

# YOUNG LAWYERS



BY MATTHEW C. PICCOLO, ESQ.

## DO PRIVATE-SECTOR EMPLOYEES HAVE A RIGHT TO FREE SPEECH IN THE WORKPLACE?

On May 23, 2018, the National Football League (NFL) revised one of its policies to mandate that players and team personnel “shall stand and show respect for the flag and the Anthem,” and that those who do not wish to stand may remain in the locker room.<sup>1</sup> In response, player Dawuane Smoot tweeted, “Freedom of speech does not exist for NFL players now ... I have a right as an American to protest when I feel there is injustice in this country.”<sup>2</sup>

In the same month, ABC canceled Roseanne Barr’s popular sitcom “Roseanne” after Barr posted a tweet that was widely perceived as having racist overtones.<sup>3</sup> After ABC’s decision, some people might have accused ABC of trampling on Barr’s freedom of speech.

Both of these major news stories raise important questions about speech in the workplace that affect workers every day. Do Nevada employees have a right to free speech in the workplace, or may employers restrict or prohibit what they say? Are there any restrictions on employer speech?

### Most Employees Have No Constitutional Right to Free Speech in the Workplace

The First Amendment to the U.S. Constitution states that “Congress shall make no law ... abridging the freedom of speech.”<sup>4</sup> The key word there is “Congress,” which the courts have interpreted to mean the federal government, as well as state governments and their subsidiaries.<sup>5</sup> As a result, employees of government have some speech protections,<sup>6</sup> but the First Amendment does not apply to private employers and, thus, employees of private entities have no constitutional protection.

Private employers can generally dictate what their employees say—or don’t say—at work and, to some extent, outside of work. For example, they can dictate what employees say to customers or write to third parties via email. Employers can also prohibit employees from divulging confidential information, business practices and trade secrets.

### Government Restricts Employee Speech in the Workplace

Not only does the Free Speech Clause not protect private-sector employees, but many laws restrict their speech in the workplace, and the Supreme Court has found that such laws do not violate the First Amendment.<sup>7</sup> For instance, civil rights laws prohibit workers from harassing one another based on

protected classes like race, gender, age and disability. *See* NRS 613.310-4383; 42 U.S.C. § 2000e *et seq.* Also, employees who make false statements about their co-workers or employers can be held responsible under Nevada’s defamation laws. *See* NRS 200.510; *Pope v. Motel 6*, 114 P.3d 277, 282 (2005).

### Government Also Protects Speech in the Workplace

At this point, private-sector employees might begin to think they have no freedom to at all to speak as they wish, but many federal and state laws are designed to protect employee speech from employer overreach, both at work and outside work.

#### At Work

Employees have a right to engage in the following forms of speech without employer retaliation:

- Engage in “protected concerted activity,” such as collaborating to improve their working conditions, *see* National Labor Relations Act, 29 U.S.C. § 157;
- Report safety and health violations to government agencies (*see* Nevada Occupational Safety and Health Act, NRS 618.435; Occupational Safety and Health Act, 29 U.S.C. § 657(f));
- Oppose or report employment discrimination and participate in proceedings related to alleged discrimination (*See* NRS 613.340(1); 42 U.S.C. § 2000e-3(a)); and
- Report fraud against the government and pursue claims to prevent it (*See* NRS 357.080, 250; 31 U.S.C. § 3730(b),(h)).

Employers may not force employees to speak by requiring them to:

- Disclose login information that provides access to their social media accounts (*See* NRS 613.135);
- Disclose their consumer credit information, including a credit report, as a condition of employment (with exceptions) (*See* NRS 613.570); or
- Speak while using a lie detector test (with exceptions) (*See* NRS 613.440-510).

If workers refuse to engage in such speech, then employers may not retaliate against them.

#### Outside of Work

Employers also may not:

- Prevent employees from “engaging in politics or becoming a candidate for any public office in this state” (*See* NRS 613.040); or
- Discharge or discriminate against an employee for using a lawful product outside work premises during nonworking

hours, if that use does not adversely affect the employee's performance or employee safety (*See* NRS 613.333), which could protect off-duty speech made through mediums such as cell phones, social media etc.

### Government Also Limits Employer Speech

To help protect employees, government also restricts employer speech. Like employees, employers can be liable for defamation against employees, and they may not verbally abuse or harass employees based on a protected class. *See* NRS 613.310-4383; 42 U.S.C. § 2000e *et seq.* During the application process, employers may not ask whether an applicant has a disability or about the nature or severity of a disability. *See* Americans with Disabilities Act, 42 U.S.C. § 12112(d)(2).

Under Nevada law, employers also may not:

- Make false or deceptive representations about the type of work to be done, compensation, sanitary or other conditions, labor disputes or ability to pay wages (*See* NRS 613.010-030);
- Blacklist former employees or attempt to prevent them from obtaining employment elsewhere (*See* NRS 613.200-210);
- Publish a job advertisement that indicates a preference or limitation based on a protected class, unless it involves a bona fide occupational qualification (*See* NRS 613.340(2));
- Ask or encourage an applicant or employee to submit to a genetic test (*See* NRS 613.345(1)(a)); or
- Request or suggest that an employee take a lie detector test or inquire into results of past tests (*See* NRS 613.440-510).

Speech in the workplace is far more complex than simply invoking the Free Speech Clause of the First Amendment. The next time a co-worker, client or employee exclaims, "But I have freedom of speech!" you might kindly explain that private-sector employees have no *constitutional* free speech protections. You can then add that workers aren't completely out of luck, because many laws protect employee speech and limit employer speech for their employees' benefit. **NL**

1. Lorenzo Reyes, "NFL's national anthem policy: Players on field must stand, show 'respect,'" *USA Today*, May 23, 2018.
2. Morgan Gstalter, "NFL player: 'Freedom of speech does not exist' for us now," *The Hill*, May 24, 2018.
3. John Koblin, "After Racist Tweet, Roseanne Barr's Show Is Canceled by ABC," *The New York Times*, May 29, 2018.
4. Article I, Section 9 of the Nevada Constitution also prohibits laws that "restrain or abridge the liberty of speech."
5. The courts have used the Fourteenth Amendment to apply the Free Speech Clause to the states and all branches of the federal government, although not without debate. *See* Daniel J. Hemel Executive Action and the First Amendment's First Word, 40 *Pepp. L. Rev.* 3 (2013).
6. *See* Laura J. Thalacker and Courtney Miller O'Mara, "Public Employees and The First Amendment: The Intersection of Free Speech Rights and Social Media," *Nevada Lawyer*, Nov. 2012.
7. *See, e.g.,* *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942).

**MATTHEW C. PICCOLO** is the owner of Piccolo Law Offices. He primarily represents employees and smaller businesses in employment matters. He also practices in the areas of civil rights and constitutional law. Before starting his practice, Piccolo served as a law clerk for Judge Robert C. Jones in the U.S. District of Nevada and worked in public policy for six years.

# PRO BONO *Honor Roll*

The State Bar of Nevada Board of Governors and the Access to Justice Commission extend a special thanks to the following attorneys who generously accepted cases through the Legal Aid Center of Southern Nevada, Washoe Legal Services, Nevada Legal Services and Volunteer Attorneys for Rural Nevadans, and those who donated their time to work at events like Ask-A-Lawyer, Lawyer in the Library and Law Day.

Michelle Anderton Tiffany Ballenger Floyd Elizabeth Bassett Matthew Beckstead Craig Bourke Elizabeth Brickfield Michael Brock Chad Butterfield Candace Carlyon Matthew Carter <b>Stephanie Charter</b> Margo Chernysheva Benjamin Childs Richard Crane Laura Deeter Damon Dias Megan Dorsey Kelly Dove M. Lani Esteban- Trinidad	Michael Falater Laura Fritz <b>Marjorie Guymon</b> George Haines Robert Hemen Jennifer Hostetler Gregory Kerr Kerry Kleiman Andrew Kynaston Caleb Langsdale Anat Levy Brittany Llewellyn Bryce Loveland Nicole Lovelock Racheal Mastel Robert McPeak Ayesha Rabbani Mehdi David Mincin Roi Moas Carlos Morales	Robert Murdock Jason Onello <b>Christine Owen</b> Maren Parry Romeo Perez Morgan Petrelli Dan Polsenberg Michael Rawlins Jennifer Roberts Marisa Rodriguez Steven Rogers Abraham Smith Nancy Snow <b>Debra Spinelli</b> Brian Steadman Jaimie Stilz Richard Tanasi Timothy Thomas <b>Dan Waite</b> <b>Marshal Willick</b>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

### Attorneys who participated in Ask-A-Lawyer, Lawyer in the Library or other clinics:

Alyssa Aklestad Bryce C. Alstead Boris Avramski <b>Jeanette "Jae" Barrick</b> <b>Robert Blau</b> Richard C. Blower Debra Bookout <b>Craig Bourke</b> <b>April Bradshaw</b> Michelle Briggs Amy Buchanan Brandi Cassidy Marilyn Caston <b>Ebru Cetin</b> Jessica Chong Lesley Cohen <b>Brittany N. Cooper</b> <b>Richard F. Cornell</b> <b>Melissa Corral</b> Richard Crane	Eric Dobberstein Dayvid Figler <b>Cherie Fletter</b> Nancy Moss Ghush Nathan Gibbs Jennifer Golanics <b>Joe Gorman</b> <b>Timothy Hay</b> Robert Hernquist <b>Laura R. Jacobsen</b> Janice Jacobino <b>Kristina Janusz</b> Tatiana Jensen <b>Gabrielle Jones</b> Kevin Kampschror <b>Bronagh M. Kelly</b> <b>Jonathan H. King</b> Madeline La Forgia Amanda Litt Bonnie Lonardo	Aaron MacDonald <b>Bryan Martin</b> Michael Matuska Christopher Owen Lauren Pena Lawrence Phillips <b>Brian J. Saeman</b> <b>Arturo Sanchez</b> <b>Glenn Schepps</b> <b>Madelyn Shipman</b> <b>Gary R. Silverman</b> Jennifer Spelman <b>Caryn R. Sternlicht</b> <b>Jaimie Stilz</b> Marissa Temple <b>Darren Welsh</b> Brenoch Wirthlin Anthony Wright Robert Zentz Chuck Zumpft
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**BOLD** honors multiple cases accepted and/or sessions conducted within the month.

**Be sure to follow Access To Justice on Twitter at @NevadaATJ, in order to keep abreast of all upcoming pro bono opportunities and events!**