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presented at
CALPELRA
moving forward, together

Social Media Usage:

How To Deal With Problematic Behavior Of Employees Online Without Violating Their Rights

PRESENTED BY
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November 18, 2020

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Social Media

The Constant Need to Express Myself to Anyone and Everyone

- Platforms for opinions
- Connecting to community
- Engaging in discourse

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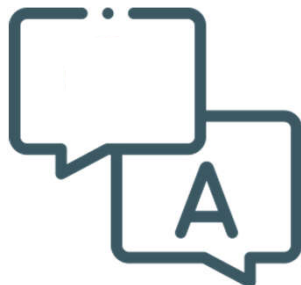
Social Media and Employment



Question:

*Can an employee be disciplined
for their social media posts?*

Social Media and Employment



The Lawyer's Favorite Answer:

It depends!

Social Media and Employment

For public employers, this is a two-pronged analysis:



First
Amendment



Concerted,
Protected Activity

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First Amendment

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First Amendment

To establish a prima facie case of First Amendment retaliation claim, a Plaintiff must demonstrate that:

- 1 they engaged in protected speech;
- 2 was subject to an adverse employment action; and
- 3 their protected speech was a “substantial or motivating” factor for the adverse employment action.

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First Amendment: Protected Speech



For public employees, we must balance the interests of the employee as a citizen and their ability to comment on matters of public concern and the employer’s promotion of efficiency in delivering public services.

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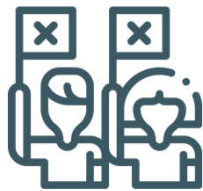
First Amendment: Protected Speech

- ✓ What is a matter of public concern?
- ✓ Did the employee speak as a private citizen or public employee?
- ✓ Did the employer have adequate justification for treating the employee differently from other members of the public?
- ✓ Would the employer have taken the action even without the protected speech?

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First Amendment: Protected Speech




Speech is protected when
it is spoken in the employee's
capacity as a private citizen


AND it relates to a matter of
public concern.

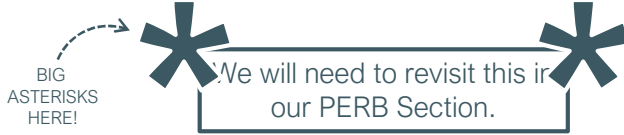
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First Amendment: Protected Speech

 Public concern when it is “fairly considered to relate to any matter of political, social or other concern to the community.”


 Private concern when it deals with individual personnel disputes and grievances.




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First Amendment: Protected Speech



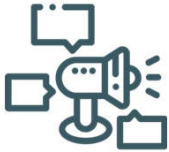
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First Amendment: Protected Speech




Speech is not protected if a public employer's "legitimate administrative interests outweigh the employee's First Amendment rights."

But what does this mean?
What are an employer's "legitimate administrative interests"?

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First Amendment: Protected Speech

Looking at the statement:

 Context of the speech	OR	 Employee dissatisfaction with employment situation
 Point of the speech		 Workplace power struggle
 Shine light on a breach of public trust		 Private interest

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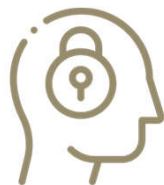
First Amendment: NOT Protected Speech

Public employers have “*wide discretion and control over [their] personal and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.*” *Connick v Myers*, 461 U.S. 138, 151 (1983).

- ✓ Does the speech interfere with performing duties?
- ✓ Does it impair discipline or control by supervisors?
- ✓ Does it disrupt co-worker relations?
- ✓ Does it erode a close working relationship based on loyalty and confidentiality?
- ✓ Does it obstruct the operations of the employer?



First Amendment: NOT Protected Speech







“A public employee who has a confidential, policymaking, or public contact role and speaks out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence, enjoys substantially less First Amendment protection than does a lower level employee.”

McVey v. Stacy, 157 F.3d 271, 277-278 (4th Cir. 1998); see also *Biggs v. Best*, Best & Krieger, 189 F.3d 989, 994-95 (9th Cir. 1999).



First Amendment: Adverse Employment Action

This isn't your first rodeo. You know what adverse employment actions are:

-  Termination
-  Demotion
-  Action, when taken as a whole, materially and adversely affect the terms, conditions, or privileges of employment
-  Conduct that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion

Minor or trivial actions that are not reasonably likely to do more than anger or upset an employee is not an adverse employment action.



First Amendment: Substantial or Motivating Factor

Retaliation was a substantial or motivating factor behind an adverse employment action, if

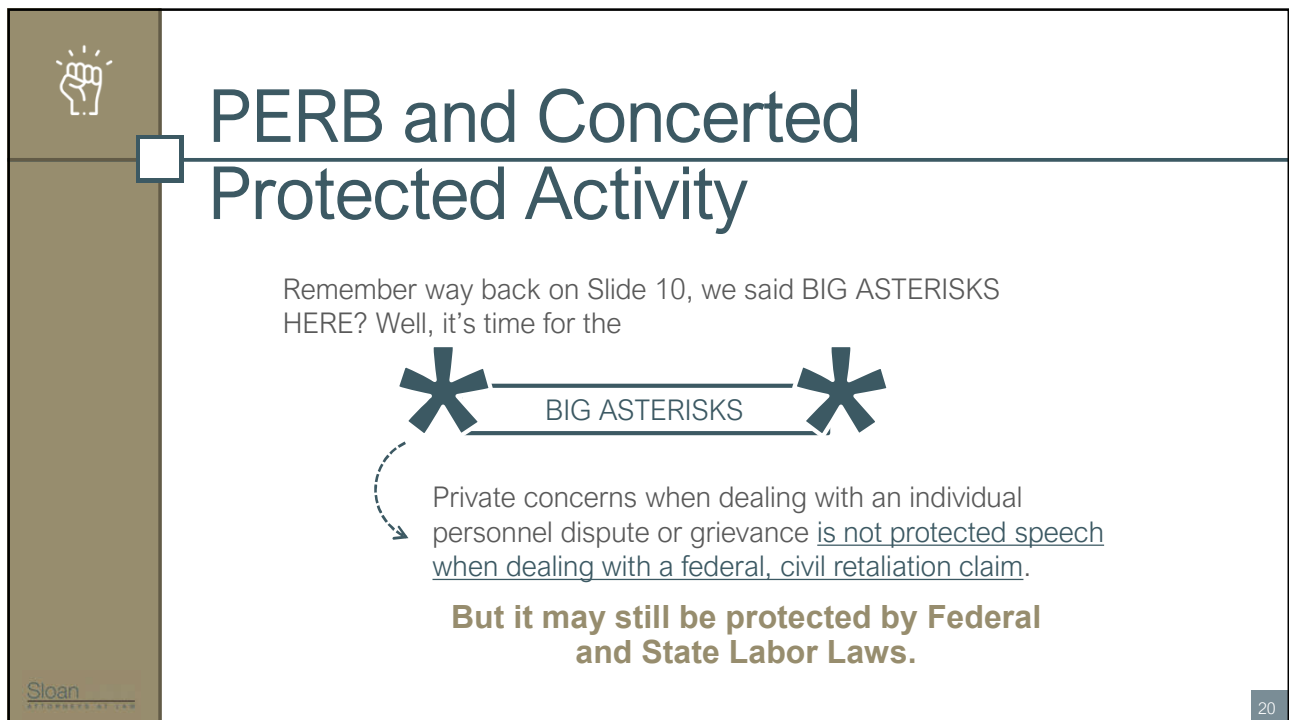
- 1 the speech and adverse action were proximate in time;
- 2 the employer expressed opposition to the speech, either to the speaker or others; or
- 3 the proffered explanations for the adverse actions were false and pretextual.

Employer does not retaliate against an employee when it would have reached the same decision regarding the employee even in the absence of the protected speech of conduct.




Slide 19 features a background image of a beach with waves on the left and a solid brown background on the right. A white icon of a raised fist is centered on the brown background. Below the icon, the text "Concerted, Protected Activity" is written in a large, white, sans-serif font. In the bottom left corner, the text "Sloan Sakai ATTORNEYS AT LAW" is visible. A small blue box with the number "19" is in the bottom right corner.

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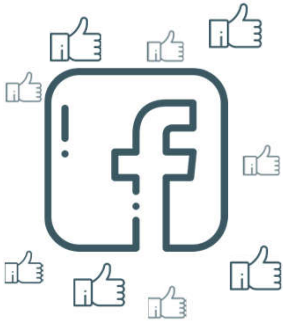


Slide 20 has a brown vertical bar on the left with a white fist icon. The main content area is white. The title "PERB and Concerted Protected Activity" is in a large, dark blue font. Below the title, the text "Remember way back on Slide 10, we said BIG ASTERISKS HERE? Well, it's time for the" is followed by two large dark blue asterisks connected by a horizontal line, with "BIG ASTERISKS" written below the line. A dashed arrow points from the asterisks to the text: "Private concerns when dealing with an individual personnel dispute or grievance is not protected speech when dealing with a federal, civil retaliation claim." Below this, the text "But it may still be protected by Federal and State Labor Laws." is written in a bold, dark blue font. In the bottom left corner, the text "Sloan ATTORNEYS AT LAW" is visible. A small blue box with the number "20" is in the bottom right corner.

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PERB and Concerted Protected Activity



How about...


A Facebook post from an employee complaining about their low pay and then calling their supervisor some very inappropriate names? The post has been “liked” by a number of other employees.

What do you do?
What can you do?


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PERB and Concerted Protected Activity



- Clearly, employees have a right to complain about wages, hours and other terms and conditions of employment.
- Discipline based on this complaint would draw (and very likely sustain) an unfair practice charge.

How about the inappropriate terminology directed at the supervisor?

- Again, it depends. On content and context. But it is likely not protected activity and may be the basis for discipline.

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Concerted Protected Activity




“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).”

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Concerted Protected Activity

Section 7 of the NLRA protects concerted activity is:

-  Activity engaged in by two or more employees
-  Activity engaged in by one employee on behalf of other employees
-  Over working conditions

PERB takes its cues from the NLRB and has expanded on it in many areas, but this is one where there is some consistency.

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Concerted Protected Activity

Individual employee engages in concerted activity when they:


-  Seek to initiate, induce or prepare for group action
-  Bring "group complaints" and can point to evidence that demonstrates "group activities"

NOTE: Protesting publicly in a group meeting is not per se protected

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Concerted Protected Activity

Working Conditions include, but are not limited to:

 Health & Safety	 Benefits
 Workload	 Workplace Policies
 Wages	 Unfair Treatment

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Concerted Protected Activity



Includes talking to the media
or governmental agency

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Concerted Protected Activity



Concerted Activity does not just mean meetings, discussions or petitions in the workplace.

- ✓ Posts
- ✓ Comments
- ✓ Threads

made on or via social media are generally protected.

Posts, comments are not generally protected if they are “mere gripes” and are not related to group activity among employees.

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Not Concerted Protected Activity


Activity can lose its protection when employees say things about the employer that are:

-  Egregiously offensive
-  Knowingly and maliciously false
-  Publicly disparaging your employer's products or services without relating back the complaints to a labor issue (i.e., wages, hours and other terms and conditions of employment)

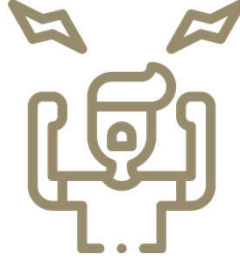
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Not Concerted Protected Activity



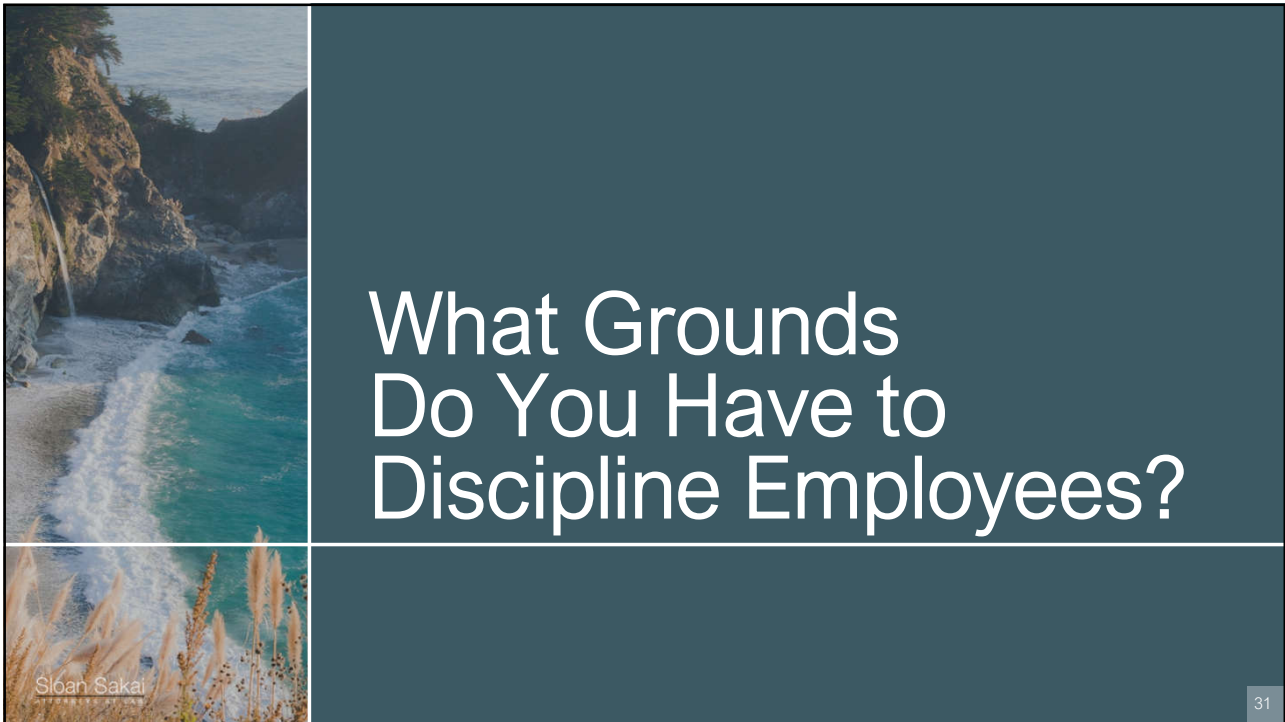
Offensive language, tirades do not necessarily lose the protection of labor laws

Loses protection when it is violent or unlawful (or incites imminent violence or unlawful acts)

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What Grounds Do You Have to Discipline Employees?

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What Do Your Policies Say?

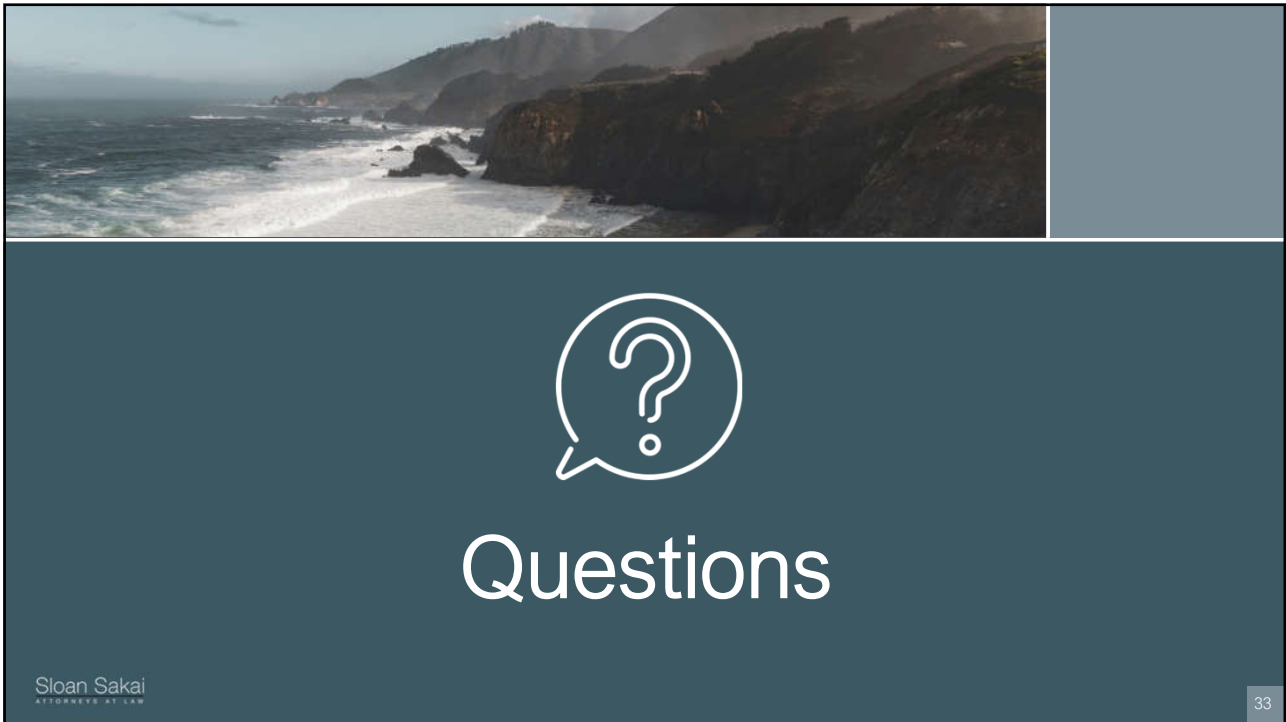


- Social Media
- Discrimination, Harassment and Retaliation
- Standards of Conduct
- Personnel Policies (e.g., personal business on work time)
- Electronic Equipment/Software (i.e., employer property)
- Confidential or Proprietary Information

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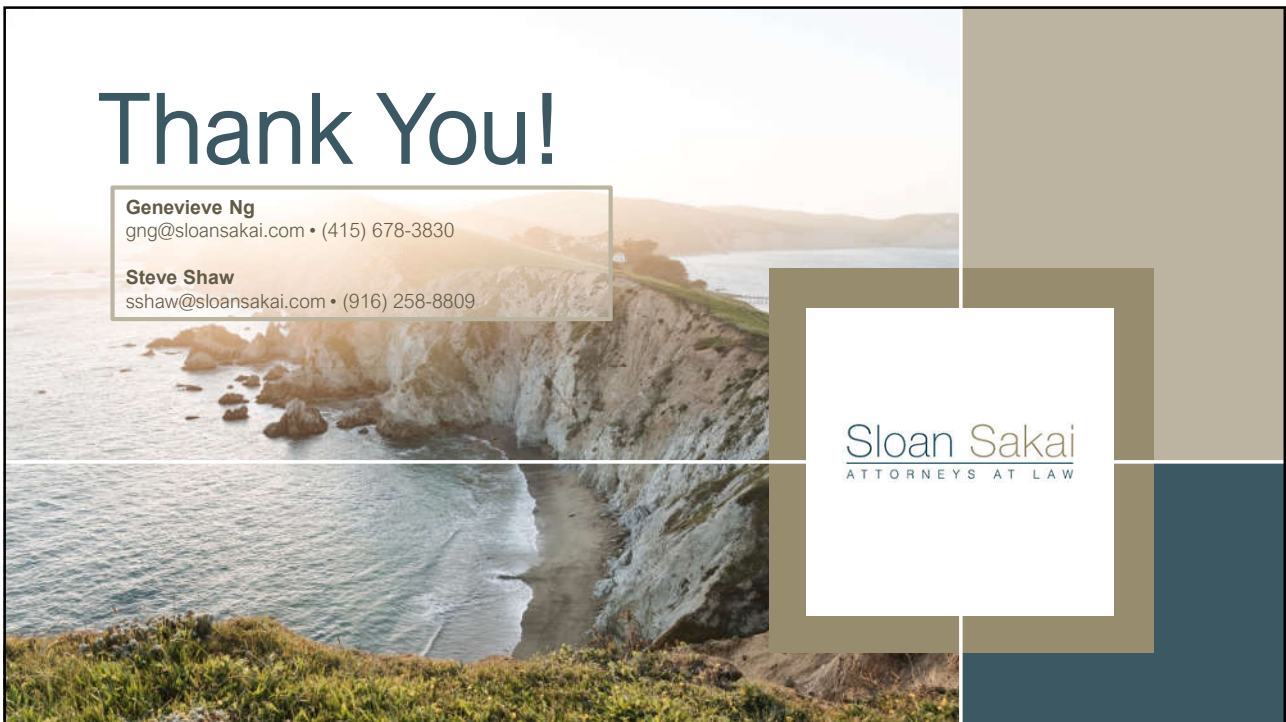


Questions

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Thank You!

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