Employer Regulation of Employee Political Conduct In and Outside of the Office

A discussion of an employer's ability to regulate employee political activity inside and outside of the workplace. "In the current era of heightened political discourse, seamless social media and hybrid work arrangements, employers face difficult questions as to the extent to which they can lawfully limit or prohibit employee political conduct in and outside of the workplace. Just ask Google…"

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Employment Law

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In the current era of heightened political discourse, seamless social media and hybrid work arrangements, employers face difficult questions as to the extent to which they can lawfully limit or prohibit employee political conduct in and outside of the workplace.

Take Google for instance. In April, Google terminated more than 50 employees who held sit-ins at the company's New York and California offices to protest Google's agreement to supply Israel with cloud computing and AI-related services. (https://apnews.com/article/google-israel-protest-workers-gaza-palestinians-96d2871f1340cb84c953118b7ef88b3f).

According to Google, the sit-ins "physically disrupted" co-workers within the company's offices. (*Id.*) The terminated employees filed a complaint with the National Labor Relations Board, alleging that their conduct was protected activity under the National Labor Relations Act. (https://www.washingtonpost.com/technology/2024/04/30/google-fired-israel-nlrb-labor/)

On Nov.10, 2023, Dr. Benjamin Neel, director of the Laura and Isaac Perlmutter Cancer Center at NYU Langone Health ("NYU"), was terminated after he reposted on X "on his personal behalf and on his personal time" content criticizing Hamas and those who celebrated the attacks and media coverage thereof. *Neel v. New York University et al*, No. 655743/2023 (Sup. Ct. N.Y. Cnty.) (NYSCEF No. 25).

Neel sued for, among other things, violation of New York Labor Law § 201-d, a rarely invoked statute that protects an employee's "political" and "recreational" activity *outside* of the workplace. (*Id.*)

The Google and NYU firings are the latest example of employer actions against employees based on their political activity. Under New York law, the legality of such terminations depends largely on whether the employee activity occurred inside or outside the workplace—a distinction that is not always so clear.

Activity 'In' the Workplace

The right of a New York employer to regulate employee political conduct *within* the workplace is well-established. New York follows the at-will employment doctrine, which means that, absent a specific employment contract, either the employer or the employee can terminate the employment relationship at any time, with or without cause, so long as the

termination "does not violate any constitutional of statutory provision." *Vardi v. Mut. Life Ins. Co. of N.Y.*, 136 A.D.2d 453, 454-55 (1st Dept. 1988).

This includes termination of an employee based on their political or other activity in the workplace (provided the political activity is not constitutionally or statutorily protected).

While the at-will employment doctrine grants employers flexibility, it does not provide carte blanche to terminate employees for any reason. For instance, under state and federal anti-discrimination statutes, an employer cannot terminate or take any other "adverse employment action" against an employee based on an employee's protected characteristics, including race, religion, age, national origin, gender, sexual orientation and disability.

Similarly, an employer cannot terminate an employee who "discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of law, rule or regulation or that the employee reasonably believes poses a substantial and specific danger to the public health or safety." NYLL § 740(2).

Under Section 7 of the NLRA, raising concerns over the terms and conditions of employment are protected activities. The ex-Google employees filed a complaint with the National Labor Relations Board alleging that Google unlawfully retaliated against them "in response to their protected concerted activity, namely, participation…in a peaceful, non-disruptive protest that was directly and explicitly connected to their terms and conditions of work."

Although employers have wide latitude to terminate at-will employees based on non-protected political activity in the workplace, they should still establish comprehensive and clear policies that address political expression, social media use and other "on-duty" conduct that strike a balance between respecting individual rights and ensuring a work environment that promotes collaboration and respect.

Activity 'Outside' the Workplace

The extent to which an employer can terminate an employee for activities conducted *outside* the workplace presents more difficult questions. New York Labor Law §201-d prohibits an employer from terminating or discriminating against an employee based on the employee's *political* or *recreational* activities "outside of work hours, off of the employer's premises and without use of the employer's equipment or other property." The precise contours of the statute have not been clearly defined by the Courts and require a fact-specific analysis.

Political Activity. Under the statute, "Political activities shall mean (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." NYLL § 201-d(1)(a). Although there is little caselaw on the issue, Courts appear to take an expansive view of the scope of "political activity" under the statute. *See, e.g., El-Amine v. Avon Prods., Inc.*, 293 A.D.2d 283 (1st Dept.) (question of fact as to whether employee's attending the funeral of Matthew Shephard constituted "political activity"); *Cavanaugh v. Doherty*, 243 A.D.2d 92 (3d Dept. 1998) (employee stated cause of action for employer's violation of 201-d based on her discussion outside of work hours concerning her "political affiliation").

Thus, it is possible that a court would find that an employee's online advocacy on a particular political issue qualifies as one of the three "political activities" expressly identified in the statute. It is notable that Neel alleges that his social media activity constituted "recreational activity," not "political activity" under Section 201-d. (Am. Compl. ¶ 111).

Recreational Activity. "Recreational activity" is defined as "leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material."

Courts have held that the following activities are *not* "recreational" under the statute: cohabitation with a married man (*Bilquin v. Roman Catholic Church*, 286 A.D.2d 409 (2d Dep't 2001)); extramarital affair with a co-employee (*Hudson v. Goldman Sachs & Co., Inc.*, 283 A.D.2d 246 (1st Dept. 2001)); "coordination of, or participation in, after-work celebrations with fellow employees." (*Delran v. Prada USA, Corp.*, No. 101691/04, 2004 WL 5488006 (Sup. Ct. N.Y. Cnty 2004) (*affd,* 23 A.D.3d 308).

In *Kolb v. Camilleri*, No. 02-CV-0117A, 2008 WL 3049855 (W.D.N.Y. Aug, 1, 2008), the District Court held that an employee's "picketing" outside of work was not conducted "for his leisure, but as a form of protest" and was thus not a "recreational activity akin to "sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material." *Id*. at *13.

Neel advances the novel claim that his social media posting constituted "recreational activity" under Section 201-d. Indeed, participation on X and other social media sites is arguably a "leisure activity" "akin" to "reading and the viewing of television, movies and similar material." On the other hand, a Court might view such online conduct as effectively a "protest" and thus not recreational under 201-d.

Outside the Office? Even if an employee is engaged in "political" or "recreational" activity under Section 201-d, it is unclear when such activity is conducted "outside of work hours," "off of the employer's premises" and without the employer's "equipment." Twenty-years ago, there was no question as to whether an employee's conduct occurred within or without the workplace.

Today, not so much. Remote employees may be perpetually "on the clock" and while they may not be physically located in the employer's offices, they may be using the employer's "equipment" such as servers, computers and cloud-based applications.

Neel, for instance, alleges that his X posts "took place outside work hours, off of the employer's premises and using his personal social media account." (Am. Compl. ¶ 111) What if an employee posts to social media outside of work hours but it is viewable to co-workers during work hours? The Courts will likely be confronted with these issues as cases involving Section 201-d proliferate.

201-d Safe Harbor. Even if an employee's conduct outside of the office qualifies as political or recreational activity, Section 201-d creates a safe harbor for employers if the employee's political activity "creates a material conflict of interest related to the employer's…business interest."

Berg v. German Nat. Tourist Office, 248 A.D.2d 297 (1st Dept. 1998) is one of the few cases applying the safe harbor provision. There, the German National Tourist Board terminated an employee based on their involvement in the Holocaust denial movement. The First Department held that even if the employee's conduct constituted protected "recreational activity," the safe harbor would apply since the employee's conduct created a "material conflict" of interest with the employer's business.

Berg was a clear-cut case and it is unclear how Courts will apply the safe harbor provision to employee social media conduct. NYU Langone allegedly justified its termination of Neel because his posts "had and may be expected to have a detrimental effect upon the reputation, character or standing of NYU Langone Health." (Am. Compl. ¶ 36) It is dubious that such barebones allegations of harm resulting from an employee's online conduct is sufficient to invoke the safe harbor provision, especially where, unlike in *Berg*, there exists an attenuated connection between the business and the employee conduct.

If an employer merely had to allege a "detrimental effect" between the out-of-office conduct and its business, the safe-harbor would render the protections under Section 201-d largely illusory.

As social media blends more seamlessly into our daily lives and the 5-day “in person” workweek becomes a relic of the past, New York Labor Law Section 201-d will play a crucial role in defining the extent to which employers can regulate employee conduct “outside of the office.”

Conclusion

Whether the employee activity at issue takes place inside or outside of the workplace—or where the locus of the activity cannot be easily determined—employers are well advised to set clear expectations through employee handbooks, policies, training and other communications so as to minimize potential conflicts.

Jonathan M. Sabin *is a partner at Kane Kessler in the firm’s litigation practice group.*