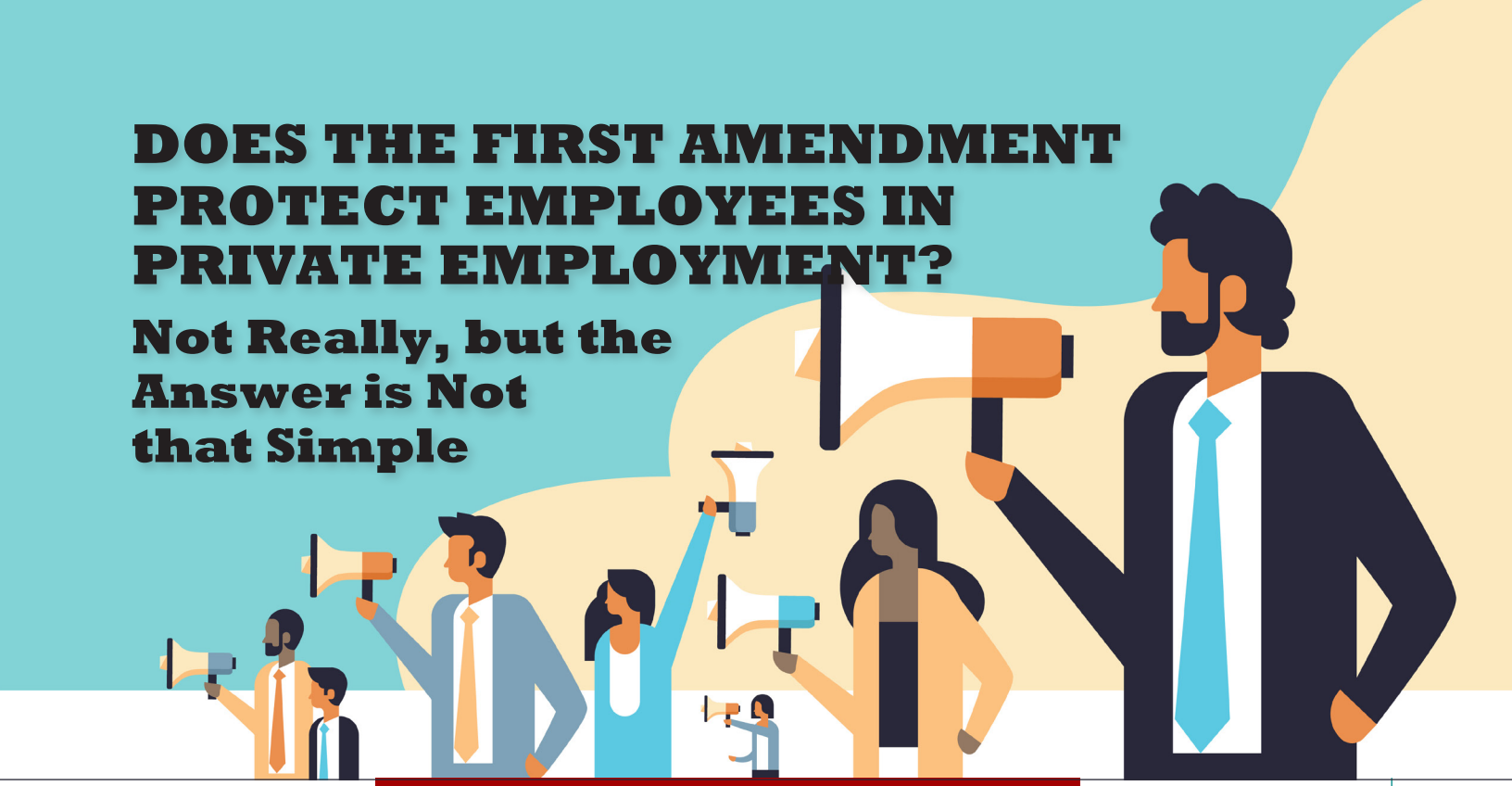
DOES THE FIRST AMENDMENT PROTECT EMPLOYEES IN PRIVATE EMPLOYMENT?

Not Really, but the Answer is Not that Simple



BY SHANNON S. PIERCE, ESQ. AND VERONICA A. PETERSON, ESQ.

Of late, news cycles have been filled with examples of the public demanding that those who attend hate rallies, use racial slurs or otherwise participate in oppressive behavior toward marginalized members of society face consequences beyond mere public scorn. Whether it's a local outcry for a university to expel a student who participated in what was deemed a hate rally, or more recently, a food retailer searching for the proper response to the use of a racial slur by a high-ranking executive, entities are facing increasing pressure to respond forcefully when one of their own engages in offensive conduct or speech.

This, of course, raises the question of whether entities can lawfully expel a student, terminate an employee's employment or otherwise disassociate with an individual due to that individual's speech or speech-related activities. While government entities (including public employers) must carefully weigh constitutional protections of free speech, free exercise of religion and freedom of association,[1] these protections generally do not apply in the context of private employment or other non-governmental action. *See Wickersham v. City of Columbia,* 481 F.3d 591, 597 (8th Cir. 2007) (First Amendment protects citizens from government, not private, action).

However, private businesses do not always have free reign to part ways with an employee because that employee's speech or conduct results in embarrassing press coverage or workplace tension. While the First Amendment generally does not prohibit private employers from disciplining (and even terminating) employees for speech or speech-related conduct, such conduct (including speech occurring outside of the workplace, such as on social media outlets) may, nevertheless, be protected under other rules governing the employment relationship.

As one example, if the speech pertains to wages or working conditions (a term that is construed broadly), it may be protected by the National Labor Relations Act, such that it should not form the basis for disciplinary action in unionized or non-unionized workforces. *See N.L.R.B. v. Lloyd A. Fry Roofing Co. of Delaware,* 651 F.2d 442 (6th Cir. 1981) (nonunion truck driver's complaints concerning safety of trucks was protected by the NLRA); *Atlantic-Pacific Const. Co., Inc. v. N.L.R.B.,* 52 F.3d 260 (9th Cir. 1995) (employee's comments that manager was unreasonable and difficult to work with constituted a protected comment concerning working conditions).

As another example, certain speech or associational activities could invoke protections against religious discrimination. Consider, as an example, the following hypothetical: An LGBTQ employee attends a gay pride celebration, and while there, notices that his colleague (and that colleague's church) are present to protest the celebration. If the LGBTQ employee later complains that the religious employee is harassing him at work, can the employer properly consider whether the religious

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employee's off-duty conduct suggests an on-duty bias on the basis of sexual orientation? Case law in this area is undecided (largely because the analysis is so heavily fact-dependent). Even if the company ultimately prevailed at trial, it could incur significant litigation costs along the way.

When employers base employment decisions (in whole or in part), on an employee's attendance at rallies or demonstrations, they could also invoke claims of discrimination based on political activity. At present, Nevada law is not clear when it comes to whether participation in a hate rally or similar activity could constitute political activity and, even if it could, whether employers are prohibited from basing employment decisions on such political activity. *See Whitfield v. Trade Show Servs.,* Ltd., No. 2:10-CV-00905-LRH, 2012 WL 693569, at *6 (D. Nev. Mar. 1, 2012) (noting that Nevada's courts have not yet explored what the Nevada Legislature meant to protect by declaring it unlawful, pursuant to N.R.S. 613.040, for employers to "make any rule or regulation prohibiting or preventing any employee from engaging in politics").

To complicate matters further, even in private business, constitutional considerations can come into play where local, state or federal government oversees decisions being made in private industry. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 138 S. Ct. 1719, 1729 (2018), a Colorado baker refused to bake a wedding cake for a same-sex wedding, citing religious reasons. After the Colorado Civil Rights Commission held that the baker's conduct violated statutory prohibitions against discrimination in public accommodations (i.e., a statute similar to N.R.S. 651.070), the baker appealed. Finding for the baker, the Supreme Court held that while states are free to enforce statutes prohibiting discrimination on the basis of sexual orientation, a state's enforcement of such regulations may not extend so far as to demonstrate hostility by the government toward the religious. In other words, while neutral enforcement of anti-discrimination regulations is acceptable, acts that demonstrate an aversion to sincerely held religious beliefs offend constitutional principles.

This same principle applies in private industry. The same statutes that prohibit discrimination on the basis of sexual orientation, gender identity and gender expression also prohibit discrimination on the basis of religion. See N.R.S. 613.330 ("[I]t is…unlawful…for an employer… [t]o discriminate against any person…because of his or her…religion, … sexual orientation, gender identity or expression…."); N.R.S. 651.070 (same as to public accommodations). As such, just as governmental entities must avoid hostility toward religion when protecting LGBTQ citizens, so too must private employers carefully balance employment decisions to avoid triggering a potential claim of religious discrimination. This issue has the potential to arise when an employer has both openly religious and openly LGBTQ employees. If, hypothetically, an employer receives a complaint that an overtly religious employee is harassing LGBTQ employees, the employer must carefully balance its response to these allegations to ensure that it is demonstrating sufficient efforts to prevent discrimination or harassment based on sexual orientation without also signaling a bias against religious employees.

As the above demonstrates, when an employer is considering taking employment action based on on-duty or off-duty speech, or religious, political or associational activity, a careful analysis should be performed to ensure that the company does not inadvertently create a potential for liability. Some of the factors to be considered are as follows:

1. ***Examine the Conduct and Context:*** If an employee's conduct is creating negative press or diminishing employee morale, before taking action, companies should consider not only the nature of the conduct in question (i.e., whether it triggers the concerns noted above), but also the context in which the conduct occurred. In some cases, the conduct may be sufficiently egregious to eliminate protections that federal and state law might otherwise afford. *See, e.g., Cellco P'ship,* 349 NLRB 640, 641 (2007) (employee lost protection under NLRB through insubordination unrelated to the alleged unfair labor practice of the employer); *Peterson v. Hewlett-Packard Co.,* 358 F.3d 599 (9th Cir. 2004) (employee's claim of religious discrimination failed where the conduct for which the employee's employment was terminated – continual posting of Bible verses concerning homosexuality – created a hostile work environment on the basis of sexual orientation). In other contexts, however, the analysis may not be as clear, creating an increased potential for litigation.

2. ***Assess the Impact on the Business:*** Especially regarding off-duty conduct, before disciplining an employee for speech, religious or associational activity, the employer should assess to what extent, if any, the employee's conduct impacts the business (or the work environment within the business). Compare, for example, an employee who is a vocal supporter (or critic) of the current presidential administration, as opposed to an employee whose attendance at a hate rally evidences a bias against members of a certain race. While political differences can certainly create discomfort, depending on the facts, this may or may not have a direct impact on the workplace (or the business in general). However, where the employee's speech or conduct is causing that employee's co-workers to assert claims of discrimination or harassment, a carefully planned response is required.

3. *Consult with Employment Counsel:* When in doubt, companies faced with tough decisions concerning employee speech and/or religious, political or related activity should consider consulting with experienced employment counsel before taking action. NL

1. These protections can extend even to hate speech. *See Matal v. Tam,* 137 S. Ct. 1744, 1747 (2017) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.').

For the last 15 years, **SHANNON PIERCE** has represented businesses against claims of discrimination brought by employees and business patrons. She can be reached at spierce@fclaw.com.

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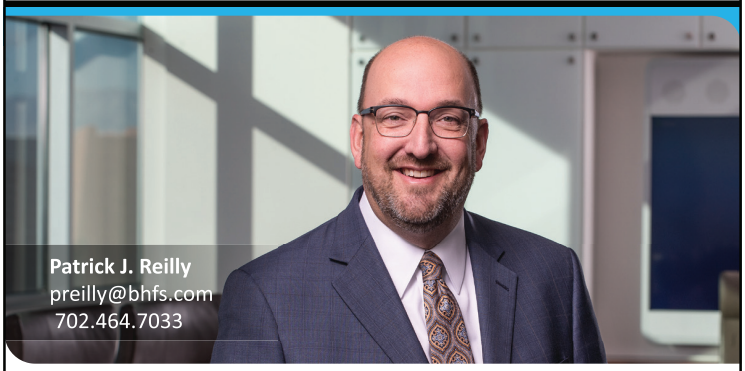
Patrick Reilly Joins Brownstein



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