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California Lawyer's
Association

Labor & Employment

POLITICS & SOCIAL MEDIA'S IMPACT ON THE REMOTE WORKPLACE

BETH W. MORA

- Beth W. Mora of Mora Employment Law is dedicated to representing victimized employees.
- Ms. Mora currently serves on numerous local and statewide boards within the legal community as well as regularly publishes and speaks on a wide range of employment law matters.
- Ms. Mora has achieved an AV rating, Martindale-Hubbell's highest rating for legal ability and ethical standards. She has been recognized by Super Lawyers each year since 2011 and was also included in the 2016 Super Lawyers Top 50 Women Attorneys in Northern California list. She has also been honored with a Diversity Award from the Contra Costa County Bar Association, a Torch Award from the California Employment Lawyers Association, and the Secretary's Exceptional Achievement Award from the United States Department of Labor.
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JAMES Y. WU



James Y. Wu has provided advice and counsel, and litigation defense, to employers for nearly 25 years.

Mr. Wu served as the President of the Board of the Contra Costa County Bar Association in 2018 and 2019, and will conclude his 10-year tenure on the Board this year. James has also served as the Section Leader of the Employment Law Section of the Contra Costa County Bar Association. Additionally, Mr. Wu served as President of the Northern California Employment Roundtable, and remains on the Board. Mr. Wu has been recognized by *Super Lawyers*.

James earned his JD from Boston College Law School, and his BA and MA from Stanford University. Mr. Wu is located in Walnut Creek, CA and serves companies throughout California.

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SOCIAL MEDIA IN THE WORKPLACE



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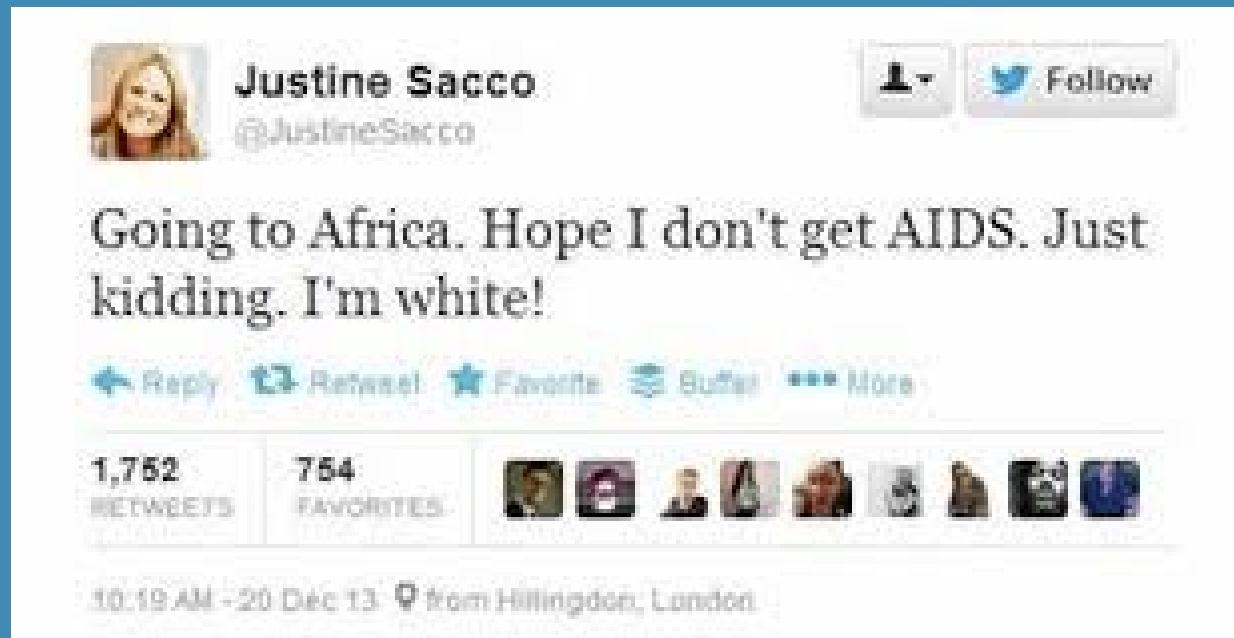
@Robertwaple



@Cellla_ And....no you don't start
that FA job today! I just fired you!
Good luck with your no money, no
job life!

SOCIAL MEDIA IN THE WORKPLACE

Just before she boarded a plane to South Africa, the head of corporate communications for media company IAC tweeted:



Dubbed the “tweet heard around the world,” IAC parted ways with the employee. She later issued an apology.

POLITICS/ACTIVISM IN THE WORKPLACE

- During a staff meeting being held to discuss operational matters, an African-American employee "takes a knee" and raises his fist in the air to protest a supervisor's alleged racial mistreatment.
- Afterward, a supervisor tells the employee that his actions during the meeting were inappropriate. The employee disagrees and begins yelling at the supervisor to the point the supervisor feels threatened. The next day, the employer terminates the employee.
- [Raynor v. Brennan, 2020 BL 326860, E.D. Ark., 4:19CV00064 JM, 8/27/20](#)

POLITICS/ACTIVISM IN THE WORKPLACE

- Woman flipped off President Trump's motorcade while riding her bicycle, photo widely spread on news and social media
- Briskman's employment was terminated by Akima, LLC



RELEVANT LEGAL AUTHORITY



US. CONSTITUTION, FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CALIFORNIA CONSTITUTION, ART. I, SEC. 1

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

FREE SPEECH IN THE WORKPLACE

- The right to “free speech” does not extend to libel, slander, obscenity, true threats or speech that incites imminent violence or law-breaking
- Free speech is for everyone, including speech we may not like, that which society rejects and despises, policies must be neutrally applied in the workplace
- In the workplace, the right of “free speech” applies only to government employees with few exceptions, there is no general right of “free speech” in a private employer workplace
- The First Amendment does not limit the right of private employers to regulate employees’ communications nor provide any constitutional right for workers to express thoughts or opinions at work

CALIFORNIA LABOR CODE § 98.6 (A)

(a) A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of section 96, and Chapter 5 (commencing with section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to section 2699, or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her.

CALIFORNIA LABOR CODE §96(K)

The Labor Commissioner and his or her deputies and representatives authorized by him or her in writing shall, upon the filing of a claim therefor by an employee, or an employee representative authorized in writing by an employee, with the Labor Commissioner, take assignments of:

(k) Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during *nonworking* hours away from the employer's premises.

CALIFORNIA
LABOR CODE §1101

No employer shall make, adopt, or enforce any rule, regulation, or policy:

- a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.
- b) Controlling or directing or tending to control or direct the political activities or affiliations of employees.

CALIFORNIA LABOR CODE §1102

- No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.
- Any employer who violates Cal Labor Code 1102 is guilty of a misdemeanor. The violation is punishable, in the case of an individual, by imprisonment in the county jail not to exceed one year or a fine not to exceed \$1,000, or both. If the employer is a corporation, the violation is punishable by a fine not to exceed \$5,000.
- Individuals may also bring a private right of action for violation of their rights under this section.

- Pursuant to California Labor Code 432.7, an employer is not allowed to use one's arrest pending trial as the *sole* determining factor in making a negative employment decision against them, otherwise, there would be no presumption of "innocent until proven guilty"
- Employees can expect their employer to ask about the circumstances of their arrest pending trial to determine whether the arrest could have an impact on the employer's business
- Exception - if the arrest could reasonably have an impact on the employer's business, then the employer may take action against the employee while the arrest is pending, example: police officer arrested while off-duty for engaging in violence during a protest
 - If arrest is resolved without conviction, the arrest cannot be used against the employee in the workplace
 - If wrongfully terminated, employee can sue for actual damages under the applicable labor code



CALIFORNIA
LABOR CODE
§ 432.7
ARRESTED AT
A PROTEST

ADDITIONAL PRIVACY RIGHTS TO CONSIDER

- Employees have a right to privacy under U.S. Constitution's 4th Amendment and the California Constitution. Whether that right has been *violated* depends on whether there is a protected privacy interest and what the employer is trying to find out
- To bring an invasion of privacy claim in California, one must show:
 - A legally protected privacy interest;
 - A reasonable expectation of privacy; and
 - A serious invasion of the privacy interest.
- The employer has an opportunity to show that the intrusion was motivated by a business reason
- Areas of privacy for the workplace complicated by remote workplaces and social media:
 - Criminal Record – California Labor Code Section 432.7, Ban the Box
 - Credit Report – Fair Credit Reporting Act and California Consumer Reporting Agencies Act
 - Disabilities/Medical Information – FEHA, ADA and HIPPA
 - Religious Beliefs – FEHA and Title VII

ANTI-DISCRIMINATION, HARASSMENT & RETALIATION LAWS

- Discrimination means being treated differently or unfairly. Discrimination in employment is illegal when the treatment is based on a personal characteristic or status, such as sex or race, which is protected under anti-discrimination laws. Since the law prohibits discrimination based only on certain protected categories, not every form of discriminatory or unfair treatment is illegal.
- Discrimination can be expressed through “harassment,” when a boss, supervisor, or co-worker says or does something that creates an intimidating, hostile or threatening work environment. To be illegal, the harassment must be so “severe or pervasive” that it interferes with the employee’s ability to perform the job.
- Several federal and state laws protect people against many types of discrimination in employment:

Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits discrimination based on race, color, sex (including sexual harassment), national origin (including characteristics related to one’s national origin, such as language), religion, and pregnancy;

The Americans with Disabilities Act (“ADA”) prohibits discrimination on the basis of disability;

The Age Discrimination in Employment Act (“ADEA”) prohibits discrimination based on age (40+);

Immigration Reform and Control Act of 1986 (“IRCA”) prohibits discrimination based on national origin and citizenship. 42 U.S.C. § 1981 (“Civil Rights Act of 1866”) prohibits discrimination based on race and national origin in the ability to “make and enforce contracts,” which has been interpreted to apply to many aspects of employment; and,

California’s main anti-discrimination law in employment is the Fair Employment and Housing Act (“FEHA”), which prohibits discrimination based on race, color, sex (including sexual harassment), national origin, ancestry, disability, sexual orientation, gender identity (including transgender status), medical condition (cancer), pregnancy, marital status, and military status. Additional protections against discrimination are found in the California Labor Code, including protections for crime victims who testify at trials, employees who take time off for jury duty, and victims of domestic violence, sexual assault and stalking.

SAMPLE RELEVANT CASES



Triple Play Sports Bar & Grill, 361 NLRB 31 (2014)

Former employee posted on Facebook, “*Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do tax paperwork correctly!!! Now I OWE money ... Wtf!!!!*” Current employee “liked” post and one comment on it calling employer an “a..hole.” Employees were discharged.

National Labor Relations Act (“NLRA”) restrictions on employer’s right to limit workers’ communications about wages, hours and the terms or conditions of employment during non-work time in non-work areas. Many NLRA provisions apply to non-union employers. No bright line between protected and unprotected communications.

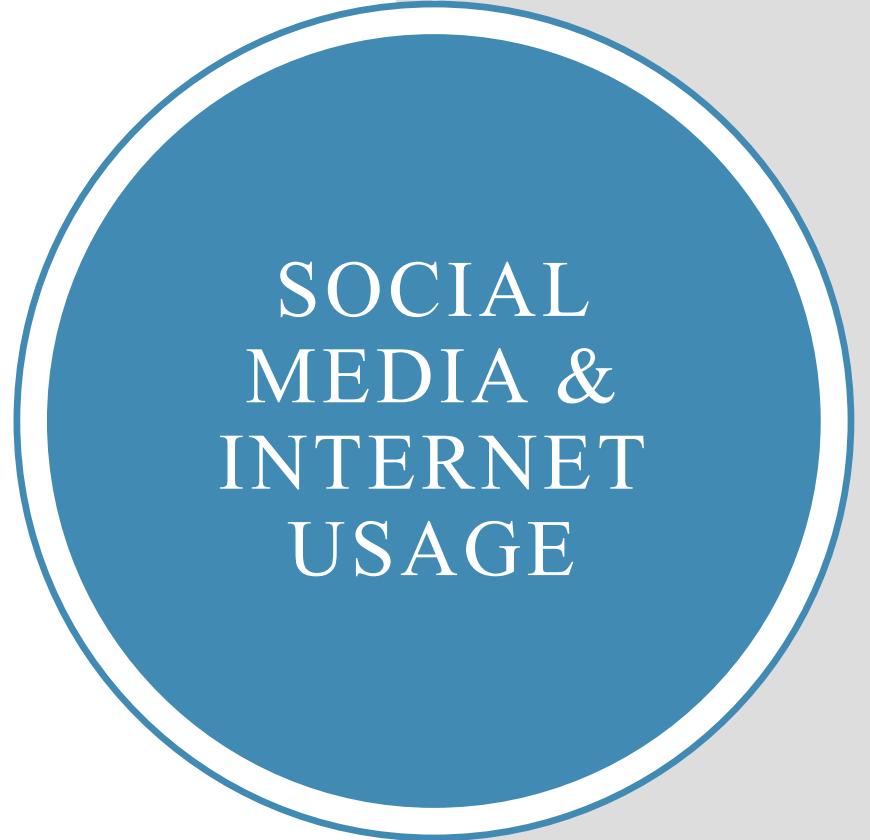
Board found that the discharges were unlawful because the employees engaged in protected concerted activities.

Espinoza v. Country of Orange (2012) 2012 Cal.App.Unpub. Lexis 1022

Employee with disability reported co-worker’s misconduct. In retaliation, co-worker started a personal blog where employees posted derogatory comments about the “*rat*” with a disability. Employee with disability reported the blog to supervisor, however company took little action to stop off-duty conduct.

POLITICS & SOCIAL MEDIA – WHERE ARE WE TODAY





SOCIAL MEDIA & INTERNET USAGE

The global digital landscape is still evolving rapidly in the second half of 2020, with the ongoing Coronavirus pandemic continuing to influence and reshape various aspects of people's daily lives, including internet usage and the workplace

Global internet traffic has grown by as much as 30% this year, to 3.96 billion by start of July 2020

More than half the world's population now uses social media

More than 1 million people started using social media for the first time ever over the past 12 months, equating to almost 12 new users every 12 seconds



POLITICAL ACTIVITY 2020, THE YEAR OF THE PROTEST

Future historians, will discuss what developed into, at times, daily protests throughout the coronavirus pandemic, even before COVID-19 fully gripped the world, 2020 was shaping up to be a year of activism, the following are just a few of the protests which gripped the nation:

Anti-Lockdown Protests, conservative activities gathered, mostly in April to May, objecting to social distancing measures (though with notable differences in how treated by civil servants)

#IRunWIthMaud, on May 8th runners demonstrated in honor of Ahmaud Arbery who was murdered while running

Black Lives Matter, the murder of George Floyd in Minneapolis on May 25th spurred a nationwide ongoing protest

Black Trans Lives Matter, culminated in a massive march on June 14th in Brooklyn, New York, in response to the epidemic of Black trans women being killed in the U.S. such as Dominique Rem'mie Fells and Riah Milton

Juneteenth protests, an annual holiday marking the day in 1865 when news that slavery had been abolished finally reached enslaved people in Galveston, Texas

Portland, Oregon ongoing protests

BLM MAY BE THE LARGEST PROTEST MOVEMENT IN US HISTORY

Four recent polls suggest that 15 million to 26 million people in the United States have participated in demonstrations over the death of George Floyd and others over a several week period.

Across the U.S., as of July 3rd, there have been more than 4,700 demonstrations or an average of 140 per day, since the first protest began in Minneapolis on May 26th

Participation has ranged from dozens to tens of thousands across 2,500 locations

Said numbers would mark the BLM movement as the largest movement in the country's history

In contrast, the Women's March in 2017 had a turnout of 3 to 5 million on a single day



THE IMPACT OF THE 2017 PRESIDENTIAL ELECTION ON THE WORKPLACE

Following the last presidential election, in May 2017 [American Psychological Association survey](#) found American workers are more likely to say they are feeling stressed and cynical because of political discussions at work now than before the 2016 presidential election:

26% of full-time and part-time employed adults said they felt tense or stressed out as a result of political discussions at work since the election, an increase from 17% in September 2016 when they were asked about political discussions at work during the election season

21% said they have felt more cynical and negative during the workday because of political talk at work
54% said they have discussed politics at work since the election

40% of American workers say it has caused at least one negative outcome, such as reduced productivity, poorer work quality, difficulty getting work done, a more negative view of coworkers, feeling tense or stressed out, or increased workplace hostility.

This is a significant increase from the pre-election survey data, when 27% reported at least one negative outcome

THE IMPACT OF THE 2020 ELECTION ON THE CURRENT WORKPLACE

A [February 2020 survey](#) of 500 employees found that politics and the 2020 U.S. presidential election are negatively affecting productivity, collaboration and employee morale in the workplace. Some notable findings:

78% of employees report discussing politics at work

47% report that the 2020 presidential election has impacted their ability to get work done

33% of employees report that the topic of the 2020 presidential election has led them to spend more time getting political news while at work

36% of employees report that the topic of the 2020 presidential election has led them to avoid talking to or working with a coworker because of their political views

31% of employees who talk politics at work report these conversations to be stressful and/or frustrating

29% of employees witnessed at least one instance of unacceptable treatment of a coworker because of their political beliefs, including being called offensive names, being avoided by colleagues or being treated unfairly

Organizations that have political expression policies, over 97% of their employees agree with the policies

WHEN POLITICAL
ACTIVITY, SOCIAL
MEDIA & THE
REMOTE
WORKPLACE
COLLIDE

HYPOTHETICAL





HYPOTHETICAL NO. 1

Internet start up, founded in 2012, located in California develops software, and has approximately 80 employees

When shelter-in-place began, employees were ordered to work from home, which has been extended through March 1, 2021

Employees were permitted to use their own technology or the employer's



HYPOTHETICAL NO. 1

Michael the Marketing Manager – Caucasian cis-gender male, employee number 10 and, high school friends with founders

Sally Sales Associate – Latinx cis-gender female, has worked for Dot.com reporting to Michael for just over 2 years, she is an outspoken immigration rights advocate and has openly criticized the Trump administrations handling of the pandemic

As the company has grown, they have tried to mature from a social club to a reputable business

HYPOTHETICAL NO. 1

Sally traveled to Portland to attend protests, posted pictures of the protest and her presence at the protest on her social media accounts. Several employees and customers of Dot.com are “friends” with Sally on social media and liked her posts as well as made supportive comments.

An employee questioned Sally as to how Mike the Manager felt about her activities to which Sally responded – ***“Mike does not get it at all! He thinks it is kind to be color blind, but really he treats me different because I am a womxn, an outspoken Latinx womxn at that! Xenophobia against immigrants and Asians is real!! Its exhausting to be educating him and others at work all the time!”*** Several employees and customers like Sally’s comment.

Shortly after, several employees and a customer notify Mike and others at Dot.com about the post. Mike immediately complains to his friends the founder who tell human resources to terminate Sally immediately. Human resources (a cis-gender Caucasian female) is concerned the employer will face a lawsuit if they do. Human resources convinces the founders to engage an employment attorney.

WHAT DO YOU DO?

HYPOTHETICAL NO. 1

Does the employer have all proper policies and procedures in place: Internet/Social Media Policy, Computer Usage Policy and Anti-Discrimination Policy?

Did employer clearly identify job duties and remote work hours?

When did the conduct occur and what technology used (timing of behavior, and was the property the employer's or employees), as well as was that clearly covered by an updated remote workplace policy?

Did employer conduct a proper investigation of claims of discrimination by manager and within the company, if not, conduct one?

Ensure policies and procedures are updated as well as applied equally and neutrally.

WHOLEFOODS & BLACK LIVES MATTER

FREE SPEECH V. CLOTHING POLICY

June 2020, employees walked out of a Cambridge, Mass. Whole Foods store, when employees were told they were violating Whole Food's dress code with their Black Lives Matter masks.

July 2020, protests throughout the country, including Berkley, CA gathered to speak against the company's dress code, as employees claim Whole Foods has not enforced its dress code policy before this incident.

14 Employees filed a class action lawsuit in July 2020, asserting Whole Foods' policy and actions violated their rights under the Title VII of the Civil Rights Act of 1964, in August 2020, which grew in August to 28 named plaintiffs over 9 states; the employer moved to have the lawsuit dismissed where Whole Foods argued the policy was neutrally enforced thus it was not racial bias

At the same time Trader Joe's and Costco has come under attack for similar policies concerning BLM accessories.

WHAT IS A NEUTRAL DRESS CODE POLICY?

HOW DO YOU ENFORCE IT?

HYPOTHETICAL NO. 2

- Company hosts a work event at a local park as a marketing effort in the wake of stagnant sales due to COVID-19. Later that evening, an employee posted pictures of the event on Facebook. The Facebook post also comments how stupid it is that no one was required to wear face masks or social distance at the event. The Facebook post is "shared" 25 times and "liked" by 85 people, including several customers who comment, "*Looks like I'm boycotting their products.*" Do you discipline the employee?
 - Would your answer change if the employee posted pictures on social media mocking customers who attended the event, stating, "*Look at these liberal puppets being controlled by their government.*"?
 - Same hypothetical, but it is a non-work event, and the employee makes the puppet comments regarding random park visitors. Is there anything else you would want to know?

POLITICAL ACTIVITY & ACTIVISM REMOTE WORK CONSIDERATIONS

- An employer cannot lawfully prohibit workplace *conversations* about protected political subjects, even during work time, unless it similarly prohibits all other non-work-related communications during work time.
- If the protected political activity involves actual *solicitation* of money or other support for a candidate or cause, then it may be prohibited on *work time*.
- If the protected political activity involves *distribution* of literature, then it may be prohibited on *work time* and in *work areas*.
- Even if the employer provides employees with use of its *computer and email systems* to perform their duties, it may prohibit the employees from using those systems to engage in protected and unprotected political activity at any time as long as the restrictions on protected political activity are consistently applied to all or similar types of prohibitions and not just to protected concerted activity. Similarly, employers may impose uniformly applied bans on employees' non-work-related use of other company equipment (such as bulletin boards, copiers, printers, televisions, public address systems and office supplies) to engage in political activities, including those protected by the NLRA.
- In the absence of significant and demonstrable "*special circumstances*" (such as unique concerns about safety, patient care, damage to machinery or equipment, or customer service issues), an employer cannot prohibit employees from wearing buttons, T-shirts or other clothing displaying protected political messages.

QUESTIONS

