



In-Depth Discussion | October 16, 2017

## **DEAR LITTLER: CAN WE DISCIPLINE AN EMPLOYEE WHO “TOOK A KNEE” DURING THE ANTHEM?**

By: Kevin Kraham

**Dear Littler:** I work for a prominent company in a small city here in the Hoosier State, and we are very involved in our local community. We sponsor a corporate softball team, and last night one of our team members “took a knee” during the national anthem before a game. His supervisor asked if the player can be disciplined for this conduct or at least transferred out of the supervisor’s department. I understand the supervisor’s frustration, but I don’t know how to react. Can we do that? I just can’t believe we have to deal with this situation.

–Irritated in Indiana

### ***Dear Irritated in Indiana,***

Lately it seems like everything is overtly political: from hurricane response to late-night comedy to sports. Your coworker chose to emulate various football players and other celebrities who have kneeled during or before the national anthem at an event, to make a public statement. For better or worse, employers face new challenges in our current, divisive climate, as politics worms its way into workplaces across the country.<sup>1</sup>

Your question raises several legal issues, which we will discuss briefly below. As with many sensitive employment issues, the ultimate question before your Indiana employer is not whether it can punish this employee—but whether it should.

<sup>1</sup> See Kevin Kraham, [Addressing Post-Election Tensions in the Workplace](#), Littler Insight (Nov. 18, 2016).

## Taking a Knee

Before we jump into the legal complexities, let's review the backdrop for your team member's decision to kneel. As you may already know, this particular form of protest began in August 2016 when NFL quarterback Colin Kaepernick sat on the bench during the national anthem for a couple of preseason games. After meeting with at least one military veteran, Kaepernick switched from sitting to kneeling during the anthem.<sup>2</sup>

Traditionally, kneeling is considered a sign of respect. (Just ask anyone who watches Game of Thrones!) Major religions incorporate genuflecting or sustained kneeling into services or other rituals. And protestors during the 1960s civil rights movement also occasionally knelt during protests. Moreover, it is not unprecedented historically for athletes to chime in on civil rights issues. Two African-American medalists at the 1968 Olympics held up fists on the podium during the playing of the U.S. national anthem. Before becoming a United Nations Messenger of Peace, helping negotiate the release of American hostages in Iraq and receiving the Presidential Medal of Freedom, boxer Muhammed Ali was an extremely controversial activist in the civil rights movement.

As for the present day, Kaepernick has repeatedly explained that he knelt to draw attention to the problems of police brutality and racial injustice in America.<sup>3</sup> Throughout last season, a few other football players and fellow athletes (at all levels and in various sports) followed suit. Participation in this form of protest picked up significantly a few weeks ago, however, after President Trump criticized protesting athletes and suggested they should be fired. In response to those statements, more athletes began to "take a knee" or link arms, either to show solidarity with Kaepernick's original message, to assert their rights to free speech, or both.

To be sure, President Trump is not the athletes' only critic. Other voices, too, have disapproved of their choice to protest during the playing of the national anthem. Despite the athletes' insistence that the protest is not intended to be discourteous, but to highlight important civil rights issues, some Americans perceive the refusal to stand for the anthem as disrespectful to the flag and/or the U.S. military. While your question does not recount all of the details, presumably your supervisor shares that view. Whether or not the supervisor actually disputes the athletes' (and coworker's) underlying message, or simply their means of protesting, you and your employer are caught in the crossfire.

## The First Amendment

For many people, the first thing that pops to mind when we talk about public protests is the First Amendment of the U.S. Constitution. Among other things, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."

The First Amendment secures many essential rights for Americans—but it does not apply to private employers. The Bill of Rights, which includes the First through the Tenth Amendments, restricts a government's ability to interfere with individual liberties, such as freedom of speech, privacy, and religious exercise. It does not restrain private citizens or organizations. While your softball player has a First Amendment right to engage in peaceful public protest without government infringement, the Constitution does not protect him from discipline at work.<sup>4</sup>

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<sup>2</sup> See Sean Gregory, [All Across the Country, Athletes Are Fueling a Debate About How America Defines Patriotism](#), Time, Sept. 22, 2016.

<sup>3</sup> Kaepernick was not signed to play in the NFL this season, an absence that has raised its own questions.

<sup>4</sup> Note that public employees (i.e., those that work for a governmental entity) are entitled to some First Amendment protections in their workplace because their employer is a government. Special rules may also apply to employees who have written contracts with their employers or are subject to a collective bargaining agreement, depending on the terms of those contracts.

## State Laws Protecting Employee Activities Outside the Workplace

Although the First Amendment may not apply, there are other laws that may affect an employer's response to this politically- and emotionally-charged situation.

Certain states prohibit employers from taking adverse actions against employees (i.e., firing, demoting, etc.) because of their lawful, off-duty conduct—including political activity.<sup>5</sup> In California, for example, employers may not coerce employees, discriminate or retaliate against them, or take any adverse action because they have engaged in political activity.<sup>6</sup> Similar prohibitions exist in other states, including Colorado, Louisiana, New York, South Carolina, and Utah. Connecticut actually extends the First Amendment protection of free speech to the employees of private employers.<sup>7</sup>

Meanwhile, the District of Columbia lists “political affiliation” as a protected category under the human rights law, along with race, religion, and similar categories, such that private employers generally cannot discriminate against or harass individuals on the basis of their endorsement of a particular party.<sup>8</sup> Absent some exception, the proposed discipline of an anthem-kneeling-employee because of lawful, off-the-clock political expression could be illegal in certain locations.<sup>9</sup>

That being said, Indiana does not offer such protections for employees engaging in lawful political activity outside the workplace. The Indiana statute restricts certain employer conduct only where related to an employee's firearms ownership or use of tobacco products.<sup>10</sup>

## National Labor Relations Act (NLRA)

Thus far, we've seen that neither the U.S. Constitution, nor state law, appear to prevent your employer from granting the supervisor's request to punish the protesting employee. We would be remiss to overlook the NLRA, however, which potentially applies to the employee in question.

The National Labor Relations Act (NLRA)—which generally covers both unionized and non-unionized non-supervisory employees working in the private sector—provides under Section 7 that “[employees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.”<sup>11</sup> The U.S. Supreme Court has interpreted this provision to mean that employees may organize as a group to “improve their lot” outside of the employer-employee relationship.<sup>12</sup> Essentially, employees may engage in protected political advocacy so long as it relates to labor or working conditions; “advocacy” can mean contacting legislators, testifying before agencies, or joining protests and demonstrations. Employers are generally barred from retaliating against employees who participate in these types of political activities outside the workplace.

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5 Zoe Argento, Dear Littler: [Can A Boss Fire Someone for Off-Duty Political Activities?](#), Dear Littler (Jan. 20, 2017).

6 Cal. Lab. Code §§ 98.6(a), 1102. The law also covers employees who are family members with people who have engaged in conduct protected by the law. Cal. Lab. Code § 98.6(e).

7 Conn. Gen. Stat. § 31-51q. Some of these laws provide exceptions for public or religious employers, or for off-duty employee conduct that creates a material conflict with respect to the employer's business interests.

8 D.C. Code §§ 2-1401.01, 2-1401.02, 2-1402.11.

9 For purposes of this discussion, we assume the employee's conduct is “off-duty” and constitutes “political activity” within the meaning of such laws. Moreover, “taking a knee” during the playing of the national anthem is entirely legal. While a federal code suggests how citizens should behave during the anthem, it is not criminal; it is purely informational. 36 U.S.C. § 301 (stating that individuals in uniform “should give the military salute,” service members not in uniform may choose to do so, and “other persons present should face the flag and stand at attention with their right hand over the heart”). The First Amendment prohibits the government from enforcing these guidelines against private citizens. Indeed, it is well-settled that individuals have a Constitutional right to burn the flag in protest, if they choose to do so. *Texas v. Johnson*, 491 U.S. 397 (1989).

10 For example, a private employer in Indiana cannot require an applicant or employee to divulge whether he or she is a firearms owner or condition employment on his or her agreement to forego such ownership. Ind. Code § 34-28-8-6.

11 29 U.S.C. § 157.

12 *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–65 (1978).

While the connection is not always obvious between the political advocacy and the benefit to workers, the General Counsel for the National Labor Relations Board (NLRB) has offered guidance that includes the example of an employee attending a demonstration in favor of immigration reform as being protected by Section 7. In the example offered by the NLRB, because some employment verification legislation could be deemed to chill even legal hiring activity, a demonstration against immigration reform sufficiently relates to employees' "mutual aid or protection" to be protected activity.<sup>13</sup> According to the NLRB, the inquiry focuses on "whether there is a direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees."<sup>14</sup>

In the anthem-kneeling situation, it is hard to tell whether an adequate nexus exists between the protest and a "specifically identified employment concern." The protest did not begin, for example, in opposition to a particular employment-related legislative bill or in support of any specific reform. A more detailed analysis would be necessary to fully evaluate if this employee's conduct qualifies for Section 7 protection—but for now, we will assume that it does not.

### **Additional Legal and Practical Implications**

Even if the U.S. Constitution, state law, and the NLRA may not impact your decision, there are a few more important legal and practical concerns.

First, you should consider consulting existing company policies to see whether they touch on this scenario. Does your employer maintain a policy, for example, limiting political discussions in the workplace?<sup>15</sup> If so, is it regularly enforced? Would the policy extend to this softball player's conduct on the corporate team outside of work hours? Even if it applies, would discipline be warranted under the policy? In assessing options, your employer should act consistently with any applicable policy, as well as with prior responses to any analogous situations.

Second, employers in this position should remain cognizant of their obligations under federal and state antidiscrimination laws, such as Title VII. If the protesting employee falls within a protected class (e.g., he is African-American), and is subjected to an adverse employment action, he may feel that he has been discriminated against because of his race or another unlawful factor and may pursue legal action. No matter how defensible your employer's position may seem, it still has to deal with the consequences.

Finally, and aside from any legal ramifications, your employer should carefully consider what message it chooses to send about this employee's conduct—and about broader issues, including the rights of its employees and how it values its workers. It is clear that your employees, like so many Americans, feel very strongly about the issues associated with the ongoing protests. Choosing one side over another will likely make matters worse. Because of this delicate situation, your company must decide, as an employer, what it wants to achieve.

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<sup>13</sup> Ronald Meisburg, N.L.R.B., [Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Activity](#), Memorandum GC 08-10 at 8 (July 22, 2008).

<sup>14</sup> *Id.* at 7.

<sup>15</sup> If so, or if your employer contemplates adopting such a policy, be aware that such policies are generally permissible—so long as they are tailored to purely political speech and comply with guidance issued by the NLRB. The NLRB has asserted that workplace rules or policies that dissuade non-supervisory employees from exercising their rights to advance their "mutual aid or protection" can run afoul of Section 7. See Richard F. Griffin, Jr., N.L.R.B., [Report of the General Counsel Concerning Employer Rules](#), Memorandum GC 15-04 (Mar. 18, 2015); see also Ilyse Schuman & William E. Trachman, [Election 2016: Political Speech and Activity in the Workplace](#), Littler Insight (Sept. 29, 2016).

**Additional questions to consider, before taking any further action, might include:**

- Is there a specific reason, perhaps based on the nature of your business, that disciplining or reassigning the employee because of his protest might be either appropriate or inappropriate?
- Would it be useful to speak with the employee to find out his precise rationale for taking a knee at the game? Would he be willing to share his perspective with others, including perhaps the supervisor or their department?
- Likewise, would it be helpful to speak with the supervisor about his or her viewpoint? Would he or she be willing to share it with others?
- Might there be any other reasons, beyond the anthem incident, underlying the supervisor's interest in disciplining or reassigning the employee? Have there been prior incidents between these coworkers, or others, that should be factored in your analysis?
- How would you justify any discipline or reassignment to the employee? Will the employer listen to his position if he challenges the decision?
- How would you explain any discipline or reassignment to other employees—and your community—particularly since the decision is not based on the protesting employee's work performance?
- How would you explain to the supervisor a decision not to discipline or reassign the protestor? Can you bring the supervisor on board with the employer's decision, no matter what it is?
- Are there other options for engaging in or accommodating the debate? While it may be uncomfortable, you might need to think outside the box on this issue. Depending on your circumstances, it may be in your employer's best interest to address "the elephant in the room," rather than let the situation fester.
- To the extent possible, try to keep your personal politics out of the assessment. At the end of the day, your employer should strive to make an informed, deliberate business decision, regardless of the political context.