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What Can You Say in the Workplace? Whatever Your Employer Allows You to Say ….

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The recent controversy involving the Google employee fired for challenging his employer's diversity policies highlights some misconceptions concerning free speech rights in the workplace.

That controversy also adds an interesting dimension to the spate of reported terminations of individuals who were internet-shamed for participating in alt-right demonstrations (such as the employee who reportedly resigned from Top Dog Café in Berkeley). Ironically enough from a timing perspective, those job actions also implicate another fundamental right – the right to freedom of assembly (and derivatively, of association).

The rights of free speech and assembly are rights the First and Fourteenth Amendments provide to us that restrict governmental action. But those rights restrict governmental action outside of the workplace. Constitutional rights have little or no application to private employers, who are generally free to regulate (or restrict) what employees do and say in the workplace.

This is of course is consistent with the nature of an employment relationship, which involves one party (the employer) telling the other party (the employee) what to do, how to do it, when to do it, and whether it is done well enough.

But, as usual, there are a whole host of exceptions to this general rule. Employees who report health, safety or labor code violations to their employers or the authorities may not be fired for making such reports because they are engaging in protected "private" speech. And the National Labor Relations Act protects employee "speech" in connection with collective action (such as group discussions) concerning wages and working conditions. Other speech that carries legal protection include reports of harassment or violations of antidiscrimination laws.

And then there are the specific state statutes that provide one degree or another of additional quasi-First Amendment speech and assembly protection. The usual suspect (California) protects employees from adverse employment actions arising from complaints (or reports) regarding wages and other Labor Code-protected conduct, and the general (though not completely unrestricted) right to engage in outside political activity. New York protects employees from adverse employment actions directed at their off-premises recreational or political activities (unless those activities create a conflict of interest with the employer's business interests). And Connecticut likewise prohibits adverse

actions against employees who speak about matters of public concern unless that speech substantially interferes with an employee's job or working relationship with the employer.

These workplace laws at least attempt to strike a balance between our inalienable rights as Americans freely to speak our minds and the employer's right to regulate its workplace – including articulating its culture (such as diversity policies), rules and even groupthink if that is what the employer wants.

But one rule is clear: absent a violation of specific statutory provisions, it is the employer's prerogative to set the ground rules in the workplace, including establishing (and enforcing) cultural values. And employees who don't care for those rules and values are free to exercise another ultimate and more fundamental right: the right to seek employment elsewhere.

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