
# CAN EMPLOYEES HAVE FREE SPEECH RIGHTS WITHOUT DUE PROCESS RIGHTS (IN THE PRIVATE SECTOR WORKPLACE)?

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Workers who are subject to employer authority are also citizens of the larger polity, and many of our concerns about private sector employers' suppression of speech relate to workers' ability to participate freely in the democratic process of the polity. But the workplace is also a site of governance; it is analogous in many ways to a polity itself. The concept of the workplace as polity is an illuminating lens through which to examine the state of free speech rights for private sector employees. Within the workplace polity, the employer (or its managers) are the rulers, and the employees are its citizens or subjects. The default form of workplace governance is autocratic as opposed to democratic. Far from a "republican form of government," the workplace is a site of what Elizabeth Anderson calls "private government"—government that is unaccountable to the governed, and with no guaranteed vehicle for worker voice or participation in the decisions that affect their lives.[1]

One might object to the analogy—to the notion that employees have any normative claim to rights of participation in their workplace, or that employers' power over workers is equivalent to that of government over its citizens—especially given the workers' free right of exit and the resulting labor market constraints on oppression of employees.[2] But for now, in what we can consider an extended thought experiment, let us indulge the analogy but tweak it: Consider the workplace polity as analogous to a local jurisdiction that is governed autocratically, whether benevolently or not. Workers might be able to vote with their feet by moving to a different

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[1] ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 37–48 (2017).

[2] For the argument that freedom to exit is employees' best protection against employer domination, see ROBERT S. TAYLOR, EXIT LEFT: MARKETS AND MOBILITY IN REPUBLICAN THOUGHT (2017).

workplace, just as a citizen faced with an oppressive and undemocratic local government could move to a neighboring jurisdiction—except that any such jurisdictions are probably governed just as autocratically, and might in any case refuse to admit the worker-citizen. What the worker-citizen has no right to do is participate in the governance of the workplace polity, except by running the gauntlet of union organizing along with their co-workers, an option to which we will return. In other words, worker-citizens have recourse to exit but normally not to any institutionalized mechanism of voice.

If we now start to fold in the law of labor and employment, we must recognize that the citizens of this non-democratic workplace polity are not without rights. We can think of the external law of work as imposing "constitutional" constraints on the employer and its governance of the workplace polity, much as state and federal constitutions constrain local governments.[3] That body of law includes provisions that add up to a quasi-Bill of Rights, including a free speech clause and an equal protection clause, for the employee-citizens of the private sector workplace.

The oldest and most important dimension of the quasi-First Amendment of the private sector workplace is found in the National Labor Relations Act (NLRA) of 1935, which protects some aspects of employees' freedom of association and expression against employer interference and restraint. (We may think of employer action within the workplace polity as analogous to "state action.") Specifically, Section 7 of the NLRA protects union activity and other "concerted activity . . . for purposes of mutual aid or protection"; and Section 8 of the Act prohibits employer interference, coercion, or restraint of employees in the exercise of Section 7 rights.[4] "Concerted activity" includes, among other things, union organizing or other expression that is by or on behalf of two or more employees or is intended to spur concerted speech or action.[5] As for subject matter, "mutual aid or protection" encompasses terms and conditions of employment and other issues of concern to "employees as employees."[6] That speech is protected both outside the workplace

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[3] *See* CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 27–29 (2010).

[4] 29 U.S.C. §§ 157, 158(a)(1).

[5] *See* NLRB v. Wash. Aluminum Co., 370 U.S. 9 (1962); NLRB v. City Disposal Sys. Inc., 465 U.S. 822 (1984).

[6] *See* Eastex Inc. v. NLRB, 437 U.S. 556 (1978).

and within it—that is, on employer property—especially during non-work times and in non-work areas of the workplace.[7] Section 7 thus creates an analog to public forum doctrine within the workplace polity for speech relevant to workplace governance and the shared interests of workers.[8]

As compared to the real First Amendment, the NLRA's quasi-First Amendment is peculiarly anti-individualistic; it privileges group expression and efforts to spur it. It is also quite narrowly focused on speech that is relevant to workplace governance, or what we might call the politics of the workplace polity. The NLRA thus protects employees' speech relating to *public* affairs, or the politics of the larger polity, only if that speech is also relevant to *workplace* governance—for example, a campaign for a local living wage law or against a state "right-to-work" law.[9] It is analogous to the narrowest theories of freedom of expression under the First Amendment, reminiscent of Robert Bork's argument that the First Amendment should protect only speech that contributes quite directly to the political process and policy making.[10] The actual First Amendment protects much more than that limited category of speech against the government, but the quasi-First Amendment of the NLRA tracks the Borkean theory of free speech rights in the workplace polity.

The point of this dimension of the quasi-First Amendment of the workplace is to protect the seeds of workplace democratization through unionization and collective bargaining. For although the NLRA fails to "guarantee a republican form of government" at work, or indeed to guarantee any mechanism of collective voice for employees, it does formally protect workers' efforts to create such a mechanism. Union representation and collective bargaining is a very far cry from democracy as we know it in the polity; even if the employees unanimously favor a change in policy (or wages), their ability to get it depends on their "bargaining power" and the strength of their "economic weapons" such as the strike as against the bargaining power and economic weapons of their employer. Moreover, collective bargaining is an option that must be affirmatively claimed by a majority of employees within an "appropriate bargaining unit" at the workplace, usually in the teeth of aggressive

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[7] *See, e.g.*, *id.*; Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

[8] *See* ESTLUND, *supra* note 3, at 27–29.

[9] *See, e.g.*, *Eastex*.

[10] *See* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

employer opposition.[11] Not surprisingly, the governors of the private sector workplace invariably prefer to maintain their autocratic authority without having to deal with representatives of the worker-citizens—and that is so even if they mean to exercise that authority in a fair-minded and benevolent way. Still, the NLRA does protect workers' efforts to overturn employers' preferred autocratic regime through union organizing and to claim the more democratic option of collective bargaining. And employees' freedom of speech is essential to making that possible.

The NLRA's quasi-First Amendment of the private-sector workplace is under enormous pressure these days. To extent that the main point of protecting employees' concerted work-related speech is to make unionization and collective bargaining possible, it has gradually come to be seen in some quarters as either pointless or suspect as unionization itself has become increasingly rare and politically polarizing. Moreover, Section 7 is enforceable only administratively rather than through a private right of action, and is backed by very limited remedies that fail to deter violations.[12] Employers who hide their anti-union motives may escape any consequences at all, and employees' rights may accordingly go unprotected. So it is that the speech at the very heart of the quasi-First Amendment of the private-sector workplace—that is, speech in pursuit of union representation—is probably the employee speech that is least secure and most likely to be punished by private sector employers. We'll return to some of the reasons for that state of affairs.

Beyond the NLRA, there are other provisions in the quasi-First Amendment of the workplace. Both federal and state law include protections, including some in the common law of tort, for speech that advances public policy or the interests of the public.[13] Scores of statutes protect employee whistleblowing, or disclosing illegal or harmful conduct, or claiming other employee rights—for example, reporting

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[11] *See, e.g.*, Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 664–67 (2010); Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RSCH. 519, 519–26 (2001); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776–86, 1820–21 (1983).

[12] *See, e.g.*, RICHARD D. KAHLENBERG & MOSHE Z. MARVIT, WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT 39–44 (2012); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1551–58 (2002); Kleiner, *supra* note 11, at 530–35.

[13] For a recent summary of the law of the tort of wrongful discharge in violation of public policy, and an argument for its extension, see Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV.

discrimination or complaining of violations of the wage and hour laws.[14] And as Eugene Volokh has reported, about half the states protect some kinds of political speech or association by private sector employees (especially that which takes place off-duty and is closely connected to the electoral process).[15] The number and breadth of those laws on their face is surprising; yet they haven't generated a lot of cases, in part because they are not well known and are more or less hemmed in by deference to employer interests and prerogatives.[16]

Crucially, all of these private employee speech protections, from the NLRA on down, take the form of exceptions to the background rule of employment-at-will—that is, the employer's prerogative, absent a contract providing for job security, to terminate employment at any time and for any reason or no reason at all, though not for a reason that is specifically prohibited by law.[17] There are many such prohibited reasons, or wrongful discharge exceptions to employment-at-will, including the speech protections just reviewed as well as the large and still-growing body of employment discrimination law. But the background rule of employment-at-will undercuts every one of those protections. For employees who suspect or believe that their discharge was in fact wrongful under the law of the land, they first have to identify the wrongful motive (which the employer usually strives to conceal) in order to figure out what claim to file in what forum.[18] Then the burden is on the employee to navigate the obstacle course of adjudication or litigation, and to prove an unlawful motive on the part of the employer, who controls almost all of the relevant documents and employs most of the witnesses.[19]

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[14] For an overview of the statutory provisions protecting employee complaints or whistleblowing against reprisals, see Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RSRV. L. REV. 375 (2010).

[15] Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012).

[16] *See* Chloe M. Gordils, *Google, Charlottesville, and the Need to Protect Private Employees' Political Speech*, 84 BROOK. L. REV. 189, 197–98 (2018).

[17] For a recent overview of the employment-at-will system, and arguments for reform, see KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, ROOSEVELT INST., ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM (2021), https://perma.cc/6EED-ADLS.

[18] *See* Cynthia Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1670–71 (1996).

[19] *Id.*

The difficulties facing wrongful discharge claimants—or, stated differently, the employment-at-will background rule that claimants have to overcome—undermine both the free speech protections and the rights against discrimination that are embodied in wrongful discharge statutes and doctrines. The U.S. law of wrongful discharge consists, in effect, of many scattered islands of protection in a sea of employer discretion, and most employees can't even muster a rowboat. Employers' ability to fire employees for no reason enables them to fire employees for reasons that are illegal but hard to prove; and it enables them to threaten firings, subtly or overtly, to enforce their power to dictate employee behavior.[20] Employers effectively exercise power over employees—even over their off-duty activity—up to the point that employees are willing and able to walk away, or risk dismissal, and find other equivalent employment.

Returning to my extended analogy to the polity: Insofar as labor and employment law functions as a quasi-constitution of the private sector workplace, that constitution lacks not only a "guarantee clause" ensuring some kind of employee voice in governance, but also a due process clause. It fails to require employers to act on legitimate grounds or to follow fair and regular procedures before taking adverse action against employees, including discharge. That is, the constitution of the workplace contains no substantive or procedural due process rights. The upshot is that whatever rights employees do have under the law are all vulnerable to employers' ability to hide their motives or otherwise to avoid enforcement.[21]

Milking my analogy for all it's worth: Imagine now that U.S. citizens had First Amendment rights against arbitrary punishment by the government, but not due process rights. The government could throw you in jail (or banish you from the polity) without having to show a good reason for doing so, and without giving you notice and some kind of hearing. If you believed that you were in fact punished for constitutionally protected speech, you could sue the government; and if you could find a lawyer, get to court, and prove your claim of an unconstitutional motive for the government's action, you might overturn your sentence and even get damages, probably months or years later. More likely, you couldn't do that. Plainly, a First Amendment without a due process clause would afford only the most precarious protection of freedom of speech.

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[20] *See* ANDRIAS & HERTEL-FERNANDEZ, *supra* note 17, at 9–13.

[21] *See* Estlund, *supra* note 18, at 1670–74.

Of course, employers' power over employees is not quite like the power of the state over its citizens. For one thing, employers can't put you in prison (although their discharge decisions can have life-changing repercussions). And of course there are usually other little workplace polities where an ejected employee might move (although those other little polities get to decide whether to admit you, and most of them are in any case just as autocratic and just as unconstrained by a requirement of due process). For many workers much of the time—especially those without specialized skills that their employer needs and cannot easily get elsewhere—their employer's power to fire them without justification is a potent threat and a deterrent to speaking out, including on the many matters as to which the public formally asserts an interest in employees' freedom of expression.[22]

The opposite background rule—one that requires a justification or "just cause" for dismissal—is more than thinkable; indeed, a version of that rule prevails almost everywhere else in the developed world. But in the U.S. private sector, just-cause protections exist almost only in unionized workplaces—that is, only for the six percent of private sector employees who are represented by a union[23] and the relative handful of workers employed in Montana (whose legislature adopted a "just cause" standard in 1987 in response to judicial rulings that threatened to make no-cause dismissals tortious).[24]

There are many gaps in the quasi-First Amendment of the private sector workplace; but filling those gaps would do much less to protect employees' freedom of speech than would joining the rest of world in protecting them against arbitrary, unjustified dismissal—that is, by supplying the necessary backstop of due process rights for any employee speech rights. Due process rights in the form of procedural and substantive protection against unjustified dismissal would cast the burden on the employer to show a legitimate and adequate business-related reason for dismissal.[25] Speech that is legally protected (such as union organizing activity or off-duty political speech and associations) would not count as just cause, and the unjust-

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[22] *See* ANDRIAS & HERTEL-FERNANDEZ, *supra* note 17, at 10–17.

[23] Only 6.1% of private sector workers were union members in 2021. U.S. DEP'T OF LABOR, UNION MEMBERS—2021 (Jan. 20, 2022), https://perma.cc/7PKF-9MMM.

[24] BARRY D. ROSEMAN, AM. CONST. SOC'Y FOR L. & POL'Y, JUST CAUSE IN MONTANA: DID THE BIG SKY FALL? 7–11 (2008), https://perma.cc/E47D-JQDF.

[25] *See* Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 155–68.

dismissal review process could provide an accessible forum for airing an employees' claim that the employer's actual reason or motive for dismissal was unlawful. Beyond that, however, requiring the employer to show good cause for dismissal provides a buffer of protection against discrimination or retaliation, and without the doctrinal difficulties of defining the exact boundaries of what is protected, or the often-fatal difficulties of proving employer motive.

Consider again private sector employees' freedom to engage in political speech and association, and to participate in the political process of the larger polity free from employer reprisals. The formal free speech rights that about half the states afford in some form, and that Professor Volokh has usefully excavated, would be far more secure in a just-cause world, yet would still be subject to reasonable employer regulation. And employees in the other half of the states would gain a measure of indirect protection for their political speech and association—especially for their off-duty activity—as an incidental by-product of the employer's burden to prove a good and substantial reason for dismissal.

Consider, too, how due process, or just cause protections, would soften the dilemmas that both Professor Volokh and I have written about in the arena of discriminatory harassment.[26] We don't entirely agree on how much potentially offensive or discriminatory speech should be censored or suppressed in the workplace. But we do agree that the prospect of liability for discriminatory harassment against the background of employment at will operates as a one-way ratchet toward censorship, and can lead to unfair disciplining of alleged harassers who have no legal right to fair treatment or to contest either the truth of the allegations or the proportionality of the employer's disciplinary response.[27] Defining when speech rises to the level of actionable harassment is very difficult, but the stakes would be reduced, and all employees' interests better protected on balance, if the accused could count on "some kind of hearing" before being punished for alleged harassment.

A just cause principle would also offer a more sensible way to analyze employee claims that they were fired for the speech through which they do their jobs. That is roughly the private sector equivalent of the *Garcetti* problem in public employee

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[26] *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992); Cynthia Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997).

[27] Estlund, *supra* note 26, at 698–99, 763–64; Volokh, *supra* note 26, at 1811–13.

First Amendment doctrine. In *Garcetti*, the Court held that the First Amendment offers no protection to public employees who are fired for speech—however truthful or important to the public—that was part of their actual job performance; in *Garcetti* itself, that unprotected speech consisted of a public prosecutor's statement, as part of his prosecutorial duties, that police had violated the defendant's rights.[28] Private sector employees have made, and mostly lost, analogous claims, often when their jobs involve legal compliance, or when their professional obligations conflict with employer interests.[29]

The *Garcetti* decision—which defers to employer prerogatives to control and evaluate how employees do their jobs—has been widely excoriated.[30] But such cases undoubtedly pose a difficult conflict between employees' free speech interests and public employers' need to oversee employees' job performance and judge its contribution to the public interest. The same is arguably true in analogous private sector controversies. I've argued elsewhere that freedom of speech is not the best vector of analysis in these public employee speech controversies.[31] A better solution lies in the basic principles of due process—a guarantee against arbitrary adverse action and a fair process for contesting the reasons for dismissal and for ensuring that the employer's action was justified by legitimate organizational interests.

Neither due process nor its employment-law equivalent of "unjust dismissal" protection is a universal solvent for conflicts between employee and employer interests. But it is an invaluable buffer against speech-based reprisals, at least in the

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[28] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[29] *See, e.g.*, Schumann v. Dianon Sys., Inc., 43 A.3d 111 (Conn. 2012); German v. Fox, No. 5:06CV00119, 2007 WL 1228481 (W.D. Va. Apr. 25, 2007), *aff'd*, 267 F. App'x 231 (4th Cir. 2008); Kentner v. Timothy R. Downey, Ins., Inc., No. 103-CV-435, 2006 WL 2669468 (S.D. Ind. Sept. 18, 2006).

[30] For the negative academic reaction to *Garcetti*, see, e.g., Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in* Garcetti *as Further Evidence of* Connick*'s Unworkable Employee/Citizen Speech Partition*, 8 J.L. SOC'Y 45, 83–86 (2007); Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1649–52 (2007); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 569–81 (2008); Charles W. Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1192–1202 (2007).

[31] *See* Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463 (2007); Estlund, *supra* note 25.

workplace context. Concern over employees' freedom of expression and association is one important reason why the United States should join the rest of the world in prohibiting unjustified dismissal.