employees, regardless of political affiliation or protected class.
- Listen and be attuned to the employees' differing views and be willing to modify these policies to reflect the dynamics specific to what is happening in the workforce.
- Consider adopting a non-solicitation and non-distribution policy that limits employees from soliciting support for causes that are unrelated to work as well as distribution of literature or paraphernalia pertaining to non-work activities.

1. "Employees Fired After Forwarding Obama E-mail," WTAE.com, (Feb. 8, 2011), http://www.wtae.com/print/26780068/detail.html.

2. See, e.g., *Griffin v. NH Dept. of Emp't Sec.*, No. 09-cv-00250-SM, 2009 U.S. Dist. LEXIS 120278 (D.N.H. Nov. 16, 2009) (denying plaintiff radiology technician's First Amendment claim against hospital that he was fired for having inappropriate political conversation with patients regarding President Obama and gun law because hospital was not government entity).

3. Id. at 567-68 ("[A]t some point the relationship [between employees' concerted activity and their interest as employees] becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause").

Connecticut and South Carolina also have broad free speech provisions. The Connecticut statute makes it illegal to discipline or discharge *any* employee for exercising his or her right to free speech but only if "such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer." Conn. Gen. Stat. §31-51q. While the statute contains broad free speech protection compared to other states, the Connecticut courts have interpreted it in favor of employers' interests and employers may, in fact, restrict certain types of employee speech in the workplace.[9] Likewise, the South Carolina statute makes it unlawful for an employee to be discharged "because of political opinions or the exercise of political rights," S.C. Code §16-17-560, however, the courts have interpreted this statute somewhat narrowly as well.[10]

It is also worth noting that several states, including California, Colorado, New York and North Dakota, have "off-duty conduct" statutes (otherwise known as "lifestyle discrimination statutes") that prohibit employers from taking adverse employment action against employees due to their lawful *off-duty* conduct and speech.[11] California's statute is the broadest, prohibiting adverse employment actions from being taken for basically any "lawful conduct occurring during nonworking hours away from the employer's premises." Cal. Lab. Code §§96(k), 98.6. New York's statute prohibits discrimination based on lawful off-duty conduct that is "political" or "recreational" and defines "political activities" as running for public office, campaigning for a candidate, or participating in political fundraising activities. N.Y. Lab. Law §201-d.

None of the aforementioned exceptions for protected political conduct under the NLRA and state law swallow the general rule that private-sector employers may restrict political expression in the workplace. Indeed, employers should implement a fair and neutral policy that limits non-work-related political speech to employees' free time. Although "political status" or "affiliation" is not a protected characteristic under federal anti-discrimination and anti-harassment law, state and local anti-discrimination laws may provide more expansive rights. Further, without such a policy, employers risk facing a claim of discrimination, harassment, or hostile work environment on the basis of race, sex, national origin or religion by any employee protected by the federal and state antidiscrimination laws based on political conduct in the workplace. Political discussions at work could also lead to retaliation claims where employees feel that they are being treated less favorably because they have expressed their political views in opposition to their supervisors' views. With the 2012 presidential elections in violation of Title VII because of her race after another African-American employee complained about her purported derogatory comments, while watching the Presidential Inauguration in 2009 at work, that she wished the media would stop making President Obama's election a "black and white issue," that her Sunday School class discussed his perceived religious conversion from Islam to Christianity, and that the class hoped if anything were to happen to him it would be done by "his own people" rather than "Americans," among other things. The plaintiff denied making such comments and the Fifth Circuit Court of Appeals ultimately affirmed the denial of the defendant's motion for summary judgment, finding that there were material issues of fact to be determined as to why the plaintiff was fired. Id. at *11.[14]

Similarly, in *Bissett v. Beau Rivage Resorts Inc.*, No. 1:10cv99-LG-RHW, 2011 U.S. Dist. LEXIS 27820 (S.D. Miss. March 16, 2011), the plaintiff, a Caucasian woman, claimed she was fired due to discrimination by other employees who were African-American, but the court found that the primary reason for the allegedly racially charged atmosphere was her political and borderline derogatory remarks about President Obama. Meanwhile another court dismissed a case on summary judgment where the African-American plaintiff claimed that he was subjected to a racially hostile work environment when he came to work wearing a t-shirt supporting President Obama. *Meads v. Dixie Consumer Prods., LLC*, No. 5:08-00507-KKC, 2010 U.S. Dist. LEXIS 80928 (E.D. Ky. Aug. 10, 2010). Regardless of their outcomes, all of these cases demonstrate the importance of implementing strong policies that restrict discriminatory, harassing, retaliatory and certain forms of on-the-job political conduct.

Even though there are considerable benefits derived from freedom of expression in the workplace, including possibly increased employee satisfaction and morale, depending on the circumstances and the dynamics of the particular workforce, political activity in the work environment can also decrease productivity, offend employees or make them uncomfortable, which may lead to legal action. Now more than ever, in the wake of this year's elections, employers should be more vigilant in keeping up with their employees' watercooler and online discussion. While it is impossible for employers to monitor everything employees say or do during work hours, private employers should take steps to regulate political expression on the job and minimize any potential risks from its occurrence in the workplace, such as:

- Consult with legal counsel to create and implement a written policy that restricts political expression unrelated to the terms and conditions of employment dur-

4. Memorandum GC 08-10, Guideline Memorandum Concerning ULP Charges Involving Political Advocacy, Office of Gen. Counsel, Div. of Operations-Mgmt., at 1, 2 (July 22, 2008), available at http://www.nlrb.gov/search/simple/all/%22GC%2008-10%22.

5. Id. at 3-7 (citing *Five Star Transportation Inc.*, 349 NLRB 42, 44-45 (2007)), enfd., 522 F.3d 46 (1st Cir. 2008); see, e.g., *Eastex Inc.*, 437 U.S. at 564-65 (upholding §7 protection for distribution of literature urging employees to vote for candidates supporting federal minimum wage increase and to lobby legislators to oppose incorporating right-to-work statute into state constitution); *Kaiser Engineers*, 213 NLRB 752, 755 (1974) (holding employee who wrote to members of Congress on behalf of his fellow employees, opposing a competitor company's efforts to obtain resident visas for foreign engineers, was engaged in protected activity), enfd., 538 F.2d 1379 (9th Cir. 1976).

6. Memorandum GC 08-10, supra note 4, at 12.

7. Political speech that the employer reasonably believes threatens to inject violent confrontation into the workplace, even if the subject matter would otherwise warrant §7 protection, is not protected. See, e.g., *Fun Striders Inc. v. NLRB*, 686 F.2d 659, 661 (9th Cir. 1981) (holding that employee who distributed leaflets advocating "violent revolution," "destruction of all bosses," and "armed revolution of all the working class" was not engaging in protected activity).

8. *Gay Law Students Ass'n. v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 488 (1979); see also *Brahmana v. Lembo*, No. C-09-00106 RMW, 2010 WL 965296, at *5 (N.D. Cal. March 17, 2010) (requiring a rule regulation, or policy of discrimination by a defendant employer to establish a violation under Labor Code §1101); *Prem v. Access Servs. Inc.*, Case No. CV 11-1358 ODW, 2011 U.S. Dist. LEXIS 89481, at *14-15 (C.D. Cal. Aug. 10, 2011) (holding that the act of reporting racial discrimination to an outside agency, with nothing more, does not connote political activity under §1101).

9. See, e.g., *Emerick v. Kuhn*, 737 A.2d 456, 469 (Conn. App. Ct. 1999) (holding that expression of opinion concerning management wrongdoing is a matter between employee and employer, and thus is not protected); *Cappiello v. Fitzsimmons*, 2005 Conn. Super. LEXIS 1930, slip op. at *13 (Conn. Super. Ct. 2005) (holding that plaintiff's complaint, even if read broadly, alleged no more than internal workplace communications and was thus unprotected). But see *DiMartino v. Richens*, 822 A.2d 205 (Conn. 2003) (holding that an employer cannot avoid liability for infringing on an employee's First Amendment rights if the employer's interest in avoiding workplace disruption is, in fact, a pretext that masks retaliatory intent); *Schnabel v. Tyler*, 646 A.2d 152, 176 (1994) (holding employer did not establish that employee's speech disrupted performance, rather employer violated law by retaliating against employee based on protected speech).

10. See, e.g., *Dixon v. Coburg Dairy Inc.*, No. 02-1266, 2004 U.S. App. LEXIS 13783 (4th Cir. May 25, 2004) (upholding discharge of employee who displayed Confederate battle flag on his toolbox after another African-American employee complained it violated company's anti-harassment policy).

11. See Cal. L. Code §§96(k), 98.6; Colo. Rev. Stat. §§24-34-402.5(1)-(2); N.D. Cent. Code §§14-02.4-01; N.Y. Lab. Law §201-d.

12. Pub. L. 104-199 (Sept. 21, 1996) (defining marriage as the legal union of one man and one woman).

13. The Sexual Orientation Non-Discrimination Act, effective Jan. 16, 2003, added "sexual orientation" to the list of specifically protected characteristics in various New York laws, including the New York Human Rights Law, and prohibits discrimination on the basis of actual or perceived sexual orientation in employment accordingly. See N.Y. Exec. Law §292.

14. See also *Keeshan v. Eau Claire Coop. Health Ctrs. Inc.*, No. 3:05-3601-MBS, 2007 U.S. Dist. LEXIS 74139 (D.S.C. Oct. 2, 2007) (finding insufficient evidence to support plaintiff doctor's discrimination and retaliation claims that she was fired for making known her support for tort reform legislation allegedly in violation of South Carolina's statutory protection of political speech).