

**DISCIPLINING EMPLOYEES FOR
FREE SPEECH, WHISTLE BLOWING, AND
POLITICAL ACTIVITIES***

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ABSTRACT

The first part of this article reviews literature and case law on disciplining employees for free speech, whistle blowing, and political activities. It focuses on the extent to which an employer regulates off-the-job behaviors of its employees [1]. Although this is not a treatise on the underlying law, the authors discuss constitutional law (especially the First Amendment), limitations on at-will employment, the Whistle Blowers Protection Act, and some state laws and the potential impact of these on the employer's behavior. The second section reviews and analyzes the results of litigation over an eleven-year period to determine the win/lose rates in the relevant courtroom battles and whether those rates have changed with an increasingly protective public policy.

You don't have to be a Nazi or an anarchist or engage in criminal activity for your boss to fire you. You might only have to support a candidate for office, blow the whistle about illegal activities, or be a conservative Christian evangelizing in

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the community. Recently the Chicago Tribune's headline was "Bounty on Daley costs GOP chief his day job" [2]. In this example, Gary Skoien was fired because his boss thought that his political activity interfered with his responsibilities in the private sector. This is one example of the public's interest in the issue of whether employees can be disciplined for behavior, including free speech that occurs off the job.

There are numerous intrusions that an employer can make into the personal life of its employees. Some employers attempt to monitor and regulate the off-the-job conduct of their employees, including activities of a very private and personal nature, and many have adopted policies proscribing or severely restricting their employees' off-the-job, off-premises activities under the assumption that they have an impact on the job. Behaviors that have been regulated include smoking, drug and alcohol use, dating, wearing safety belts while driving, committing adultery, gambling, single marital status, civic and political activities, leisure activities causing health risks or image problems, moonlighting, eating, and illegal acts. While such policies have been challenged in court, the law that covers monitoring and regulating of off-the-job conduct has not been well developed in most jurisdictions. This article deals with that topic.

BASIC LEGAL PROTECTIONS FOR EMPLOYEES

Employees have certain protections from employer intrusions into their lives. Many of them are delineated in Appendix 1. The first ten amendments to the U.S. Constitution guarantee U.S. citizens a variety of basic freedoms from unwarranted intrusion by the federal government into their daily lives [3]. These protections were extended to protection from interference by state government, by the Fourteenth Amendment, Congress and the courts have provided further protections. The federal courts have ruled on cases involving issues of free speech, free association, political activities, residency requirements, invasion of privacy, and lifestyles (Appendix 1). And, there are many state laws that bar disciplining employees for various types of off-duty conduct [4] (Appendix 1). New York, for example, prohibits employers from punishing employees for political activities [5]. Based on their analysis of recent cases, Silbergeld and Sasaki noted that the trend appears to be moving in the direction of protecting employees from such perceived intrusions into their off-duty activities [6].

LITERATURE ON THE EMPLOYER'S RIGHT TO PEER

The employer's right to peer into the lives of its employees is not unlimited. Generally, an employer's intrusion into an employee's privacy is thought to be permissible only if a sufficient justification can be given that outweighs the

employee's claim to privacy. Such a justification can be given only if the intrusion occurs in someone's legitimate interest. From the perspective of the employer, this means that three possibilities exist. The employer can argue 1) that its own (business) interests justify the intrusion; 2) that it is justified by the interests of the employee; or 3) that it is justified as a means to protect an interested third party's legitimate interests.

Martin and Freeman contended that seven arguments can be used to rationalize the monitoring of employees [7]. These include productivity, security, liability, privacy, creativity, paternalism, and social control. None of these arguments is conclusive, and each calls for managerial and moral consideration. Persson and Hansson commented further with respect to regulation of on-the-job behavior ". . . the following need to be considered: a reasonable account of the moral legitimacy of privacy intrusions should respect the prima facie legitimacy of individual privacy" [8].

Bosch argued that there are insufficient protections for employees except when there are contracts, anti-discriminative provisions, public policy exceptions, and limited lifestyle protection laws [9]. The courts, accordingly, have traditionally stayed out of disputes of employee restrictions in all but the most egregious of cases. He argued that state legislatures should adopt expanded lifestyle protection legislation that fully protects all employee activities that do not have a sufficient impact on the employer's legitimate business interests [9].

Dworkin pointed out that while employers' efforts to control employees' off-the-job activities are increasing, employees have little legal recourse against such interference because of the employment-at-will doctrine [10, 11]. There has been some erosion of that doctrine, as employees are mounting challenges to employer interference on a variety of fronts, including challenges under the Constitution, Title VII, state lifestyle protection statutes, marital discrimination statutes, wrongful firing, and invasion of privacy. Numerous legislated exceptions have also been enacted.

In general, whether they involve political involvement, criminal acts, or personal expressions online, workers' activities off-hours have caused employers no small amount of grief and hand-wringing. After reviewing thirty-three arbitration awards conducted in 1989, lawyers Stephen Krashinsky and Jeffrey Sack, authors of *Discharge and Discipline*, concluded that employees may be disciplined for off-duty conduct if it: 1) detrimentally affects the employer's reputation; 2) renders the employee unable to properly discharge his/her employment obligations; 3) causes other employees to refuse to work with him/her; or 4) inhibits the employer's ability to efficiently manage and direct the production process [12]. However, Toronto-based lawyer Stuart Rudner said, "Outcomes of similar cases often diverge; thus, employers should tread with caution. It's hard to come up with a hard and fast rule" [cited in Vu, 13)]. Even when the off-duty conduct for which an employee is sanctioned is criminal, it's not always certain

that the employer has the right to fire the employee [13]. In assessing these challenges, courts should adopt a reasonable business-necessity standard.

SCOPE OF THE RESEARCH

In a comprehensive overview of the privacy aspect of lifestyle discrimination, Sugarman pointed out that employer regulation can focus on many types of behaviors, including personal relationships, civic and political activities, leisure activities, moonlighting, daily living, and illegal activities. A subset of these consists of civic and political activities, which were the focus of this research. These can include: voting, running for office, and campaigning. Simply joining a group with political goals or speaking out on civic and political issues is also of concern because many workers have been punished by their employers over what they view as the exercise of their free-speech rights off-the-job (even if their arguments are based on a faulty understanding of the First Amendment, which protects freedom of speech only against federal government action).

Their concerns are real; this is not a purely academic exercise. Employers have retaliated against workers who have taken a political stand on an issue that the employer views as directly contrary to its business interests [14]. For example, workers have been disciplined for speaking out at a public hearing in opposition to some legal variance, planning permit, or local ordinance that the employer was trying to obtain, for complaining about the job to friends or co-workers, and for complaining to others about the firm's working conditions.

Punishment has been meted out even when the connections with the employer's business interests are less direct. An employer may discipline an employee because the employer feels the employee's political activities and public statements were considered extremely offensive (such as being a grand dragon of the KKK, or speaking out in support of pornography or pedophilia). The employer may claim it is simply responding to pressures from other employees and customers. Other times, the worker's politics may be in conflict with those of a boss who prefers to have like-minded people working for the enterprise [1].

VOTING OR POLITICAL BEHAVIOR

Background

There are state statutes protecting off-duty conduct, including political activities, in California, New York, North Dakota, Colorado, and Connecticut [15, 16]. States have been carving out common law exceptions to the doctrine of employment at will. Through an extensive evaluation of the precedent-setting cases in each state, it is possible to develop a framework for analysis. This

framework categorizes states based on what version of the exceptions (public policy, implies contract, or good faith and fair dealing exception) they have adopted and how large the exception is. It also examines the timing of the state-level judicial adoptions of these exceptions to employment at will.

With regard for disciplining employees for political activity, the employer's contention is often that voting and/or political behaviors may detract from the employer's reputation or productivity. For example, customers may negatively view employees' participation in a political campaign or rally or employees may be distracted, and thus less productive.

The Fine Line Between Free Speech and Political Behavior

A number of cases tested the bounds of New York's law after it became effective in 1992, including two cases involving political activities. In *Richardson v. City of Saratoga Springs*, the plaintiff-employee Scott Richardson claimed that his job duties were modified and he was denied a promotion because he supported a political opponent to the commissioner of public works [17]. The court found that it was "reasonably inferable" that the changes were "prompted by the Commissioner's awareness and disapproval of the plaintiff's opposing political activities" [17]. In short, the court held that Richardson "satisfied his burden of coming forth with legally admissible proof that he was treated detrimentally, by having his job duties adjusted in a way that led to his being denied a promotion and concomitant salary increase" [17].

Michael Italie had been fired by Goodwill Industries of South Florida because of his affiliation with the socialist Workers Party (SWP). The affiliation came to light on October 18, 2001 when Italie, appearing in a televised debate as the SWP's mayoral candidate, called for a "workers' and farmers' government" and declared, "I support the Cuban Revolution" [18]. On October 22, he was fired. Dennis Pastrana, chief executive of Goodwill in South Florida, told the *Miami Herald* (Oct. 30, 2001): His beliefs are those of a communist who would like to destroy private ownership." This firing does not infringe on his right to be a communist (or a socialist for that matter) and no one violated Italie's right to be a member of the Socialist workers Party. Indeed, he still is one. No one prevented Italie from exercising his First Amendment rights, from expressing his views, or even from acting on them (by running for mayor). But based on press coverage, many people apparently believe that Goodwill did wrong in firing Italie [18]. Italie's firing raises the question of whether it's ever permissible for a company to terminate an employee because of his/her political speech, and if so, when [19]?

There are political cases that involve balancing a public employee's right to function as a citizen in a free society against a public employer's right and need to

maintain reasonable control over the effectiveness of the services it provides. We should remember that public employees are held to a higher standard of accountability for their conduct in non-job-related activities than are private-sector employees [20]. Further, as we shall see in cases involving retaliation against public employees for constitutionally protected activities, lower courts in various jurisdictions have differed in their legal interpretations and with the rulings of the Supreme Court.

In *Brochu v. City of Riviera Beach*, Brochu, a police lieutenant, testified in an FBI corruption hearing against his boss [21]. He had his union become involved in municipal politics against the current administration and supported a new city manager. During his off-duty hours, Brochu actively participated in the election campaigns of various reform candidates for the city council. He was subsequently transferred to a less-desirable assignment with significant changes in job duties and responsibilities. Brochu alleged that, as a result of these anti-corruption activities, he was placed on administrative leave and subjected to conditions that were so intolerable as to cause him to involuntarily resign his employment. It seems like discipline by the employer [21].

The district court awarded Brochu \$2000, finding that the city had retaliated against him for engaging in conduct protected by Title VII and \$45,000 on his First Amendment claim, and finding that protected speech activity was a substantial and motivating factor for the city's decision to place him on administrative leave. However, this decision was reversed on appeal [21].

Another interesting case is *Roe v. City of San Diego* [22]. John Roe, while a San Diego police officer, videotaped himself stripping in a generic police officer's uniform and engaging in acts of masturbation. He offered these homemade videos for sale on the adults-only section of eBay. He was subsequently fired. Roe sued, alleging that his off-duty, non-work-related activities were protected by the First Amendment and could not be grounds for termination. The district court dismissed Roe's claim, concluding that the videos did not address a matter of "public concern" and thus the department did not violate Roe's constitutional rights by firing him. The appeals court concluded that the district court had erred, and reversed the findings [22].

The appeals court held that these activities, which addressed a public audience, were made outside the workplace and involved content largely unrelated to government employment. These activities, therefore, fell within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace. The court held that this claim must be settled under *Pickering*, which balances free speech versus the department's legitimate interests as an employer in promoting the efficiency of the public services it performs [23]. The court ruled that Roe's interest in self-expression outweighed the employer's possible injury [22].

Sometimes the distinction between free speech and illegal activities is unclear. Another case claiming a violation of First Amendment Rights was *Russo v. Budd* [24]. Russo alleged that he was fired for political activities, specifically for supporting the campaign of a former county sheriff, Chance, in the general election against the current sheriff, Wellington. Although winning the election, Sheriff Chance was forced to resign after a criminal conviction for racketeering and extortion [24].

While off duty, Russo, the plaintiff, requested that a license plate number be investigated through the state's computer system. He claimed that a suspicious car was in his neighborhood. The license plate was registered to the husband of a county commissioner seeking reelection at the time. The information that this license plate had been run through the computer later appeared on a local radio show. It was believed that Russo wanted the information for political purposes. After a hearing that included a lie detector test, the department decided that Russo had violated policy provisions relating to abuse of position, unauthorized dissemination of information, and failing the truthfulness directive. For these types of violations, the prescribed punishment was discharge, which was upheld on appeal [24].

WHISTLE BLOWING

Whistle blowing means disclosing information that a worker believes is evidence of illegality, gross waste, gross mismanagement, abuse of power, or substantial and specific danger to the public health and safety. Whistle Blowers are protected from retaliation by the Federal Whistle Blower Protection Act (1989) [25].

In *St. Hilaire v. Pep Boys*, when an employee filed race discrimination charges for failure to get promoted and being subject to a hostile environment, the plaintiff evoked the Whistle Blower Act [26]. He claimed his employer was violating Title VII of the 1964 Civil Rights Act, which protects against race discrimination and that he was whistle blowing regarding the behavior of his employer. However, he did so inappropriately, and his firing was upheld. The process and outcome were similar in *Adeniji v. Administration for Children Services*, since those filing claims under Title VII are not protected as whistleblowers [27]. It appears that the plaintiffs felt that they would have a stronger case if they claim protection under the Whistle Blower Protection Act, although this is not legally justifiable.

Even a process as sacrosanct as the promotion of a faculty member can be subject to litigation based on whistle blowing. In *Schutts v. Feldman*, the plaintiff successfully filed and received \$500,000 in compensatory and punitive damages because the employer interfered with the promotion process and his right to freedom of speech [28]. Eli Schutts was an assistant professor of philosophy at

Western Connecticut State University (WCSU), and the defendant, Stephen Feldman, was dean of WCSU's business school and, later, university president. In 1986, Feldman quashed Schutts's promotion to associate professor, an action that Schutts believed to be in retaliation for speech protected by the First Amendment to the United States constitution. Feldman had successfully solicited a large donation from Nathan Ancell, a businessman, which Ancell made on condition that it be used only for the business school. In return, the school was named in his honor, and he received an honorary degree. The gift and the honors bestowed on its donor were the subject of public debate and controversy, both inside and outside the university. Schutts was an outspoken critic of the business school's decision to accept this private money, and he expressed his criticism in a letter to the *Danbury News-Times* and in an article published by the WCSU newspaper. A jury found that Feldman's 1986 promotion decision had violated Schutts's right to freedom of speech, and awarded Schutts \$150,000 in compensatory damages and \$300,000 in punitive damages [28]. This is a case in which the distinction between whistle blowing and free speech is vague, since the plaintiff disseminated negative information about an administrator who received a contribution that was used inappropriately.

FREE SPEECH

Background

The legal basis for protection of free speech is delineated in Appendix 1 [1]. It is common for employees to claim free speech rights for speech on the job. However, the protection for employees is offered only for actions taken by the government and not by individual parties. These are some of the conclusions from a study of the court decisions under the First Amendment freedoms and how they relate in the work environment:

- Employees who offer statements haphazardly and without regard to others may have their statements ignored as ignorant statements.
- Speech that may affect the public concern should be heard without punishment to the speaker.
- Employers who offer discipline to employees who attempt to help others who believe in certain religions are wrong.
- As long as the business may operate efficiently and smoothly, there is no reason to discriminate or punish employees for speaking their mind or expressing their beliefs [29].

The Connecticut law may be generally instructive. A key issue in cases brought under Connecticut law seems to be whether the speech at issue regards a matter of "public concern." Protected speech addressing matters of public concern includes statements that can be "fairly considered as relating to any matter of

political, social, or other concern to the community. Speech that is not protected includes speaking out about perceived wrongdoings on the part of the employer's upper management, speech relating to the terms and conditions of one's employment, and a supervisor's off-duty, off-premises sexual contact with a new employee. In summary, only where a private employee is expressing concern about a public matter will the Connecticut statute protect against adverse employment action [15].

Another study of arbitration cases in the public sector that dealt with free speech found that the employee was more likely to prevail if there were issues of individual rights such as privacy, freedom of association, freedom of speech and employer control of off-the-job behavior [30]. There are incidents where employers were punished for their employee's off-duty conduct. A manager used his home computer to send e-mails entitled, "Politics is No Place for Women Today," and the employer incurred \$15,000 in legal fees to oppose the motion to compel the manager to produce the computer [31]. In justification of promoting employee control, *Abraham* found that shareholders' returns in two states increased in response to the courts affirming the supremacy of employment-at-will doctrine and fell when the court decision cut back on employment-at-will erosions [32].

An Ontario arbitration board had a case in which a teacher was fired who was known to hang out with racists who support white supremacist and anti-Semitic groups [33]. The teacher had ignored warnings from his employer that his off-duty misconduct could lead to his termination. The school board argued that high standards apply to off-duty conduct of teachers and that where the off-duty conduct of a teacher is incompatible with these standards, discipline may be imposed for just cause. In a 2-1 ruling, the board concluded that the teacher's actions put the school's commitment to multiculturalism into question. This termination was upheld, even though there was no proof that the teacher, an employee for 23 years, had ever expressed his private opinions in the classroom and there was no evidence of direct impact on students. This case raises the question of what is acceptable behavior for teachers when they are off-duty and whether their private lives should be an issue in evaluating their ability to teach [33].

Some additional cases related to free speech involved issues as mundane as expressing sexual orientation, wearing symbols on a tee shirt, and parking a car. An interesting free speech case involves homosexuality in the military [34]. A lawsuit was brought in 1996 by a military officer who contended that inability to express his homosexuality was a violation of his freedom of expression. This is a challenge to "Don't Ask, Don't Tell." In *Watson v. Perry*, the plaintiff lost on appeal and was subsequently discharged from the military [34].

In a situation involving surveillance of an off-duty police officer, the officer received a three-day suspension, not for what he was under surveillance for, but for confronting the employee doing the surveillance, who was legally parked

in front of this house [35]. While the plaintiff argued that the suspension violated his free speech, the court held that the integrity of the police was in the public interest. Additionally, the chief of police and the mayor held qualified immunity in this case [35].

THE FORMAL DATA ANALYSIS

Up to this point we have discussed laws and cases. Now we shift to the question of whether the outcomes of the cases have changed and whether those outcomes have changed over time. Stated in the form of null hypotheses, we examined whether or not there had been changes in the outcomes of the cases litigated over two discrete periods within that decade. The null hypotheses that guided the methodology for this study are:

- H₁** There are no differences in prevailing win/loss rates in the litigated off-duty or off-the-job cases relating to free speech, whistle blowing, and civic or political activities [36].
- H₂** There are no differences in prevailing win/loss rates over the last decade.

The cases were randomly selected from several hundred published cases in *Federal Labor Law Academic LexisNexus*TM if there were more than 40 cases for each category of case. If there were fewer than forty cases, all cases were used. To discern win/lose rates over time, the years 1994-1999 were separately analyzed from the years 2000-2004. Because we were concerned with discipline for off-duty behavior, the key words “off-duty” or “off-the-job” were included in the search. Since by its very nature whistle blowing usually occurs while the employee is off-duty, these terms were omitted in the whistle-blowing subsearch. Some nonrelevant cases were eliminated. For instance, “off-the-job” behavior, words occur when employees walk off the job. Thus, those cases that were inappropriate were eliminated.

The cases included the private sector employers as well as the public sector. Thus, an employer could be a federal agency, a retail organization, a union, or a government agency such as the National Labor Relations Board (NLRB). All of the cases involved significant discipline: termination, demotion, or loss of pay. We have placed the cases into three categories: free speech, political activities such as campaigning, and whistle blowing. The dependent variable is the outcome of the court case: Did the employer or the employee prevail or was the case split between the two?

The chi square analysis was done to discern whether there were differences in employers prevailing over time. The nonsignificant chi squares allow one to draw the conclusion that there were no differences over time.

Table 1. Comparison of Case Outcomes By Year

	2000-2004 Number of Cases	1994-1999 Number of Cases	Chi Square $p = .05$
Free speech			4.05, N.S.
Employer prevails	24	15	
Split	12	19	
Employee prevails	4	6	
Whistle Blowing			0.25, N.S.
Employer prevails	20	21	
Split	10	11	
Employee prevails	10	8	
Political Activities			1.69, N.S.
Employer prevails	13	15	
Split	8	18	
Employee prevails	3	7	

FINDINGS AND CONCLUSIONS

As portrayed in Table 1, all three categories showed a trend for the employer to prevail, confirming hypothesis 1. In addition, there were no significant differences over time, confirming hypothesis 2. Cases were categorized as employer prevailing, employee prevailing, or split. In split decisions, the employer and the employee each received a portion of their position in the award. For instance, if an employee was reinstated, but not given back pay, it would be considered a split decision.

Table 1 displays the holdings of 224 cases litigated in federal courts during the respective periods. The conclusions that can be drawn are: 1) the raw data indicates that employers win far more often than employees. Employers won 108 of those cases; employees won 38; and the parties split the remaining 86. 2) the nonsignificant chi square statistics ($p > .05$) indicate that there has been no significant change in case outcomes in the two periods of time under consideration, in spite of the fact that there were significant changes in law during this period.

This is surprising because the changes that were made generally went in favor of the plaintiffs. For example, the creation of federal rights for whistle blowers has enhanced the ability of employees to disclose employer violations of law. Furthermore, another important development in whistle blower protection has been that a majority of states have recognized a public policy exception to the common law termination-at-will doctrine. Instead of offering protection to employees covered under special laws or employees who work

for the federal or state governments, the public policy exception cause of action usually protects all private sector employees in the states that have adopted the exception. Additionally, most states classify a retaliatory discharge cause of action as a tort, and, consequently, employees who file claims under this cause of action are entitled to jury trials and, if successful, punitive damage awards.

We have three thoughts on the apparent employer dominance in these cases. First, that dominance might be explained in part by the fact that cases are decided on precedents. The previous rulings affect decisions in subsequent cases unless the changes in the laws clearly override the previous decisions.

Second, the legal changes that have taken place tend to have a patchwork nature. For example, only employees who perform certain specific whistle blower actions in certain specifically protected industries are covered under federal law. Each federal whistle blower statute has its own filing provisions, its own statute of limitations, and its own administrative or judicial remedies. Thus, each potential whistle blower case must be evaluated on the basis of who the employer is, what the disclosure concerns, and in which state the actions occurred. On the basis of these variables, an attorney must review various federal laws to determine whether the employee is protected and exactly what procedures should be followed in filing a claim for redress [37]. Thus, it may be just as difficult to pursue and win cases that take away rights of the employer such as in whistle blowing cases, even though the laws have seemed to make it more protective of employees.

Third, the employers won 108 cases. Employees won 38 outright and got something for themselves in 86 split decisions. It is possible to argue that employees won at least something in a majority of the cases (124 wins in 232 cases [54.4%]).

FUTURE DIRECTIONS

As we can see through the examination of legislation and cases, no uniform standard exists in the United States to determine when an employer can use an employee's off-duty conduct as the basis for an adverse disciplinary decision. The lack of definition is particularly troublesome for companies with workers in multiple states, because the protection for off-duty conduct varies so widely. It would be helpful for both employers and employees if a federal statute would be enacted that balances the reasonable rights for employee privacy with the needs of employers. Marissa Pagnattaro, an assistant professor of legal studies at the Terry College of Business at the University of Georgia, suggested a model statute that meets those needs [15]. Such a statute would provide that a plaintiff who brings an off-duty conduct right-to-privacy claim could establish a prima facie case by showing that 1) the conduct at issue is protected by the statute; 2) s/he was qualified for the position, and 3) there was an adverse employment action

causally related to the protected conduct. If the plaintiff meets these requirements, the burden would shift to the employer to show that it had some legitimate, nondiscriminatory reason for the alleged adverse action. If the employer met this burden, then the plaintiff would have the opportunity to show that this action was pretext [15].

More research is needed to understand how the various laws affect employers and employees in disciplining employees for free speech, whistle blowing and political activities.

APPENDIX 1

Legislation Regulating Off-Duty Behaviors: Free Speech, Whistle Blowing, and Political Activities

Common Law Protections—Tort Claims

Generally, there are four theories upon which a plaintiff can assert an invasion of privacy claim: 1. the intentional intrusion upon solitude or seclusion; 2. appropriation of plaintiff's name or likeness for unpermitted use; 3. public disclosure of private facts; and 4. false light. Of primary concern to employees is the tort of intentional intrusion upon solitude or seclusion. The tort of intrusion upon seclusion may occur by: physical intrusion into a place where plaintiff has secluded himself or herself, use of defendant's services to oversee or overhear the plaintiff's private affairs or some other form of investigation by examination into plaintiff's privacy concerns.

Constitutional Law—Specific Amendments

The following three amendments to the Constitution provide for protections from government intrusions into the lives of private citizens. Although frequently used as a basis for litigation involving the employer-employee relationship, this legal coverage is generally not applicable to the employer-employee relationship in the private sector.

First Amendment

The First Amendment of the United States Constitution protects the right to freedom of religion and freedom of expression from government interference. Freedom of expression consists of the rights to freedom of speech, press, and assembly and to petition the government for a redress of grievances, and the implied rights of association and belief. The Supreme Court interprets the extent of the protection afforded to these rights. The First Amendment has been interpreted by the Court as applying to the entire federal government even though it is only expressly applicable to Congress.

Fourth Amendment

The amendment as interpreted provides for a reasonable expectation of privacy on the part of all persons. Specifically, it is the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

Fourteenth Amendment

The Court has interpreted the due process clause of the Fourteenth Amendment as protecting the rights in the First Amendment from interference by state governments.

Federal Law

Hatch Act

The Hatch Act (1939) restricts the political activity of executive branch employees of the federal government, District of Columbia government, and some state and local employees who work in connection with federally funded programs. In 1993, Congress passed legislation that significantly amended the Hatch Act as it applies to federal and D.C. employees. Under the amendments, most federal and D.C. employees are now permitted to take an active part in political management and political campaigns. The Hatch Act applies to executive branch state and local employees who are principally employed in connection with programs financed in whole or in part by loans or grants made by the United States or a federal agency.

Privacy Act for Federal Employees

In December 1974, Congress passed a law relating to protection of privacy in administrative process of federal executive agencies. The Privacy Act gives American citizens and aliens lawfully admitted for permanent residency a greater say in the way records about them are kept and eliminates needless intrusions on personal privacy through the keeping of extraneous records. The Privacy Act assures individuals on whom information is collected that there are no federal government personal record-keeping systems whose very existence is secret; that federal personal information files are limited to those that are clearly necessary; that they will have an opportunity to see what information about them is kept and to challenge its accuracy; that personal information collected for one purpose is not to be used for another purpose without their consent and, if disclosures are made, they will find out to whom they were made, for what purpose, and on what date.

State Laws

Many states have statutes protecting off-duty use of legal products. However, California, New York, North Dakota, and Colorado all have statutes that protect a broader range of activity. Connecticut prohibits discrimination against employees who are candidates or elected to office. Delaware and Minnesota prevent employers from penalizing employees for taking time off to attend political party meetings when they are members of the party machinery. Montana requires that employees elected to office receive leaves of absence. Oklahoma requires an employer to provide two hours to vote. Oregon prohibits discrimination against and requires reinstatement of employees elected to the legislative assembly. Wisconsin requires time off to vote and prevents employers from prohibiting employees from serving as elected officials [1].

ENDNOTES

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4. R. M. Howie and L. A. Shapero, "Lifestyle discrimination statutes: A dangerous erosion of at-will employment, a passing fad, or both?" *Employee Relations Law Journal*, 31:1, pp. 21-38, 2005.
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9. J. Bosch, "None of your business interest: The argument for protecting all employee behavior with no business impact," *Southern California Review*, 76, p. 639, 2003.
10. T. Dworkin, "It's my life—leave me alone: Off-the-job employee association privacy rights," *American Business Law Journal*, 47, p. 103, 1997.
11. The right of employers to fire employees for any reason, or for no reason at all is the definition of employment at will. It also gives employees the legal right to quit their jobs at any time for any reason. Despite this legal doctrine, employers may not fire employees in a way that discriminates, violates public policy, or conflicts with written or implied promises they make concerning the length of employment or grounds for termination
[http://www.nolo.com/lawcenter/dictionary/dictionary_listing.cfm/Term/321F71C9-D7DF-4360-970E4C86EE934A5A/alpha/A].
12. S. Krashinsky and J. Sack, *Discharge and Discipline*, Vol. 1, Lancaster House, Toronto, 2003.

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14. From the employer's perspective, three possibilities can fulfill this condition. The employer can argue 1) that his/her own (business) interests justifies intrusions into workers' privacy; 2) that it is justified by the interests of the employee; or 3) that it is justified as a means to protect an interested third party's legitimate interests [8]. There are public policy and other exceptions to the employment-at-will doctrine.
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16. See, e.g., *Simms v. Metro Dade County*, 972 F.2d 1230 (11th Cir. 1992); Lewis Kurlantzick, John Rucker and Employee Discipline for Speech, 11 Marq. *Sports Law Review*, p. 185, 2001.
17. *Scott Richardson, Appellant v. City of Saratoga Springs et al., Respondents*, 80540 Supreme Court of New York, Appellate Division, 246 A.D.2d 900, 1998.
18. www.objectivistcenter.org/showcontent.2spx?ct=5358h=54.
19. D. E. Miller, "Terminating employees for their political speech," *Business & Society Review*, 109:2, pp. 225-243, 2004.
20. M. J. Levine, "Regulating the off-duty conduct of public employees: Constitutional issues," *Journal of Collective Negotiations in the Public Sector*, 14:4, pp. 359-373, 1985.
21. *Edward Brochu, Plaintiff-Appellee v. City of Riviera Beach, Defendant-Appellant, William Hunter, Dennis Widlansky, et al.*, 304 F.3d 1144; 2002 U.S. App. Lexis 18510.
22. *John Roe, Plaintiff-Appellant v. City of San Diego; San Diego City Police Department; David Bejarano; George Saldamando; Glenn Breitenstein, Defendants-Appellees*, 356 F.3d 1108. 1569.
23. The Supreme Court outlined the test for First Amendment protection of government employees' speech in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). To receive protection, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury that the speech could cause to the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.
24. *Robert Russo, Plaintiff-Appellant v. Michael J. Budd, in his individual capacity; Mahonic County, Ohio, Defendants-Appellees*, 95 Fed. Appx. 140, 2004.
25. Whistle Blower Protection Act, 1989.
26. *Hirame St. Hilaire and Jenise Selby, Plaintiffs v. The Pep Boys—Manny, Moe and Jack, a Pennsylvania Corporation, Val Santos, Chris Hubacher, Ken Racik and Frank Romano*, 73 F. Supp. 2d 1350, 1999.
27. *Ade A. Adeniji, Plaintiff v. Administration for Children Services*, 97 Civ. 5827 (KMW) 43 F. Supp. 2d 407, 1999.
28. *Eli P. Schutts v. Stephen Feldman*, U.S. Dist. Lexis 3428, 1997.
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35. *John Killian, Plaintiff v. Joseph P. Muldowney and Dale Repp, Defendants*, Civil Action No. 97-CV-4833, 1998.
36. These are subcategories of Sugarman's Lifestyle Discrimination categories [1].
37. <http://www.whistleblowers.org>

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