KAUFMAN DOLOWICH LLP

How To Protest and Not Get Fired, Fast Company, ft. Ellen Storch

Ellen Storch, partner in the Kaufman Dolowich & Voluck LLP Long Island office, was quoted in a *Fast Company article, written by Rich Bellis, published on July 5, 2018.*

We are living in politically charged times. Here's what to consider before you tweet or march.

Remember Juli Briskman, the woman who got fired for flipping off President Donald Trump's motorcade last fall? Well, in April she sued her former employer for wrongful termination, and now a court will decide whether her viral "FU" was a fireable offense under Virginia employment law.

Free speech is a constitutional right, but exercising it can still have some consequences for your career. If you're planning to join a protest, or engage in any form of political activity for that matter, it's helpful to know where the risks might lie with regards to your job. Here are some pointers and precautions covering a few common circumstances:

IF YOU'RE OFF THE CLOCK

For example, Ellen R. Storch, partner at Kaufman Dolowich Voluck, tells Fast Company, many "do not apply to particular types of employers, like public employers, or to conduct that creates a material conflict with the employer's business interests."

IF YOU'RE PROTESTING YOUR OWN EMPLOYER

Storch points out that "federal law could limit the employer's response" in other ways, including if you're protesting your employer rather than, say, a government policy. "Section 7 of the National Labor Relations Act, which applies to both unionized and non-unionized employers, prohibits employers from taking adverse actions against employees who 'engage in . . . concerted activities for the purpose of . . . mutual aid or protection.' According to cases interpreting this statute," Storch points out, "an employer could not take adverse action against an employee who participates in lawful political advocacy that relates to labor or working conditions."

In recent months Silicon Valley tech workers have pushed back against their employers' military defense contracts. Since labor conditions aren't at issue, the bigger question is whether their activism impacts business. "Google, Amazon, and Microsoft are getting negative press due to recent employee protests," Storch continues. "If these companies can show that they are losing business because of the negative press, they may be able to terminate employees who participate in the protests, depending upon where those employees live."

IF YOU'RE TWEETING

"Employers are more likely to have social media policies that limit what employees can post than they are to have policies that limit what events employees can attend," Storch says, adding that social media policies tend to be more legally enforceable for two reasons: First, they're often worded quite precisely, and second, "evidence of political speech on social media is more readily available to an employer and more difficult for an employee to deny, than attending a rally in a public space would be."

In terminating her, Briskman's employer, the government contractor Akima, LLC, cited its social media policy prohibiting obscenity. "If instead of making an obscene gesture, she was photographed and later posted the photograph of her holding a sign indicating that she objected to a particular Trump policy," Storch says by way of example, "her company could not have relied on its prohibition of obscenity to terminate her."

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