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## **KNEEL AND YOU'RE FIRED: FREEDOM OF SPEECH IN THE WORKPLACE**

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### **Abstract**

The divisiveness of race relations, using sports as a political platform and President Trump himself aside; does the National Football League have the right to terminate their employee for kneeling during the National Anthem? Does an NFL employee have a protected right to “Freedom of Speech” without putting their employment at risk?

This paper will examine the legal rights of employers to terminate employees for engaging in workplace speech. Part One of the paper will examine job security and an analysis of employment as a protected property interest. Part Two will analyze freedom of speech in the workplace. Part Three will provide a legal analysis of the NFL players protest. Part Four will conclude, suggest solutions and possibly solve other impossible world problems.

**Key Words:** Workplace free speech

### **Introduction**

During a campaign rally for U.S. Senator Luther Strange in Huntsville, Alabama, on Friday September 22, 2017, President Donald Trump rhetorically asked, “Wouldn’t you love to see one of these NFL owners, when somebody disrespects our flag to say: ‘Get that son of a bitch off the field right now. Out. He’s fired. He’s FIRED!’”<sup>1</sup>

Trump’s comments refer to National Football League players who have kneeled, raised a fist or put a hand on a teammate’s shoulder during the playing of the national anthem in the hope that their symbolic acts of protest will raise awareness of racial social injustice in the United States and encourage change.

The divisiveness of race relations, using sports as a political platform and President Trump himself aside; does the National Football League have the right to terminate their employee for kneeling during the National Anthem? Does an NFL employee have a protected right to “Freedom of Speech” without putting their employment at risk?

This paper will examine the legal rights of employers to terminate employees for engaging in workplace speech. Part One of the paper will examine job security and an analysis of employment as a protected property interest. Part Two will analyze freedom of speech in the workplace. Part Three will provide a legal analysis of the NFL players protest. Part Four will conclude, suggest solutions and possibly solve other impossible world problems.

### **Employment as a Protected Property Interest**

The United States is still one of the only countries that adheres to the employment-at-will philosophy. No industrialized countries and few developing countries have adopted and maintained this Labor Relations theory. Employment at will jurisdictions allow employers to discipline their employees up to and including discharge, with or without cause and with or without notice.<sup>ii</sup> In the United States, almost all jurisdictions federal, state and local presume all employment relationships are at will.<sup>iii</sup>

This presumption is a default condition under the law. Many employment relationships are not at will. Employees may not be at will employees if their employment relationship is modified by an express or implied contract, a collective bargaining agreement or their status as a civil servant or tenured employee.

Employees who negotiate an individual employment contract usually limit the employer's right to terminate. An express employment contract, written or verbal, creates a requirement that "just cause" be established to terminate the employment relationship without resulting in a breach of contract finding by the court.<sup>iv</sup> In the United States typically only high level or highly compensated employees with highly sought after skills have the leverage to negotiate individual employment contracts.

Express contracts include carefully drafting written agreements between the legal representatives of the employer as well as verbal promises made during the onboarding promise.<sup>v</sup> Conduct by the employer may create an implied contract also limiting a right to terminate. Employee handbooks or policies and procedures manuals have been held to create a contractual obligation. Additionally, if all employees are given a verbal warning, than a written reprimand before they

are terminated, the employer may be on questionable legal grounds to terminate the next employee without acting similarly.<sup>vi</sup>

Statutory and common law tenure schemes also create enhanced job security protections. Teachers and administrators, protected by these laws, are not employees at will. They may be disciplined up to and including termination only pursuant to the legal due process requirements and just cause limitations afforded them.<sup>vii</sup> While many of these tenure rights have been the subject of both legal and political challenges, a majority of states have retained tenure as an employment protection.<sup>viii</sup>

Employees hired according to federal, state or local civil service laws are also not employees at will. Unlike private sector employees at will, these federal, state and local government employees enjoy procedural protections before they can be terminated from employment. These rights come from the Fifth Amendment of the United States Constitution, which prohibits the government from affecting the employee's property interest without the requisite legal due process. The federal government agencies must follow the required process pursuant to the Civil Service Reform Act of 1978 or applicable state or municipal law if employee termination is sought.<sup>ixx</sup>

Employees covered by a collective bargaining agreement are also not at will employees. Collective bargaining agreements prioritize limiting management discretion in hiring, promoting, compensation and discharge whenever possible. Clauses requiring a "just cause" burden of proof for any disciplinary action up to and including termination is standard form.<sup>xi</sup> Employees may benefit from collective bargaining agreement protection whether or not they are union members. All members of the collective bargaining unit receive such protection in most jurisdictions.

At will employment allows employers to terminate the employee for any reason except for an illegal reason. The burden of proof is on the plaintiff employee to prove they were terminated for a prohibited reason under the law. This seems to be a common misunderstanding among both job applicants and employees who believe their employer needs a "good reason" to fire them.<sup>xii</sup> Professor Pauline Kim's empirical study found 80-90% of employees believe the law of the United States requires employers to treat employees fairly and that a good reason (just cause) is required to terminate.<sup>xiii</sup>

Exceptions to pure employment at will have been created at common law and by statute.<sup>xiv</sup> Most jurisdictions have adopted in whole or in part, one or more of the implied contract exception, public policy exception or the implied covenant of good faith and fair dealing exception.<sup>xv</sup>

The public-policy exception holds an employee at will may not be terminated if the rationale for their discharge violated the public policy standard within the jurisdiction of their employment. Termination for refusing to comply with an order by his or her employer to commit a crime, for whistleblowing or for filing a workers compensation claim would be common examples. Although some of these aforementioned acts may be protected by state statutes, the public policy exception provides protection in states without a statutory prohibition.<sup>xvi</sup>

The Implied Contract Exception, previously mentioned incorporates limitations created by the conduct of the parties into the employment relationship. Stated policies, either orally or in writing, regulating conditions of employment such as employee discipline up to and including discharge, create legally binding limitations on an employers' rights. Typically, promises made during onboarding, verbally or in writing and employee policies and procedures manuals with language promising continued employment except for "just cause" are the basis for these implied contracts. Currently 41 states and the District of Columbia recognize some form of the implied contract exception.<sup>xvii</sup>

The Covenant-of-Good-Faith Exception is the least recognized of the three exceptions. Courts usually interpret this exception to mean an employee may not be terminated without a good reason. Courts have created both implied in fact covenants and implied in law covenants. Covenants implied in fact have been found in factual objective manifestations, such as regular promotions or wage increases. Courts have held these actions by the employer might reasonably give an employee cause to believe that he or she will be treated fairly and have job security absent just cause.

California courts have interpreted an implied in law covenant of good faith and fair dealing. In the minority of jurisdictions, California state courts have held every employment contract carries with it an implied covenant that neither party will impede the other from receiving the benefits of the agreement. The benefits of the agreement and related employer promises can be interpreted to mean the employee maintains legal protection from discharge absent a legitimate economic or legal reason. As this is very similar to just cause, states which have adopted the covenant of

good faith and fair dealing have essentially rejected employment at will as the law within their jurisdiction.<sup>xviii</sup>

Every jurisdiction has enacted statutory exceptions to employment at will. Employers may not adversely affect any term or condition of employment for these legislatively decreed reasons. Common statutory exceptions include discrimination based on race, color, age, disability, gender, religion and veteran status. Some states also prohibit discrimination in employment based on marital status, sexual orientation and even legal off site activities (e.g. smoking).<sup>xix</sup>

Disciplined or terminated employees at will have the burden of proof in an action against their employer to show the reason for the adverse action is prohibited by law. If the employee can establish they are not an employee at will, the employer will bear the burden to establish “just cause” for the discharge.<sup>xx</sup>

In a due process analysis, "just cause" refers to contractually standards of conduct that an employee must breach before he or she can be disciplined or discharged. A widely accepted standard for defining “just cause” is Arbitrator Carol Daugherty’s Seven Part Test articulated in Empire Wire. It assessed the reason for the discharge, the notice, fairness and application of the rule and the appropriateness of the punishment.<sup>xxi</sup>

### **Freedom of Speech in the Workplace**

The First Amendment of the U.S. Constitution states, “Congress shall make no law...abridging the freedom of speech.”<sup>xxii</sup> This protection is against government action. The U.S. Supreme Court has consistently held private sector employees have no First Amendment protection against their employers absent some proof of state action.<sup>xxiii</sup>

Public sector employees have First Amendment rights subject to certain restrictions. Any restriction of speech by a public sector employer has First Amendment implications. In the private sector, no such rights exist unless created by another statutory scheme.<sup>xxiv</sup>

Even in the private sector, speech that is defamatory or constitutes sexual or racial harassment is actionable and victims protected under state and federal law. Employees terminated for whistleblowing or filing workers compensation claims or discrimination claims would also have such “speech” protected even in the private sector.<sup>xxv</sup>

Statutes that prohibit disclosure of medical records, trade secrets or certain financial information also may abridge the speech of a private sector employee. These restrictions on speech are required by other laws. The National Labor Relations Act is an example of a federal statute that does limit a private sector employer's right to limit speech.

Employees' protected speech under the National Labor Relations Act (NLRA) is actually an exception to an employer's broad rights to restrict both speech and expression at work. Section 7 of the NLRA gives employees the right to engage in speech related to wages hours and working conditions and organizing a union. An employee complaining about his or her employer on social media may be seen by the NLRB as concerted action or advocating unionization. That speech would fall within the purview of the NLRA Section 7 protections.<sup>xxvi</sup>

These protected activities, including communication, apply whether the private workplace is unionized or not. A single employee may also engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action.<sup>xxvii</sup>

While the commitment to free speech is deeply ingrained in our society, including in the workplace, it is important to remember, private sector workplace actions are balancing one citizen's rights with another's. These private actions not involving any government action abridging freedom of speech does not raise a First Amendment issue.

Speech protesting against the United States government is fully protected speech under a First Amendment analysis. The government may regulate speech reasonably as to time, place and manner as long as the regulation is content neutral and narrowly tailored to serve a significant government interest while leaving open some alternative means of communication. Furthermore, even speech that enjoys the most extensive First Amendment protection may be restricted on the basis of its content if the restriction passes "strict scrutiny" (i.e., if the government shows that the restriction serves "to promote a compelling interest" and is "the least restrictive means to further the articulated interest").<sup>xxviii</sup> Unprotected speech, such as obscene speech, defamatory speech, speech inciting lawlessness, treason, copyright infringement child pornography may be prohibited based on content as it has held to not be within the protection of the First Amendment.<sup>xxix</sup> In *Texas v Johnson*, the US Supreme Court's landmark case, the Texas state statute criminalizing desecration of a venerated object (American Flag) at the Republican

National Convention was held unconstitutional.<sup>xxx</sup> Johnson's "symbolic speech" was held to be expressive in nature and the political subject matter intended to be protected by the original framers.<sup>xxxi</sup>

### **NFL Players Protests and Protections**

We will now apply the employment protections and workplace free speech analysis to the NFL players kneeling in protest during the National Anthem as it is played at the beginning of each NFL contest. NFL Players are not employees at will. They are protected by a collective bargaining agreement negotiated by their representative the NFLPA. If the NFL wanted to discipline a player for any action or behavior, such as kneeling during the playing of the National Anthem at the start of an NFL game, the due process rights and disciplinary guidelines negotiated in their contract must be complied with.<sup>xxxii</sup>

Each NFL player's terms and conditions of employment are contractual. As a private sector employee the player's Free Speech Rights are limited to the statutory protected types of speech previously discussed. His First Amendment Free Speech rights only protect him from actions by the government. While NFL Commissioner Roger Goodell earns five times more money annually than all the US Governors plus the President combined, he is not the government.<sup>xxxiii</sup>

A player's rights, as an employee, are primarily determined by two applicable contracts. The player's employment contract with his team and the collective bargaining agreement that governs the player's working conditions as an employee of one franchise in the league. Every NFL player must sign the standard NFL Player's Contract. As a private sector employer, the team contract may legally contain content restrictions on free speech without violating First Amendment guarantees.

Paragraph 2 of the NFL Player Contract contains language regulating the player's conduct on and off the field in exchange for his employment and services.

*2. EMPLOYMENT AND SERVICES. Club employs Player as a skilled football player. Player accepts such employment. He agrees to give his best efforts and loyalty to the Club, and to conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game. Player will report promptly for and participate fully in Club's official mandatory minicamp(s), official preseason training camp, all Club meetings and practice sessions, and all preseason, regular season and*



*postseason football games scheduled for or by Club. If invited, Player will practice for and play in any all-star football game sponsored by the League. Player will not participate in any football game not sponsored by the League unless the game is first approved by the League.*<sup>xxxiv</sup>

Could a team discipline a protesting player and argue he is in breach of this clause because his actions have negatively impacted “public respect” for “those associated with the game?” How would this broad language be interpreted? The player protests impact on “public respect” varies depending upon which fan base, target market or demographic queried.<sup>xxxv</sup>

Another basis within the NFL Player’s Contract that might cited for disciplining a protesting player is paragraph 11, “Skill, Performance and Conduct.”

*11. SKILL, PERFORMANCE AND CONDUCT. Player understands that he is competing with other players for a position on Club’s roster within the applicable player limits. If at any time, in the sole judgment of Club, Player’s skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club’s roster, or if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract. In addition, during the period any salary cap is legally in effect, this contract may be terminated if, in Club’s opinion, Player is anticipated to make less of a contribution to Club’s ability to compete on the playing field than another player or players whom Club intends to sign or attempts to sign, or another player or players who is or are already on Club’s roster, and for whom Club needs room.*<sup>xxxvi</sup>

Notice in Paragraph 11 the player has agreed the “Club may terminate this contract” if the “Player has engaged in personal conduct reasonably judged by the Club to adversely affect or reflect on Club.” This paragraph gives substantial power to the Club/team to judge the affect personal conduct such as a protest has on the Club. If a team “reasonably judges” the protests are diminishing the team’s brand, it might terminate the player’s contract citing a Paragraph 11 breach.

The “Integrity of the Game” clause found in paragraph 15 of the NFL Player’s Contract is another contractual provision, which a team using its bargained for “broad discretion” could argue has been breached by a player protesting during the National Anthem.

*15. INTEGRITY OF GAME. Player recognizes the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that if he accepts a*

*bribe or agrees to throw or fix an NFL game; fails to promptly report a bribe offer or an attempt to throw or fix an NFL game; bets on an NFL game; knowingly associates with gamblers or gambling activity; uses or provides other players with stimulants or other drugs for the purpose of attempting to enhance on-field performance; or is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.<sup>xxvii</sup>*

Paragraph 15 specifically references gambling and drugs potential to erode the public confidence in the game, but broad language here could allow for application to protesting players' conduct being a breach. It refers early on to "good character of NFL players." While some might argue speaking out against social injustice demonstrates superior character, others have opined the use of the National Anthem as the vehicle for the protests is unpatriotic.

Later in paragraph 15, the player agrees to be subject to fine, suspension or termination for "any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football." This restriction, similar to paragraph 1, contains broad if not vague conduct prohibitions with broad discretion given away by the player to the Commissioner. Although the player is guaranteed a hearing for any alleged paragraph 15 breach, the basis for the protests being a breach remains viable.

The League and team retain broad discretion in disciplinary matters as evidenced again in the Collective Bargaining Agreement between the players and League specifically, Article 46, "Commissioner Discipline."

*ARTICLE 46*

*COMMISSIONER DISCIPLINE*

*Section 1. League Discipline: Notwithstanding anything stated in Article 43:*

*(a) All disputes involving a fine or suspension imposed upon a player for conduct on the playing field (other than as described in Subsection (b) below) or involving*

*action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows: the Commissioner will promptly send written notice of his action*

*to the player, with a copy to the NFLPA. Within three (3) business days following such*

*written notification, the player affected thereby, or the NFLPA with the player's*

*approval,  
may appeal in writing to the Commissioner.<sup>xxviii</sup>*

In all cases of a fine or suspension for on the field conduct (except Sec. 1(b) unnecessary roughness or unsportsmanlike behavior) or conduct detrimental to the integrity of the game, the Commissioner has the right to appoint the initial decision maker and or hear the final appeal.

*Section 2. Hearings:*

*(a) Hearing Officers. For appeals under Section 1(a) above, the Commissioner shall, after consultation with the Executive Director of the NFLPA, appoint one or more designees to serve as hearing officers. For appeals under Section 1(b) above, the parties shall, on an annual basis, jointly select two (2) or more designees to serve as hearing shared equally by the NFL and the NFLPA. Notwithstanding the foregoing, the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion.*

A player terminated for protesting could attempt to argue the Article 43, Non-Injury Grievance provisions of the CBA should apply.

*ARTICLE 43*

*NON-INJURY GRIEVANCE*

*Section 1. Definition: Any dispute (hereinafter referred to as a “grievance”) arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this Agreement, the NFL Player Contract, the Practice Squad Player Contract, or any applicable provision of the NFL Constitution and Bylaws or NFL Rules pertaining to the terms and conditions of employment of NFL players, will be resolved exclusively in accordance with the procedure set forth in this Article, except wherever another method of dispute resolution is set forth elsewhere in this Agreement.<sup>xxxix</sup>*

The League would contend Article 46 controls citing the Art. 43 Sec.1 language, “except wherever another method of dispute resolution is set forth elsewhere in this agreement.” If the NFLPA prevailed, it would get the grievance away from the Commissioner to a mutually selected, probably more neutral, arbitration panel. The same arguments would be heard about the impact of the protests and if they were held to have been “reasonably judged by Club to adversely affect or reflect on Club.” While the arbitrator would be more objective, the players have bargained away significant control of their conduct and the related discipline thereof.

The arbitrators would then issue an award. Under Article 43, the award is considered the full, final and complete disposition of the grievance. The losing side could challenge the arbitration award in federal court, but federal courts give great deference to arbitration awards. Convincing a federal appeals court to vacate an arbitration award is, as Tom Brady discovered, not easy.<sup>xi</sup>

Defamation law may also be a viable cause of action. If an owner criticizes a protesting player as “Unpatriotic or Un-American” the player might consider filing a defamation lawsuit. Proving the owner made a false statement of fact rather than an opinion would be an uphill battle. If the owner cut or fined the player the damages element would not be difficult to prove. Since NFL players are public figures, the player would be required to demonstrate the owner’s statement was made with “malice.” The owner knew or should have known the objectively determinable statement of fact was untrue. Also, not easy.

The unanimity of the players’ protests probably makes the success of a discrimination claim less likely. If a private sector employer like the NFL, discriminated against an employee because of their status in a protected class such as race, it would be a violation of federal and state discrimination laws.<sup>xii</sup> Players have been unified in their protests to the point of West Point graduate, decorated Army Ranger and Pittsburgh Steeler player Alejandro Villanueva apologizing for not protesting enough.

On September 24, 2017 in Chicago, the Pittsburgh Steelers had agreed as a team to remain in the locker room during the playing of the National Anthem prior to the start of their game against the Chicago Bears. The team reasoning was to avoid continued controversy with their options on the field being protest or not. Several players and coaches later explained, that coming out after the anthem was a neutral message and would allow the team to focus on playing the football game.

Villanueva walked to the end of the tunnel leading to the field. He later explained he hoped to respect his teammate’s decision while still demonstrating his respect for the flag and anthem of his country. Villanueva’s presence alone at the end of the tunnel was captured by the media and led to, what he described, as an embarrassing situation. He stated the next day he felt “he left his teammates behind” (a very meaningful military sentiment, as any veteran will explain).<sup>xlii</sup>

Villanueva spent four years at West Point and served three tours of duty in Afghanistan. If he is conflicted over the appropriate time, place, and manner for these player protests, it is no wonder it remains a divisive and difficult to reconcile issue for the public.<sup>xliii</sup>

### **Conclusion and Final Recommendations**

NFL players have bargained away many of their protections. The nature of collective bargaining is the employer and employee reaching an agreement as to the terms and conditions of employment for the entire bargaining unit. The League maintained significant control over the discipline process including selection of arbitrators, hearing officer and the appeals process.

A generous reading of the NFL Player Contract and the CBA would still result in the League Commissioner having the contractual right to discipline the protesting players. As private sector employees, the players would have no strong constitutional argument that their symbolic speech was protected against action from their private sector employer.

State and federal statutes, which provide additional legal options such as employment discrimination, defamation or labor laws do not appear to be any more promising from the players' perspective.

The players' best protection is not in state or federal court, but rather in the court of public opinion. Players and their agents love to talk about protecting their "brand." From the original Dream Team playing in the Olympics to the public relations makeover of Alex Rodriguez when he returned from suspension, image and public perception can be managed. Anthem protests have gone from Colin Kaepernick sitting during the anthem and no one noticing (August 14 and 20, 2016) to all players on the Chiefs, Broncos, Patriots and Seahawks team linking arms during the anthem (September 11, 2016) to almost all the NFL teams playing linking arms or kneeling during the anthem (September 24, 2017.)<sup>xliv</sup> In week 13 of the NFL season, only 23 players out of about 2000 players and coaches protested in some way.<sup>xlv</sup>

The creation of company employment and labor law policies and the application of those policies should address three important questions. Does this policy and its enforcement enable the company to comply with all required laws and regulations? Does this policy and its enforcement minimize grievance and litigation expenses? Does this policy and its enforcement maximize employee productivity considering the impact on morale, and corporate culture?

On Monday November 27, 2017, the NFL announced a proposed donation of \$100 million to African-American communities and related charities who provide assistance for social justice causes, at the heart of the player protests. In keeping with the theme of disagreement, several players announced they were in disagreement with the structure of the donation negotiated with the 40-player group founded by Malcolm Jenkins and Anquan Boldin.<sup>xlvi</sup>

The legal right to terminate does not necessarily mean that termination is the best decision for the company. The termination of an employee or group of employees can have as pervasive a devastating impact to organization profitability as terminating a product line the employer has every right to terminate. Anybody remember New Coke?

Decisions to discipline up to and including discharge should be made after thorough analysis of all relevant factors and consequences, internal and external, legal and ethical, long term and short term. NFL owners and Commissioner Goodell should continue to support and speak out against social injustice. They must resist the urge to do what they legally can do but instead to should patiently act with moral courage.

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<sup>i</sup> [https://www.youtube.com/watch?v=vrW-GI\\_9IL8](https://www.youtube.com/watch?v=vrW-GI_9IL8)

<sup>ii</sup> [https://www.law.upenn.edu/journals/jbl/articles/volume3/issue1/Summers3U.Pa.J.Lab.&Emp.L.65\(2000\).pdf](https://www.law.upenn.edu/journals/jbl/articles/volume3/issue1/Summers3U.Pa.J.Lab.&Emp.L.65(2000).pdf)

<sup>iii</sup> <http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx>

<sup>iv</sup> <http://employment.findlaw.com/hiring-process/employment-contracts-and-compensation-agreements.html>

<sup>v</sup> <https://ag.ny.gov/labor/can-you-be-fired>

<sup>vi</sup> <https://www.bls.gov/opub/mlr/2001/01/art1full.pdf>

<sup>vii</sup> Richard M. Ingersoll, *Who Controls Teachers' Work? Power and Accountability in America's Schools* (Cambridge, MA: Harvard University Press, 2006), 109; See also

<http://www.ecs.org/clearinghouse/94/93/9493.pdf>; See also *Vergara v. California* - Appellate Decision (California Court of Appeal, Second Appellate District, Division 2 April 14, 2016).

<sup>viii</sup> Dana Goldstein, *The Teacher Wars: A History of America's Most Embattled Profession* (New York: Doubleday, 2014); See also David Finley, "Teacher Tenure: An Innocent Victim of *Vergara v. California*," *Education Week*, March 4, 2015; See also Caitlin Emma, "Vergara, New Mexico Edition?," *Morning Education*, Politico, April 29, 2015; See also

<sup>ix</sup> See MERIT SYSTEMS PROTECTION BOARD (MSPB), *WHAT IS DUE PROCESS IN FEDERAL CIVIL EMPLOYMENT?* (2015),

<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1166935&version=1171499&application=ACROBAT>

[hereinafter "What is Due Process"]; 5 U.S.C. §§ 4303, 7513.

See also <http://work.chron.com/can-fired-civil-service-jobs-19492.html>



- <sup>x</sup> <https://patimes.org/pre-post-termination-hearings-public-employees-entitled-due-process-hearings/>
- <sup>xi</sup> <http://uwua.net/what-are-the-benefits-of-being-a-union-worker/>
- <sup>xii</sup> <https://www.nolo.com/legal-encyclopedia/employment-at-will-definition-30022.html>
- <sup>xiii</sup> Pauline T. Kim, *Norms, Learning and Law: Exploring the Influence on Workers' Legal Knowledge*, 1999 U. Ill. L. Rev. 447; See also Robert C. Bird, *Employment as a Relational Contract*, 8 U. Pa. J. Lab. & Emp. L. 149, 196-197 (2005)
- <sup>xiv</sup> <https://www.bls.gov/opub/mlr/2001/01/art1full.pdf>
- <sup>xv</sup> <https://paywizard.org/main/labor-law/dismissal/states-with-exceptions-to-employment-at-will>
- <sup>xvi</sup> See *Firestone Textile Co. Division, Firestone Tire & Rubber Co. v. Meadows*, 666 S.W.2d 730 (1983); See also <https://pdfs.semanticscholar.org/75bb/c93b4a0ede6dad930bb463409797d93133ab.pdf>; See also <https://www.law.com/sites/michaelkraemer/2014/03/12/pennsylvania-public-policy-wrongful-discharge-lawsuits/?slreturn=20171104195338>
- <sup>xvii</sup> <http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx>
- <sup>xviii</sup> See *Khanna v. Microdata Corp.*, 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985); See also *Kerr v. Gibson's Products Co.*, 733 P.2d 1292 [Mont. 1987]
- <sup>xix</sup> <https://www.eeoc.gov/laws/statutes/>; See also [https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state\\_nondiscrimination.pdf](https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf)
- <sup>xx</sup> *Ross v. Garner Printing Co.*, 285 F.3d 1106, 1113 (8th Cir. 2002); See also *Lucas v. Whittaker Corp.*, 470 F.2d 326, 328 (10th Cir. 1972); *Rosecrans v. Intermountain Soap & Chem. Co.*, 605 P.2d 963, 965 (Idaho 1980); See also <http://www.tlgattorneys.com/news-resources/workplace-discrimination-and-the-plaintiffs-burden-of-proof/>
- <sup>xxi</sup> <https://www.hawaii.edu/uhwo/clear/home/EnterpriseWire.html>; See also <https://hr.berkeley.edu/hr-network/central-guide-managing-hr/managing-hr/er-labor/disciplinary/just-cause>
- <sup>xxii</sup> U.S. Const. amend. I
- <sup>xxiii</sup> See *Garcetti v. Ceballos*, 547 U.S. 410(2006); See also *Connick v. Myers*, 461 U.S. 138 (1983); See also *Pickering v. Board of Education*, 391 U.S. 563 (1968);
- <sup>xxiv</sup> <http://corporate.findlaw.com/law-library/freedom-of-speech-in-the-workplace-the-first-amendment-revisited.html>
- <sup>xxv</sup> <https://www.nolo.com/legal-encyclopedia/wrongful-termination-retaliation-whistleblowing.html>; See also <https://supreme.justia.com/cases/federal/us/573/13-483/>
- <sup>xxvi</sup> <https://www.hrexaminer.com/is-there-free-speech-at-work/>
- <sup>xxvii</sup> <https://www.nlr.gov/rights-we-protect/employee-rights>
- <sup>xxviii</sup> <https://fas.org/sgp/crs/misc/95-815.pdf>
- <sup>xxix</sup> <https://constitutionallawreporter.com/amendment-01/freedom-speech/unprotected-speech/>
- <sup>xxx</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).
- <sup>xxxi</sup> *Brandenburg v Ohio*, 395 U.S. 444; See <http://democracyweb.org/freedom-of-expression-history>; see also <https://www.alternet.org/story/54214/a-history-of-the-fight-for-free-speech-in-america>;
- <sup>xxxii</sup> <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>
- <sup>xxxiii</sup> [https://ballotpedia.org/Comparison\\_of\\_gubernatorial\\_salaries](https://ballotpedia.org/Comparison_of_gubernatorial_salaries);
- <http://www.businessinsider.com/how-much-does-the-us-president-get-paid-2016-11>
- <sup>xxxiv</sup> [https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011\\_Final\\_CBA\\_Searchable\\_Bookmarked.pdf](https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011_Final_CBA_Searchable_Bookmarked.pdf)
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xxxv <http://www.baltimoresun.com/news/maryland/bs-md-ravens-reax-20171001-story.html>

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<sup>xl</sup> <https://www.nytimes.com/2016/04/26/sports/tom-brady-deflategate-new-england-patriots-suspension-reinstated.html>

<sup>xli</sup> See 42 U.S.C. 2000e; See also <https://www.eeoc.gov/laws/statutes/titlevii.cfm>

<sup>xlii</sup> <https://www.cbsnews.com/news/steelers-alejandrovillanueva-refuses-to-join-anthem-protest/>

<sup>xliii</sup> Full disclosure requires me to inform you my three daughters are involved in public service. Kristen is an EMT who services a disadvantaged community where she has seen too many lives lost. Casey served four years in the USMC and was deployed to the Middle East and Africa. Kerry is a 2017 graduate of the US Naval Academy. She will be leaving for Okinawa shortly as a member of the USMC.

<sup>xliv</sup> <http://www.abc10.com/news/local/quiet-gesture-sparks-loud-debate-a-timeline-of-nfl-national-anthem-protest/478582333>

<sup>xlv</sup> [http://www.espn.com/blog/nflnation/post/\\_/id/259964/nfl-players-who-protested-during-national-anthem-in-week-13](http://www.espn.com/blog/nflnation/post/_/id/259964/nfl-players-who-protested-during-national-anthem-in-week-13)

<sup>xlvi</sup> [http://www.espn.com/nfl/story/\\_/id/21606390/nfl-offers-100-million-plan-social-justice-organizations-partnership-players](http://www.espn.com/nfl/story/_/id/21606390/nfl-offers-100-million-plan-social-justice-organizations-partnership-players)