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Bill Helfand and Kathryn Kahle Talk Termination

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Let's talk termination. While the thought admittedly isn't pleasant, try to think about how many times one of the corporate higher-ups has blasted into your office or rung you up on the phone to complain about an employee. You've heard about this employee before; they're the employee who calls up local reporters to tell them all the gossip about what is going on in your high-profile company, or it's the employee who is constantly caught telling other co-workers just what exactly is wrong with the office. Maybe they are the employee whom management would like to fire, but are afraid to do so. After all, they ask you, it's illegal to fire an employee for their speech, right?

If the thought of this question suddenly sends you reeling back to constitutional law in your first year of law school, have no fear. The law in this area is actually quite straight-forward and won't require you to dig through your old bar materials. Just think of Donald Trump on NBC's "The Apprentice" and his famous trade-mark line; "You're fired!" This image actually suggests the answer management usually both wants and needs. A private-sector employer can almost always fire an employee because of their speech.

As we all know, the First Amendment guarantees every United States citizen the right to free speech. But, as a general proposition, the Constitution speaks to limitations on governmental, not private, exercises of power. Consequently, a private sector employer in the private-sector does not have to tolerate everything which comes from an employee's mouth or word processor. When it comes to free speech and the work place, the private-sector employer is truly in charge.

Oftentimes, management will not fire an employee for his or her speech simply because they don't want to be slapped with a wrongful termination lawsuit. However, it might come in useful next time you're faced with this dilemma to consider what exactly a lawsuit like this would look like. So, consider a scenario where one of your company's employees has written a letter to the city newspaper criticizing recent decisions management has undertaken. Management then fires the employee, only to find out later the employee has filed a wrongful discharge action against them on the basis of free speech. This scenario is not far-fetched; it has been lived out in courtrooms throughout the country.

The discharged employee has several major obstacles to overcome before he or she can win the wrongful discharge action. The first, and considerably largest, hurdle to overcome is the necessity to prove state action. Here, since it is a private company that fired the employee, neither the state nor any of its entities, discharged the employees. Because the First Amendment generally requires only that state actions conform to the First Amendment, the private company has considerable flexibility

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when it comes to firing employees for their speech.

In June of 2004, a California Court of Appeals echoed this widely-held legal postulate when it held that the First Amendment free speech provision applies only to government action, and consequently does not support a discharged employee's wrongful termination suit against a private-sector employer. That court was certainly not the first, and clearly will not be the last, to make such a ruling.

A second and equally significant obstacle a plaintiff will face is the widespread sentiment among courts nation-wide not to interfere with the at-will employment doctrine which predominates in most states. Courts in this country are simply reluctant to involve themselves with this issue as it relates to how a private-sector employer runs its company. In fact, many courts have suggested the only way a plaintiff can overcome the powerful at-will doctrine which rules this issue in most states and all of its attendant benefits for employers is for an employee to prove their discharge violated a clear mandate of public policy. While this may sound poorly defined and give rise to concern for employers, this is not the loophole discharged employees maybe be looking for.

In 2003, a New Jersey federal district court explained that merely arguing the importance of freedom of speech under the First Amendment is not going to save an employee's case against a private-sector employer that generally fails due to the lack of state action and the applicability of the at-will doctrine. In other words, relying on the importance of freedom of speech is not the type of public policy violation which is going to save employees. This holding has been consistently applied in courtrooms across the country, from West Virginia to Alaska.

To date, the view that a discharged employee can successfully argue public policy to thwart state action and the at-will doctrine has been accepted by very few courts. In 1983, the Third Circuit Court of Appeals held that the First Amendment should be viewed as a source dictating that free speech must prevail at all costs. As a result of this view, the court decided an at-will employee could sustain a wrongful discharge action against a private-sector employer based on public policy alone. However, what is important about this decision today is not that it sides with employees on this, but, more importantly, that it has been widely criticized by courts throughout the country and has subsequently been denounced by the Third Circuit itself.

Of course, when you tell management they truly do have some power when it comes to terminating their employees for inappropriate speech, they may give you a look of disbelief. They might even ask just who the First Amendment does protect, because, in light of the foregoing, this is a reasonable question. The answer is this: the First Amendment usually protects public-sector employees, but even they are not always guaranteed a successful wrongful discharge claim based on the exercise of free speech.

The United States Supreme Court has considered this issue several times, most notably in *Connick v. Myers*, and their stance is perfectly clear: a balance must be struck. The High Court has decided that courts faced with such a situation must arrive at a balance between the interests of the employee as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. So, if a public employee is fired for speech relating to matters only of personal interest, that speech isn't protected and a wrongful termination claim will not stand.

So should management rejoice in the thought that they can virtually fire any employee if their speech isn't to the employer's liking? Not quite. While an employee may certainly have a tough time succeeding on the basis of free speech claim, other avenues might be available to the employee which would allow recovery against an employer. Moreover, the claim, even one you win, may be costly to

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defend. Before firing someone, an employer needs to make sure that they really are terminating on the basis of speech and not another carefully protected right, such as religion. There, for example, the law isn't as lenient.

Courts theoretically recognize that there are rights that cannot be compromised, but in reality, courts have a tendency to favor an employer due to necessity and efficiency. This tendency is often management's best friend. So, next time your office door almost gets knocked down by a director who is fed up with the gossiping employee, tell him to go ahead and pretend he's Big Boss Trump and say, "You're fired."

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