

Free Speech, Politics, and Social Media: Employee Opinions and Employer Concerns

Melissa S. Woods – Cohen, Weiss and Simon
Aaron Holt – Cozen O’Conner



the social network



THE NEW NORMAL



Facebook would be the most populated country in the world with over 3.05 billion monthly active users (China: 1.4 billion people)

LinkedIn has more than 1 billion members and 310 million monthly active users, and 2 new members joining every second

Twitter (X) has more than 415 million monthly active users sending 500 million tweets per day (5,800 tweets per second) and 200 billion tweets per year

When An Employee Goes Viral



Hypothetical

Bruno works for Madrigal Inc. selling realistic, animatronic toy rats across the United States. Bruno is an avid animal rights activist who eventually comes to believe Madrigal's products are doing more harm than good for the public perception of animals everywhere, but especially rats.



Hypothetical

1. One day, Bruno tweets out the following:



2. What action(s) can Madrigal Inc. take in response to Bruno's tweet? Ask him to take it down? Discipline?



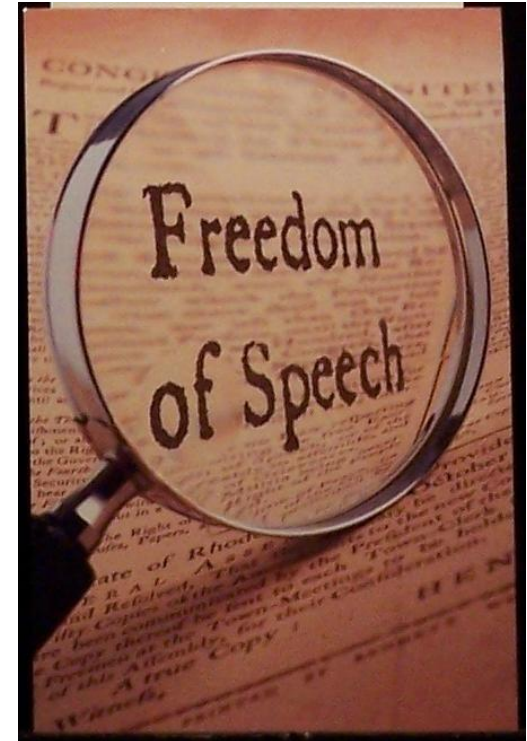
First Amendment Free Speech

FIRST AMENDMENT:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Private Employer:

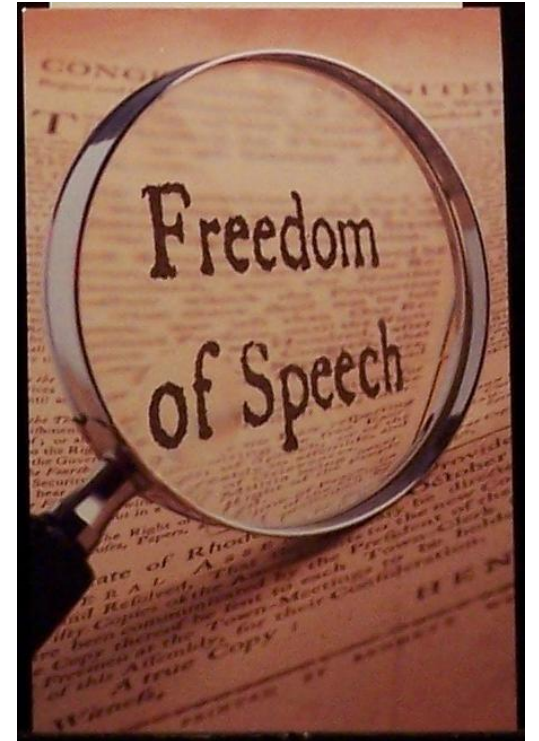
- 1st Amendment **DOES NOT** apply to private employers
- At will employers have latitude to regulate conduct (inside and outside of work) that violates its policies *so long as they are consistently applied*
- Employers have the right to expect their employees perform the duties for which they were hired during work time



First Amendment Free Speech

Public Employer (federal, state or local government):

- 1st Amendment Freedom of Speech on Matters “of a Public Concern”
- Balance the state employer’s interest in a disruption free workplace and the citizen’s ability to speak on matters of public importance
- Level of scrutiny depends on the form of expression
 - *Expressive Conduct (Strict Scrutiny)* – conduct designed to convey a message (e.g. *Texas v. Johnson* ('89) – holding burning American flag was speech protected by 1st Amendment).
 - *Political Speech (~Strict Scrutiny)* – any form of speech concerning politics, including monetary donations.
 - *Commercial Speech (Intermediate Scrutiny)* – speech that proposes a commercial transaction relating to the speaker or audience’s commercial interests.
 - *Unprotected Speech* - Content or manner of speech loses protection of the law (e.g. threats of violence, speech that may provoke violence, child pornography, defamation, fraud, etc)



Connick v. Myers

- **FACTS:** Myers was an Assistant District Attorney in New Orleans Parish who received a transfer to a different section of the criminal court. Myers opposed the transfer and expressed this to her supervisor and colleagues. She distributed a 14 question survey regarding the DA's transfer policy, office morale, confidence in supervisors, pressure to work in political campaigns, the need for a grievance committee. Myers refused the transfer and was fired for insubordination.
- **Issue: Did Myers' termination violate her 1st Amendment Rights of Free Speech?**
 - District Court: found the survey was the primary cause for her termination, not the refusal to transfer. Court found the survey involved a matter of public concern and employer had not demonstrated that the survey substantially interfered with the DA's office. Court ordered reinstatement, back pay, and attorneys fees.
 - 5th Circuit: affirmed district court.

SCOTUS

Connick v. Myers

- In determining a public employee's rights of free speech, the problem is to arrive *"at a balance 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."*
- 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**, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.
- Here, except for the question in respondent's questionnaire regarding pressure upon employees to work in political campaigns, the questions posed do **not** fall under the rubric of **matters of "public concern."**
- Discharge did not violate 1st Amendment because the survey composed and distributed by Myers was **primarily an expression of a personal grievance** relating to office policies and politics rather than a matter of public concern.

A New Trend

The Trump Administration has issued a series of Executive Orders (“EOs”) targeting the spread of “anti-American” and “discriminatory” ideologies.

The EOs seek to curb the spread of such ideas by attempting to curtail speech centered on race and gender. The EOs also empower federal authorities to defund and/or prosecute individuals and entities as necessary to carry out the EOs.

At least 1 EO, however, has expanded protections for speech the Administration considers consistent with “American” values and national identity. (*See Establishment of the Religious Liberty Commission*, Exec. Order No. 14291)



The Orders

- Since taking office on January 20, 2025, President Trump has issued over 200 EOs
- At least 12 of the EOs arguably substantively affect free speech protections
- Of those 12:
 - 7 assert the advancement of a biased or anti-American “ideology” as justification for the EO
 - 5 specifically identify speech related to race; gender; and diversity, equity and inclusion (DEI) as discriminatory
 - 2 concern the use of artificial intelligence

Recent Cases

Specifically Invoking Trump EOs

- Am. Ass'n of Univ. Professors v. Rubio, 780 F. Supp. 3d 350 (D. Mass. Apr. 29, 2025)
 - AAUP sued the Trump Administration for its ideological-deportation policy, which targets alleged Hamas sympathizers in furtherance of EO 14188 (combating anti-Semitism). Plaintiffs allege a culture of fear on college campuses which has chilled free speech rights.
- Schiff v. U.S. Off. of Pers. Mgmt., 784 F. Supp. 3d 380 (D. Mass. May 23, 2025)
 - Physicians and professors challenge the removal of articles they authored from an online patient-safety resource launched and hosted by the federal government alleging violations of their First Amendment rights and the APA arising from an Executive Order concerning “gender ideology” – see EO 14168 (“Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”).
- E.K. v. Dep't of Def. Educ. Activity, 2025 WL 2969560 (E.D. Va. Oct. 20, 2025)
 - Military families challenge removal of certain books and educational materials pursuant to Executive Orders directing the removal of material centering on racial and gendered speech. They also challenged changes in curriculum such as the elimination of some cultural celebrations and information on sexually transmitted diseases.

Recent Cases

Online Political Speech in Education

- Sander v. Westchester Reform Temple, 228 AD3d 688 (N.Y.3d Dec. 16, 2025)
 - private synagogue fired teacher for writing a blog post criticizing Zionism and Israel over 2021 airstrikes in Gaza
- Fellowship of Christian Univ. Students at Univ. of Texas at Dallas v. Eltife, No. 1:25-CV-1411-DAE, 2025 WL 2924228 (W.D. Tex. Oct. 14, 2025)
 - student organizations and an individual student at UT Austin and Dallas campuses sought an injunction barring state law requiring universities to adopt policies prohibiting certain expressive activities
- Hook v. Rave, 4:25-CV-04188-KES, 2025 WL 2720978, slip op. at *1, 6 (D. S.D. Sept. 24, 2025)
 - University placed professor on administrative leave after posting about Charlie Kirk's assassination on his personal Facebook account.

Online Political Speech Decision

Professor fired over Charlie Kirk post is reinstated and awarded \$500k

The significant payout was authorized by high-ranking state officials, including Tennessee's governor, attorney general and comptroller

Jonathan Mattise

Thursday 08 January 2026 19:11 EST

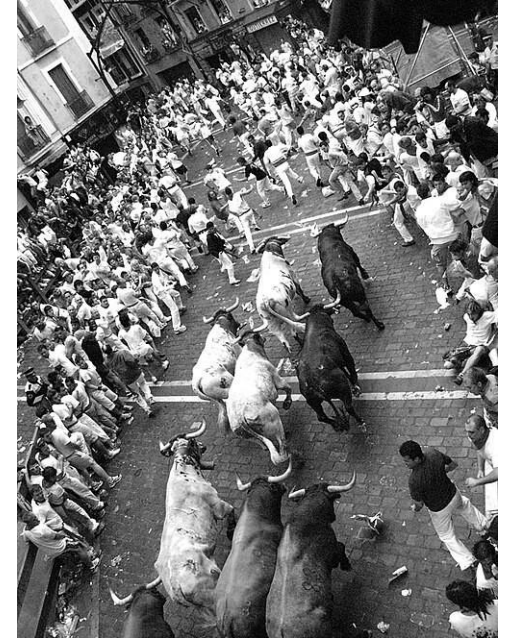


Hypothetical

Elmer Lepage is a titan of industry. Specifically, his company reigns supreme over the niche industrial strength super glue market. His company's practices have come under scrutiny recently for what activists call inhumane animal testing.

Elmer is thrilled with his company's work and thinks their "instant stick" technology is revolutionary. He speaks publicly about the work and even invites animal rights activists to debate him on stage.

In a twist of fate, Elmer was killed when one of these activists secretly glued Elmer's shoes while he was adventure-vacationing at the Bulls of Pamplona.



This Photo by Unknown Author is licensed under CC BY-SA

Hypothetical (continued)

Sheila is a longtime follower of Bruno, she works as a nurse at a private hospital during the day, but her passion is comedy. She has a large Tik Tok following, where she posts funny jokes on a range of topics.

Sheila hated Elmer and his company. When he died, Sheila took to Tik Tok with her own commentary. She made jokes about animal rights and just desserts, and said she was glad Elmer had met such a tragic end.

Sheila's employer finds out about the post and fires her. One of her colleagues posts on Instagram, lamenting Elmer's demise; the hospital does not discipline her.

- Does Sheila have a good free speech / wrongful termination claim?



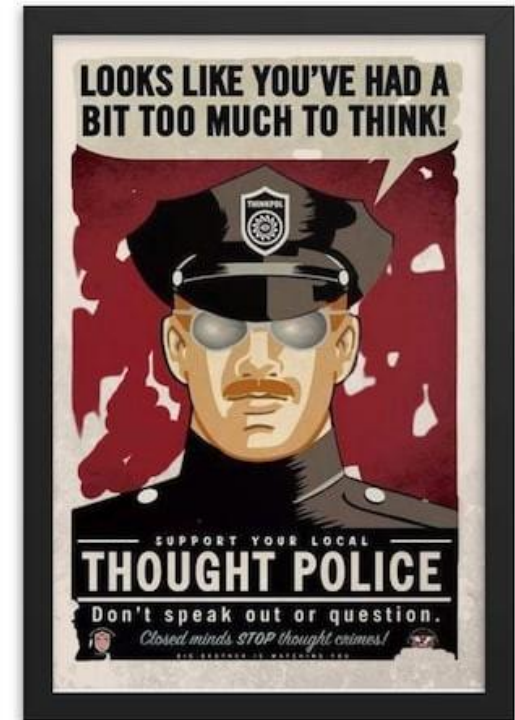
This Photo by Unknown Author is licensed under CC BY-SA

NetChoice Litigation

Special Speech Controls for Minors

Industry trade group, NetChoice, challenges various state laws imposing restrictions on social media platforms with the purpose of protecting minors

- California
- Maryland
- Georgia
- Mississippi
- Arkansas
- Louisiana
- Colorado
- Ohio



Hypothetical

1. After hours and on his personal X (i.e. Twitter) account, tweets the following about Madrigal's Human Resources Direct Louisa:



2. There is no evidence this tweet was shared or discussed in the workplace. What action(s) can Madrigal Inc. take in response to Bruno's tweet? Ask him to take it down? Discipline?



Okonowsky v. Merrick Garland

- **Facts:** Employee of federal prison alleged sexually hostile work environment created by co-worker posting derogatory content on social media. Employee reported this to her employer, and was directed to cease posting in violation of their anti-harassment policy, but the co-worker continued posting for 3 weeks after the demand. Employee eventually transferred out of state and filed suit.
- **Trial Court:** granted summary judgment finding that the posts were “entirely outside the workplace” because they were made on a personal account and not shared or discussed with plaintiff in the workplace.



Okonowsky v. Merrick Garland

- **9th Circuit:** Found online social media contact can constitute workplace harassment. The Court rejected the *"notion that only conduct that occurs inside the physical workplace can be actionable, especially in light of the ubiquity of social media and the ready use of it to harass and bully both inside and outside of the physical workplace."*
- The court further warned that *"[s]ocial media posts are permanently and infinitely viewable and re-viewable by any person with access to the page or site on which the posts appear"* and that *"even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee's working environment."*





National Labor Relations Act

The NLRA applies to almost all employees regardless of whether or not they are unionized (exception: supervisors and independent contractors).

Section 7 of the NLRA grants employees the right to 1) form, join or assist unions and 2) **engage in concerted activity for their mutual aid and protection.**

- Concerted Activity – two or more employees acting together to try to improve their wages, hours or conditions of employment, including:
 - Protesting to improve working conditions
 - Criticizing working conditions
 - Discussing wage rates, bonuses or employment benefits with other employees
 - Complaining about favoritism, specific managers or policies

Applies to both unionized and non-unionized employers

Hypothetical

1. What if Bruno's tweet actually said this:



2. What action(s) can Madrigal Inc. take in response to Bruno's tweet? Ask him to take it down? Discipline?



Pier Sixty, LLC



- Two days before union election, an Employee working as a server at a fundraising event was scolded by the Assistant Director of Banquets about being more attentive to guests at the fundraiser.
- The employee took a break and posted to Facebook that the Director was *“such a NASTY MOTHER F***ER don’t know how to talk to people!!!!!! F**k his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!”*
- Employee was fired two weeks later after an investigation

Pier Sixty, LLC



NLRB: *“The overwhelming evidence establishes that, while distasteful, the Respondent tolerated the widespread use of profanity in the workplace, including the words ‘f**k’ and ‘m****f***er.’ Considered in this setting, Perez’ use of those words in his Facebook post would not cause him to lose protection of the Act.”*

NLRB found the statement protected, concerted activity and order Pier Sixty to reinstate the employee and granted him back pay.

Political Activity under the NLRA

- NLRB General Counsel Memorandum 08-10 – July 22, 2008

1. Political advocacy is protected *when the subject of that advocacy has a **direct nexus to employee working conditions**; and*
2. *Specific **means employed** in the advocacy does not render it unprotected.*





Is Political Speech Protected, Concerted Activity? *It Depends.*

- Forms of employee political activity that the NLRB found:

Not Protected

- Distribution of "purely political tract[s]" that call for the election of a particular slate of candidates without reference to any particular employment-related issues (*Firestone Steel Products Co.*, 244 NLRB 826 (1979))
- Writing to government agency with which the employer contracts to raise concerns about non-employees (*e.g.* safety of public school students riding school buses) (*Five Star Transportation, Inc.*, 349 NLRB No. 8 (2007))

Protected

- Employee attempts to circulate a petition at work calling upon Congress and the President to investigate the employer's use of government funds for anti-union activities (*Union Carbide Corp.-Nuclear Division*, 259 NLRB 974 (1981))
- Employee testimony before US Senate and state environmental agency regarding environmental safety laws impacting the working conditions of employees handling toxic materials (*GHR Energy Corp.*, 294 NLRB 1011, 1014 (1989))

Hypothetical

1. Assume Madrigal is a public entity. In the wake of #blacklivesmatter protests, Bruno tweets the following in response to news coverage about the protests:



2. What action(s) can Madrigal Inc. take in response to Bruno's tweet?
Ask him to take it down? Discipline?



McLin v. Twenty-First Jud. Dist.

- McLin was employed as a collections officer for the 21st Judicial District in Louisiana. A co-worker reported concerns about McLin's character and fitness for judicial employment after finding a Facebook post where McLin commented on a news article during the nationwide protests following George Floyd's murder about a motorist driving through protestors, stating: **"All I'm going to say is that Silver Duramax enjoys pulling that black horse trailer at 80mph #IWillrunYouOver."**
- A coworker reported the post to a supervisor, who escalated it to the Chief Judge. McLin was terminated shortly after.
- McLin sued, alleging race discrimination and First Amendment retaliation.



McLin v. Twenty-First Jud. Dist.

- During litigation, Employer argued McLin (1) threatened public safety and undermined the public's trust in the judiciary's fitness and impartiality, (2) harmed workplace morale and created discord among co-workers and (3) violated the district's interest in maintaining the integrity of the judicial system
- The court rejected McLin's claims and dismissed the claims, holding that McLin's post, although touching on a public issue (the protests), did not meaningfully contribute to public discourses and instead:
 - Reflected overt hostility and encouraged violence
 - Weakened workplace morale, as evidence by her co-worker's complaint
 - Undermined the judicial district's credibility and its ability to function impartially
- The court ruled that McLin's First Amendment retaliation and discrimination claims failed, stating that her post was not protected where it **"reflected an intentional and violent disregard for the lives and rights of protestors."**
- The court emphasized that McLin's speech rights could not shield from the consequences of her public, hostile statements that compromised her employer's mission.

Responding to Social and Political Expression at Work

- **No legal right** to wear political clothing or display political images in the workplace – employers are well within their rights to ban any clothing or bodily displays of political speech.
- **All or nothing.** Employers may choose to implement dress-code policies that ban all messaging – while others may allow positive messages and still ban obscene or harassing content.
- **Consistency is Key.** Make sure all workplace policies, including dress—code policies, are clear and up-to-date and have been vetted for bias. Enforce policies evenly to avoid the appearance of discrimination.
- **Public v. Private Employer.** Employees have a limited First Amendment right in their public place of employment so long as it relates to a “matter of public concern” as opposed to an expression of a personal grievance.



Thank You