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WHAT ARE WE GOING TO DO WHEN EMPLOYEES “GET UP, STAND UP?”

Tim Peebles

Moderator

DANIEL COKER HORTON & BELL, P.A.

Oxford, Mississippi

tpeebles@danielcoker.com

Schaun Henry

MCNEES WALLACE & NURICK, LLC

Harrisburg, Pennsylvania

shenry@mcneeslaw.com

THE RIGHT TO PROTEST

A. Public Protests

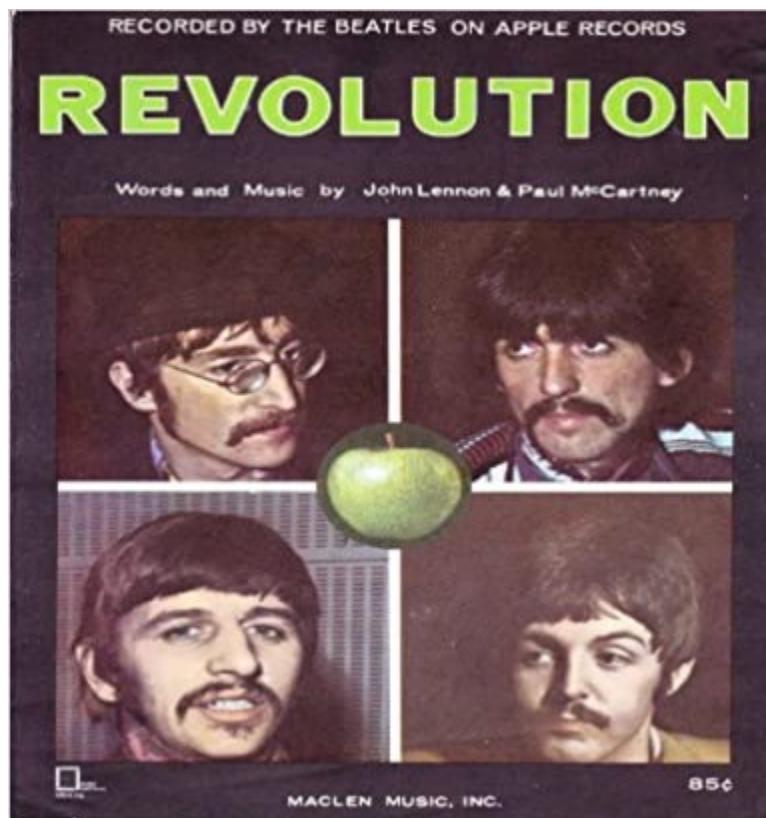
1. Can employees participate in a public protest?

You say you want a revolution

Well, you know

We all want to change the world

- Beatles, *Revolution* (1968)



The short answer to that question is, yes. Employees of private companies have the right to participate in public protests under the First Amendment to the United States Constitution. The First Amendment guarantees the freedoms of expression and assembly, providing that “Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble.”¹

¹ www.law.cornell.edu/constitution/first_amendment

Injustice anywhere is a threat to justice everywhere

- Dr. Martin Luther King, Jr.

2. But can an employee be terminated for participating in a public protest?

Get Up, Stand Up, stand up for your right

Get Up, Stand Up, don't give up the fight

- Bob Marley and the Wailers, *Get Up, Stand Up* (1973)



The short answer to that question is, it depends, although for most employees, the reality is that they may be fired if they choose to participate in a public protest.

While the First Amendment affords employees the right to participate in a public protest, it fails to offer any job protections to employees who do so.² In fact, there are no federal protections for employees who engage in public protest activities.³ There are similarly no protections for engaging in what arguably constitutes expressions of one's political views. Take Juli Briskman, for example, who was fired after a photo of her “flipping the bird” to President Trump's motorcade circulated on the internet.⁴

² www.cnn.com/2020/06/05/can-you-get-fired-for-attending-a-protest.html

³ *Id.*

⁴ www.huffpost.com/entry/woman-flips-off-donald-trump-fired_n_59fe0ab4e4b0c9652fffa484



Most employees, like Ms. Briskman, fall into the at-will category, meaning they may be terminated for any reason at all (or even no reason), so long as the employer’s decision is not based on an employee’s membership in a protected class.⁵ There are, however, a small number of states that afford employees off-duty conduct protections, notwithstanding their at will employment status. Some of those states include:

California

California’s Labor Code prohibits employers from discharging, or threatening to discharge, employees for participating in protests of actions by federal, state, or local government officials.⁶ The Labor Code further protects employees from demotion, discipline, and discharge for engaging in lawful conduct during non-work hours away from the jobsite.⁷

The caveats to these provisions are (1) an employer may still discipline an employee who misses work without permission to engage in protest activities and (2) an employer may still discipline an employee whose political activities significantly disrupt the employer’s business.⁸

Colorado

Under Colorado law, employers may not terminate employees who engage in lawful activities away from the workplace during nonworking hours.⁹ That provision appears to be broad enough to protect an employee

⁵ Employees who have an employment contract obviously fall into a different category, and any employment decision involving such employees would have to be made after reviewing the employment contract.

⁶ <https://legalaidthatwork.org/factsheet/your-rights-as-protestor-political-protests-by-employees/>

⁷ *Id.*

⁸ *Id.*

⁹ www.mhlnews.com/labor-management/article/22054513/can-you-fire-any-employee-for-attending-a-protest-yes-depending-on-your-state

who engages in a peaceful protest away from the employer’s jobsite while off the clock.¹⁰



Louisiana

Louisiana does not permit employers to ban or attempt to ban coerce employees from participating in politics.¹¹

New York

New York’s Labor Code prohibits discrimination for any lawful, leisure-time activity for which employees receive no compensation.¹² While there are no legal decisions that specifically hold that political protests fall under that umbrella, such activity would seemingly be protected so long as the employee’s participation in a protest does not create a material conflict with the employer’s business interests.¹³

3. What else can be done to limit an employee’s right to engage in activism?

Most employee handbooks clearly outline what employees can and cannot do at work. More and more, employers are now addressing off-duty conduct as well in their employment manuals. Employers are doing so with detailed policies that prohibit any off-duty conduct that harms the company’s name, brand, or reputation.¹⁴ Employers have also adopted policies which dictate the “don’t’s” for employees who utilize social media

¹⁰ *Id.*

¹¹ *Id.*

¹² <https://lawintheworkplace.com/2017/08/15/can-fire-employee-attending-protest/>

¹³ www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/pages/politics-at-work.aspx

¹⁴ <https://fairygodboss.com/career-topics/prottesting-at-work#>

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platforms.¹⁵ Employers may likewise consider limiting the reasons that employees may use paid sick leave time.¹⁶

B. Protests over work-related issues

All employees, whether members of a union or not, have the right to participate in protected strikes, pickets, and protests over work-related issues, with limitations.¹⁷ The right of employees to engage in such conduct “depends on the object or purpose of the action, on its timing, [and] on the conduct of those involved.”¹⁸



But when you talk about destruction

Don't you know that you can count me out

- Beatles, *Revolution* (1968)

Acts of violence and other serious misconduct, like destruction of property, is never protected, however, as even the National Labor Relations Board acknowledges on its website.¹⁹

*F*ck the police, f*ck – f*ck –*

*F*ck the police, f*ck – f*ck –*

*F*ck the police, f*ck the – f*ck the –*

*F*ck the police*

- N.W.A., *F*ck tha Police* (1988)

¹⁵ *Id.*

¹⁶ www.pcwlawfirm.com/using-sick-leave-to-attend-a-protest-are-employees-protected.html

¹⁷ www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/strikes-pickets-and-protest

¹⁸ *Id.*

¹⁹ *Id.*



Employees “have the right to act with co-workers to address work-related issues in many ways.”²⁰
Examples of protected concerted activity include:

1. Talking with one or more co-workers about wages, benefits, or working conditions,
2. Circulating a petition asking for better hours,
3. Participating in a concerted refusal to work in unsafe conditions,
4. Openly talking about the employee’s pay and benefits, and
5. Joining with co-workers to talk directly to the employer, a government agency, or the media about problems in the workplace.²¹

Working 9 to 5, what a way to make a living

Barely gettin’ by, it’s all taking and no giving

They just use your mind and they never give you credit

It’s enough to drive you crazy if you let it

²⁰ www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/concerted-activity

²¹ *Id.*

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9 to 5, for service and devotion

You would think that I would deserve a fair promotion

Want to move ahead but the boss won't seem to let me

I swear sometimes that man is out to get me

- Dolly Parton, *9 to 5* (1980)



Single employees may also be deemed to be engaging in protected concerted activity by:

1. Acting on the authority of other employees,
2. Bringing group complaints to the employer's attention,
3. Trying to induce group action, and
4. Seeking to prepare for group action.²²

²² *Id.*



As is the case with most rights, however, there are limitations on the scope of an employee’s right to complain about working conditions and other work-related concerns.²³ Employees who say or do something “egregiously offensive or knowingly and maliciously false” are not protected from retaliation by their employer, nor may employees “publicly disparage[e] [the] employer’s products or services without relating [the] complaints to [a] labor controversy” with impunity.²⁴ The central question is whether the employee is “pushing for better working conditions or protesting questionable in-company policies or if [the employee is] engaging in more ambiguous political activism that in turn is jeopardizing the company’s business.”²⁵

Don’t you know?

They’re talking about a revolution

It sounds like a whisper

While they’re standing in the welfare lines

²³ *Id.*

²⁴ *Id.*

²⁵ www.fairygodboss.com/career-topics/protesting-at-work#

Crying at the doorsteps of those armies of salvation

Wasting time in the unemployment lines

Sitting around waiting for a promotion

- Tracy Chapman, *Talkin' Bout a Revolution* (1988)

