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PERSPECTIVE

Cancel culture and civility codes: grounds for wrongful termination?

By Panda Kroll

California employers should be cognizant that their codes of conduct create an "ideological echo chamber" that runs afoul of statutory prohibitions against interfering with employees' off-duty political activities, even where the activity promotes unpopular or controversial causes.

See, for example, *Snyder v. Alight Solutions*. *Snyder* is an interesting labor complaint (with a cyber-harassment angle) filed in the Central District of California on Jan. 26, 2021, 20 days after the plaintiff attended the march on the Capitol. The complaint alleges wrongful termination in violation of Labor Code Sections 1101 and 1102 and violation of California's Tom Bane Civil Rights Act.

In her $10 million lawsuit, Snyder alleges that she had been employed in California as a software engineer by an Illinois company, Alight Solutions, for over 20 years when Alight terminated her because of her off-duty participation in the infamous rally. Of note, she expressly denies in her complaint that she entered the Capitol, that she participated in any rioting, or violated any laws. Snyder alleges that she was fired within 48 hours of her registering a complaint to Alight's human resource office that she was the victim of cyber-bullying after selfies that she posted to her Facebook page showing her posing with a member of the Capitol Police and placing her at the Capitol on the fateful day became the catalyst for a "vicious attack" against her on the social media site.

New York Times News Service

James Damore, who was fired by Google after suggesting that there may be biological reasons for gender gaps in tech jobs, in San Francisco, Sept. 18, 2017.

An exhibit to the complaint shows that Snyder's selfies and the related heated exchange were apparently reproduced by another poster with a tag directing to Alight's Facebook page. The Alight post was captioned, "Alight employee storming the capital (sic)."

Snyder alleges that Alight summarily fired her without a formal investigation because Alight "adopted a version of the events in Washington, D.C., which had been advanced by a particular cancel culture media outlet. Defendant was willing to employ persons of different races, creeds, colors, genders, and sexual preferences, so long as they conformed their ideas and expression of their ideas to a narrowly focused, but unwritten agenda, established by Defendant. Plaintiff received no protection by Defendant from the cyberbullies." It is beyond the scope of this article to dig into the controversial practice of "Doxxing," which has been described as "stitch[ing] together the digital scraps of someone's life to publicly accuse them of committing a crime." *See* "Doxxing insurrectionists: Capitol riot divides online extremism researchers," Protocol (Jan. 16, 2021), available at https:// www.protocol.com/doxxing-capitol-rioters.

I am more interested in the unintended consequences of workplace civility codes, which can run afoul of the Labor code.

Workplace Civility Codes: Political Correctness Gone Awry?

Some of you may recall the dispute between a Google engineer, James Damore, who filed a complaint with the National Labor Relations Board after he was terminated in 2017 for violating Google's code of conduct. Damore had internally circulated a memo titled "Google's Ideological Echo Chamber," opposing Goggle's diversity efforts. Damore withdrew his complaint after the NLRB opined that "[w]here an employee's conduct significantly disrupts work processes, creates a hostile work environment, or constitutes racial or sexual discrimination or harassment, the Board has found it unprotected even if it involves concerted activities regarding working conditions." Undeterred, in 2018, Damore filed a 12-count class action complaint against Google in Santa Clara County Superior Court seeking inter alia to enjoin Google from violating Labor Code Sections 1101 and 1102 "by discriminating, harassing, and retaliating against individuals with conservative political views." The complaint additionally asserted subclasses including Gender (males) and Race (Caucasian or Asian) who asserted hostile workplace discrimination at Google. In May 2020, the case was dismissed, citing an undisclosed "agreement."

As an aside, Damore's attorney, Harmeet Dhillon, previously filed a lawsuit against UC Berkeley for violating the free

speech rights of the campus' chapter of College Republicans after the school cancelled a talk by controversial speakers Ann Coulter and David Horowitz over security concerns. The settlement required the university to pay $70,000 in attorney fees and reconsider policies that promoted a "heckler's veto."

Employees' Right to Engage in Off-Duty, Non-Violent Political Activity and Affiliation

Labor Code Section 1101 prohibits an employer from making, adopting or enforcing a rule or policy that: (1) forbids or prevents an employee from engaging in politics or becoming a candidate for public office; or (2) "tends to control or direct" his political activities or affiliations. Similarly, Section 1102 prohibits an employer from threatening to fire an employee to "coerce or influence" him into adopting or following (or not adopting or follow) any particular "course or line of political action or activity." In short, an employee has a fundamental right to engage in "political activity" without interference or retaliation from his employer. Labor Code Section 98.6(a) prohibits anyone from discharging an employee or discriminating, retaliating or taking any adverse action against any employee or applicant for employment because the employee or applicant engaged in any political activity, or even if the employee did not actually engage in such an activity, but the employer believes the employee did so. Based on the use of the "*tends* to control or direct" language, an employer's interference with an employee's off-duty political activity or affiliation may be indirect and yet still be actionable. Section 1101 survived a constitutionality challenge in *Lockheed Aircraft Corp. v. Superior Court of Los Angeles County*, 28 Cal. 2d 481 (1946). The court found that the statute was neither an arbitrary or unreasonable limitation on the right to contract nor unconstitutionally uncertain or ambiguous.

Later, in *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458 (1979), prior to sexual orientation being included as a protected category under California' Fair Employment and Housing Act, class plaintiffs claimed that the defendant refused to hire them because they were gay, and that such conduct violated Sections 1101 and 1102. The defendant argued unsuccessfully that no partisan activity was at issue: "The term 'political activity' connotes the espousal of a candidate or a *cause*, and some degree of action to promote the acceptance thereof by other persons." (emphasis in original).

There are carve outs, however: Labor Code Section 98.6(c) generally permits employers to require applicants to sign a "contract" (presumably, an employee handbook could constitute such a contract) forbidding conduct that: (1) "directly conflicts" with the employer's "essential enterprise-related interests"; and (2) "materially and substantially disrupts" the employer's operations. "Essential enterprise-related interests" is not defined. Nonetheless, an employer could argue that Section 98.6(c) permits adverse employment actions against employees who affiliate with controversial, if not extremist groups to the extent that such groups promote views that can be interpreted as inconsistent with the "enterprise" of the employer.

As a remedy for a Section 1101/1102 violation, Section 98.6 entitles an employee to reinstatement, reimbursement for any wages and benefits, and a civil penalty of up to $10,000 per violation. An employee can file a common law cause of action for retaliation in violation of public policy and seek pain and suffering and punitive damages. Whether or not a fee right attaches to a Section 1101/1102 claim, however, is unclear. That lack of clarity may explain why Snyder's counsel included a Bane Act claim, which expressly provides for attorney fees, in addition to compensatory damages, civil penalties of up to $25,000, treble and punitive damages, and injunctive relief. The Bane Act (Civil Code Section 51.7) broadly provides that all persons have the right to be free from violence and intimidation by threat of violence based on, among other things, race, religion, ancestry, national origin, political affiliation, or sex. Bane Act claims are more commonly understood to provide a civil remedy for hate crimes. It remains to be seen whether a termination, without more, is sufficient "intimidation" to constitute a Bane Act claim. (It would not be surprising if Snyder adds a Private Attorneys General Act claim, though that statute has its own challenges.)

In summary, most of us are familiar with wrongful termination lawsuits that cite garden-variety protections afforded to certain individuals pursuant to FEHA: race, religion, color, national origin, ancestry, physical and mental disability, medical condition, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status. In 2012, discrimination on the basis of a person's genetic information was added to the list. While FEHA does not offer protections to members of political parties, employers may be surprised to learn that employees who affiliate with controversial causes on their own time — including conservative causes such as the march on the Capitol — may be engaging in protected conduct to the extent the activity constitutes non-violent political activity, and does not "directly conflict" with the employer's "essential enterprise-related interests" or "materially and substantially disrupt" the employer's operations. ■

Panda Kroll *is founder of Panda Kroll, Esq. & Associates where she represents both employers and employees in labor disputes. To learn about her practice, visit her website at http://pandakrollesq.com.*