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Termination of Employment when an Employee "Peacefully Protests."

Employment Law, HR Policies & Procedures, Internal Investigations / April 8, 2021 / Andrea Johnson

This COVID year *plus* has been a time of lockdowns and social distancing. However, along the way, people have been out in public, without necessarily social distancing, and protesting—vociferously and publicly, and, in some instances, as a part of larger riots, destruction of property, injury to others, and challenges to the political bodies in power. The 24/7 news cycle has both regaled and alarmed us with stories about the George Floyd and the U.S. Capitol protests. Wherever one is on the political spectrum, both examples have involved cries of free speech; various people shroud these events with sanctified protection under the First Amendment to the Constitution—protection that seems to be inviolate.

Nevertheless, what is one man's peaceful protest may be seen by another as a calamity, a riot, and . . . , well, let's face it, folks, trouble with a capital "T."[1] *What's a private employer to do?* When we are talking about at-will employment and someone who, as employers, we may believe presents possible "trouble" due to perceived off-campus violence and illegal actions, the answer may lead to employment termination. Is that the direction to go?

Certainly, employers are loath to employ and/or retain an employee who seems to present aggressive and destructive tendencies or personnel who seem to have violated substantial law (particularly in a notorious way[2]). Might there be a question of negligence if the employer retained a person who, perhaps, then committed a violent act on the job or associated with his/her work?[3] But, are we stepping on the toes of the Bill of Rights if that kind of adverse employment action is taken—*i.e.,* terminating someone's job?

While Americans are steeped in the belief that we have a right to express ourselves under the First Amendment, employers are not generally subject to that right/obligation, as it protects individuals from interference by *the government*, not private employers.[4]

Outside of that lofty constitutional protection, there may be some limited state rights (though not Texas) that provide protection for employees working in private employment, as to their political beliefs or affiliations.[5] Some states (again, not Texas), in addition, prohibit employers from taking adverse employment actions against employees enjoying lawful, off-duty activities.[6] Yet, those rights, if available, may be narrowly worded, and, thus, the statutes have to be carefully reviewed to see if they apply.

What happens if an employee is, it turns out, "peacefully protesting," and not actually involved in publicly destructive behavior done by others? Should an employer's response be different?

Currently pending litigation in California suggests perhaps not, at least if the employer's decision is the result of a reasoned conclusion given the facts then available. The case, styled as *Leah Snyder v. Alight Solutions, LLC* ("Alight"),[7] involved a long-term employee of twenty years, Ms. Snyder, who was present when the "Capitol Insurrection" occurred on January 6, 2021. Alight, a San Francisco-based human resources software company,[8] concluded, after its internal

investigation related to Snyder's social media posts, that she was involved in an "illegal" riot and that she had violated the law. It determined, based on its review of information it had, that Snyder's job should end. In short, Alight fired Ms. Snyder. In response, Snyder cried foul in a wrongful termination lawsuit, alleging that she was not part of those that had *actually* stormed the Capitol. Admittedly, she was there in Washington, she said, but protesting peacefully. In short, she said that Alight's conclusions were wrong.

The key in the *Snyder* case is not the *truth* of what Ms. Snyder was actually doing on the fateful Wednesday in January, but what Alight's "beliefs" were, founded on the facts it had when the termination decision was made, and were they "reasonable" given what the Company knew. Alight had been alerted to Snyder's own postings on social media—big, bold, and out there on Facebook. There were pictures of her selfies with Capitol police, she had clearly (and, arguably, illegally) walked right past the barricades, and she publicly argued with others whose explicit-laced language were a part of her postings. Alight's two and two together added up to Snyder's job loss.

In *Snyder*, the company has filed a motion to dismiss, which the federal district judge will hear at the end of this month. While the case hinges, largely, on a state law prohibiting employers from *threatening* employees from exercising certain free speech rights (see footnote 5 *supra*), the key to the case may be the fact that Alight came to a reasoned conclusion about Ms. Snyder's Capitol activities, given *its* review of the data that *it* had at that time. Alight denied that it ever "threatened" Snyder; it acted only after the postings came to its attention, after the protest ended, and the postings seemed to suggest that Snyder was part of the riot within the government buildings. Thus, Alight "believed," based on the information it had pieced together, that she had acted illegally and was one of the violent actors on January 6th. That belief is what led to her job termination, and, that, they say, is enough.

From that perspective, there is nothing earth shattering about Alight's position. Employers every single day make numerous decisions as to employees. These employment decisions generally come from investigatory efforts related to the facts a company gathers. Investigations may arise as to discrimination, harassment, retaliation, and many other violations of company policies. Employers, as it turns out, are not private investigators or trained police departments, and they are not members of a jury reviewing well-advocated claims, with a duly appointed, black-robed judge to act as umpire. Instead, they are everyday supervisors and managers who must make reasonable decisions given the facts and materials that they then have. With that data, they render decisions about hiring, firing, promotion/demotion, and nearly every other facet of employee relations. Courts will say that even a decision that proves to be "wrong"—if different data is unearthed later—will not be overturned, as employers are entitled to a business judgment assessment of their decisions, *when made*.[9] In other words, hindsight may be better, but it is not what governs in reviewing an employer's decisions as to employee relations.

The *Snyder* case points up the lessons for both employers *and* employees.

Snyder's participation in the January 6, 2021, events reached the light of Alight's human resources office only because she voluntarily posted (and bragged) about it on Facebook. She took a day off and let the world (and her employer) know about both her strongly held political beliefs and her presence in Washington, D.C. Had Snyder asked for advice, after her traipsing through the Capitol taking selfies with the police, one might have said to her: "Hey, dummy, don't post it on Facebook!" Teenage pranks remain "anonymous" *but only if* the perpetrators keep quiet. However, that is not where our society is today or maybe has ever been. We all seem to be interested in our 15 minutes of fame, and social media through Facebook and all of the other apps simply make posting something way too enticing.

Ms. Snyder is not the only other person who has been fired due to involvement in Capitol protests/riots/insurrection. Notably an in-house lawyer at an insurance company[10] was let go, among others, all of whom have been alluded to in various Internet articles.[11] However, with some California laws seemingly backing her,[12] she is the only person who was brash enough to sue her former employer for wrongful termination, it seems. As a side note, these issues about possibly terminating folks due to public protests turned violent, have been raised as well regarding the George Floyd protests/riots, but this writer has not found any Internet-noted job terminations related to those events (or lawsuits alleging wrongful termination).[13] Only the January 6th event at the Capitol has made the news with regard to both wide-ranging FBI arrests and several job terminations.

What is an employer to do, when faced with what appears to be violent, outside-of-work behavior or employees involved in significant illegal activities, particularly when the events raise issues of traditionally sacred First Amendment rights? First, employers should consider if the off-campus events raise questions about ending employment (obviously, a speeding ticket should not be viewed the same as an aggravated assault charge). Second, employers should review their particular

state laws that govern the employment relationship. Are there laws protecting employees above and beyond what the Constitution provides, and what are the limits of those laws? Naturally, employers should also make a *reasonable* investigation based on the data that it reasonably pulls together (see, for example, the steps noted in Part 1 and Part 2 of *Tips for Conducting Effective Internal Investigations Including Zoom Investigations* posted by KRCL Director Dennis Duffy).

Additionally, employers should also make sure that they are following their process in a consistent and neutral way as to all employees, no matter their race, religion, age, etc., and regardless of the issue raised by the activity (whether the issue leans "left" or "right"). Finally, employers need to be cognizant that the decision, one way or the other, will have a ripple effect in their employment arena. The employer needs to ask: How will the termination ripple among employees? What is the lesson within the workplace? And, will there be a ripple effect in the public in general? Within these parameters, employers are allowed to make non-discriminatory decisions about their at-will employees, if founded on reasonable "beliefs" about the facts that they have presented to them, and it is possible—legally supportable—for violent, illegal action outside of work to lead to the end of at-will employment. Here, that's what Alight concluded, and, despite the California additional protections, Ms. Snyder may be without recourse as to that private employer's decision. We await the court's decision.

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[1] Part of the lyrics of "You Got Trouble" in *The Music Man*, a well-known, often revived, late 1950's musical ("Right here in River City. Trouble with a capital 'T.' And that rhymes with 'P' and that stands for pool!. . . . Oh yes, we got trouble, trouble, trouble! With a 'T'! Gotta rhyme it with 'P'! And that stands for Pool.")

[2] Presumably, we are not talking about speeding tickets on I-45, or, if we were, every Houstonian might not have a job.

[3] *See, e.g*., *Ogg v. Dillard's, Inc*., 239 S.W.3d 409, 420-21 (Tex.App.-Dallas 2007, pet. denied), which noted: The basis of responsibility for negligent hiring and retention is the employer's negligence in hiring or retaining an incompetent employee who the employer knew or, in the exercise of ordinary care, should have known was incompetent or unfit, and thereby creating an unreasonable risk of harm to others. *Estate of Arrington v. Fields,* 578 S.W.2d 173, 178 (Tex.App.-Tyler 1979, writ ref'd n.r.e.); *Leake,* 918 S.W.2d at 563; *Morris,* 78 S.W.3d at 49. *See also Rosell v. Cent. West Motor Stages, Inc.,* 89 S.W.3d 643, 655 (Tex.App.-Dallas 2002, pet. denied); *TXI Transp. Co. v. Hughes,* 224 S.W.3d 870, 901–02 (Tex.App.-Fort Worth 2007, pet. filed.). "Negligence in hiring requires that the employer's 'failure to investigate, screen, or supervise its [hirees] proximately caused the injuries the plaintiffs allege.' " *Fifth Club, Inc. v. Ramirez,* 196 S.W.3d 788, 796 (Tex.2006) (quoting *Doe v. Boys Clubs of Greater Dallas, Inc.,* 907 S.W.2d 472, 477 (Tex.1995)).

[4] In contrast, public employment has some additional rights. *See, e.g*., *Caleb v. Carranza*, 518 S.W.3d 537, 544 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (rights to "speak as a citizen addressing matters of public concern," if not acting in official capacity) (citations omitted). As *Guillame v. Greenville*, 247 S.W.2d 457, 463-64 (Tex. App.-Dallas 2008, no pet.) (footnote omitted), explained public employees have limited rights of free expression: The First Amendment protects public employees against retaliation for the exercise of their free-speech rights under some circumstances. *Garcetti v. Ceballos,* 547 U.S. 410, 126 S.Ct. 1951, 1957, 164 L.Ed.2d 689 (2006). A violation of a public employee's First Amendment rights is actionable under 42 U.S.C. § 1983. *Scott v. Godwin,* 147 S.W.3d 609, 616 (Tex.App–Corpus Christi 2004, no pet.). Courts have held that the elements of a First Amendment retaliation claim are: (1) speech by a public employee involving a matter of public concern, (2) the employee's interest in commenting on matters of public concern outweighs the employer's interest in efficiency, (3) an adverse employment action, and (4) the speech motivated the adverse employment action. *Id.; see also Harris v. Victoria Indep. Sch. Dist.,* 168 F.3d 216, 220 (5th Cir.1999).

[5] *See, e.g*., Cal. Labor Code §1101 (employers may not make rules "[c]ontrolling or directing, or tending to control or direct the political activities or affiliations of employees"); Cal. 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 employee to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."). Neb. Rev. Stat. §32-1537 (The law prohibits as a criminal act a "person who (1) coerces or attempts to coerce any of his or her employees in their voting or in any other political action at any caucus, convention, or election held or to be held in this state or (2) attempts to influence the political action of his or her employees by threatening to discharge them because of their political action or by threats on the part of such person to close his or her place of business in the event of the passage or defeat of any issue on the ballot, in the event of the election or defeat of any candidate for public office, or in the event of the success or defeat of any political party at any election shall be guilty of a Class IV felony.").

[6] *See, e.g.*, Colo. Rev. Stat. §24-34-402.5 (declaring discrimination or an "unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction"); N.D. Stat. §14.02.4-03 ("It is a discriminatory practice for an employer to fail or refuse to hire an individual; to discharge an employee; or to accord adverse or unequal treatment to an individual or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of race, color, religion, sex, national origin, age, physical or mental disability, status with respect to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.").

[7] Cause No. 8:21-cv-00187, in the Central District of California.

[8] Maybe, since the company sells software in the "human resource" industry, Snyder's conduct was viewed more closely.

[9] *See, e.g.*, *Udoewa v. Plus4 Credit Union*, 754 F.Supp.2d 850, 875 (S.D. Tex. 2010), *aff'd* 457 Fed.Appx. 391 (5th Cir. 2012), which states that courts have long abstained from second-guessing the prudence of an employer's business-judgment decision when there is no evidence raising a fact issue of discrimination. See *Deines,* 164 F.3d at 278 ("Whether an employer's decision was the correct one, or the fair one, or the best one is not a question within the jury's province to decide. The single issue for the trier of fact is whether the employer's [action] was motivated by discrimination."); *Grimes v. Texas Dep't of Mental Health & Mental Retardation,* 102 F.3d 137, 142 (5th Cir.1996) ("The relevant inquiry in any case is not whether the employer's evaluations were wise or correct, but whether they were honestly held and free of discriminatory bias."). *See also Campbell v. Zayo Group*, L.L.C., 656 Fed.Appx. 711, 716 (5th Cir. 2016) (affirming summary judgment; to overcome the presumption as to a company's business judgment, the employee had to show the "employer either considered impermissible factors in its employment decision or failed to uniformly apply a company policy") (citations omitted).

[10] An in-house lawyer at Texas-based Goosehead Insurance. *See* "Insurance co fires in-house counsel, ex-Big Law attorney spotted at Capitol riot" Spiezo, Caroline, Reuters. https://www.reuters.com/article/lawyer-election-goosehead/insurance-co-fires-in-house-counsel-ex-big-law-attorney-spotted-at-capitol-riot-idUSL1N2JI31T (accessed on April 8, 2021) (he had posted videos about his participation); see also "Fired for rioting? Most workers don't have a legal recourse," Tippett, Elizabeth, Univ. of Oregon, https://around.uoregon.edu/content/fired-rioting-most-workers-dont-have-legal-recourse (accessed April 8, 2021) (noting, among others, dismissal of CEO of data analytics company).

[11] *See* footnote 10 supra; *see also* "Whether Employees Can Be Fired for Participating in Peaceful Protest, Melzer, Andrew & Barth, Whittney, Univ. of Illinois, https://www.illinoislawreview.org/online/whether-employees-can-be-fired-for-participating-in-peaceful-protests/ (accessed April 8, 2021).

[12] *See* footnote 5 *supra*.

[13] Aside from public and news channel opinions, there may be other issues regarding those events as well. For example, it is possible that Section 1981 may provide additional protection to those involved in racial protests. *See* "Whether Employees Can Be Fired for Participating in Peaceful Protest, Melzer, Andrew & Barth, Whittney, Univ. of Illinois, https://www.illinoislawreview.org/online/whether-employees-can-be-fired-for-participating-in-peaceful-protests/ (accessed April 8, 2021) ("42 U.S.C. § 1981 presents a potentially promising, if perhaps largely untested, avenue to protect protesters speaking out against racial injustice.") (noting, however, the unsettled nature of the law and possible difficulties in asserting the claim).

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