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Testify or be silent? California chooses free speech

The ongoing firings and suspensions following Charlie Kirk's assassination—including ABC's temporary removal of Jimmy Kimmel—highlight the tensions between political speech, employer retaliation, and the protections afforded by California law and the First Amendment, underscoring how quickly public commentary can trigger legal, regulatory, and reputational consequences.

By Arash Homampour

Now testify
Testify
It's right outside your door
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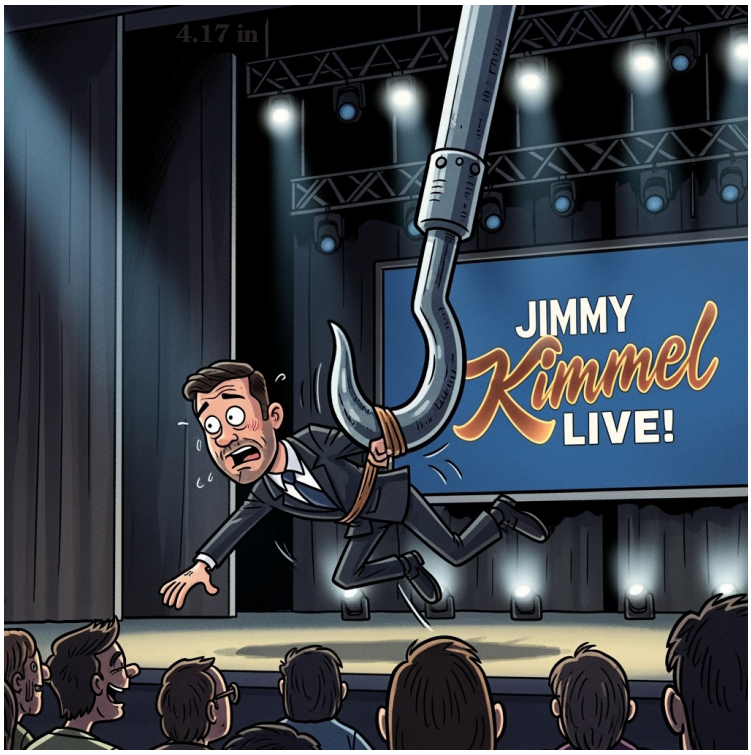
— Rage Against the Machine, *Testify*

On Sept. 10, Charlie Kirk, founder of Turning Point USA, was assassinated during an event at Utah Valley University. No matter the cause, violence in the name of politics must be condemned everywhere and every time.

The shooting, carried out by a 22-year-old later arrested after a two-day manhunt, sparked widespread political commentary. Among those who spoke out was Karen Attiah, an editor at the Washington Post, who posted about gun violence and race. Within hours, she was terminated after eleven years at the paper.

She is not alone. Professors, journalists, and workers across industries have been fired or suspended for political commentary outside of work.

Recently, ABC pulled Jimmy Kimmel Live! off the air indefinitely because of what host Jimmy Kimmel said during his monologue: "We hit some new lows over the weekend with the MAGA gang desperately trying to characterize this kid who murdered Charlie Kirk as anything other than one of them and doing everything they can to score political points from it."



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Kimmel returns to the air tonight, though Nexstar-owned stations and some other affiliates have stated they will not be airing the episode.

The backlash following Kimmel's suspension was immediate. FCC Chair Brendan Carr threatened regulatory consequences, and Nexstar Media Group, the largest owner of local television stations in the United States, announced it would stop airing the show. The episode underscores how quickly political speech — even in comedy — can trigger retaliation and attempts to silence.

Could Kimmel sue? The answer is likely no for claims against ABC under state employment or contract law; private broadcasters retain broad editorial discretion and can suspend or remove hosts under "morals clauses" or other contractual terms. But Kimmel may have a stronger argument against the federal government. FCC Chair Carr's threats to revoke ABC's broadcast license raise serious First Amendment concerns.

Courts have long held that when government officials use regulatory authority to pressure private actors into silencing speech, it can amount to unconstitutional coercion. (*See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).) Because ABC is a broadcast network that must maintain an FCC license, it is especially vulnerable to this kind of pressure — unlike cable channels such as Fox News, which operate outside the FCC licensing regime. If Kimmel can show that ABC acted in response to federal threats rather than its own editorial judgment, he could frame a claim for unlawful government retaliation.

Public vs. private employees

Public employees enjoy constitutional protection under the First Amendment, as well as protections afforded by state law. A public school teacher or city planner fired for political speech may therefore invoke constitutional rights when targeted by government action. A software engineer at a private company cannot.

California law fills this gap. Labor Code Sections 1101 and 1102 extend protection to both public and private employees, prohibiting employers from controlling or retaliating against lawful political activity.

Labor Code Sections 1101 and 1102

Labor Code Section 1101 bars rules or policies that forbid or control political activity. Section 1102 prohibits coercion through threats of discharge over political views. These provisions are not symbolic. They impose real penalties, including misdemeanor charges, fines, and even jail time. More importantly, they create civil claims for damages.

The California Supreme Court held in *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481 that these duties are part of every employment contract. In *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, the court defined political activity broadly as "the espousal of a candidate or a cause, and some degree of action to promote the acceptance thereof by other persons." This covers far more than elections: civil rights marches, environmental advocacy, social justice campaigns — virtually any effort to influence policy or public opinion.

Why these statutes exist

California's Legislature enacted these statutes to prevent employers from using economic power to control political expression. They were a direct response to practices in which companies pressured employees to support certain candidates, attend employer rallies, or stay silent on controversial issues. State lawmakers understood that democracy requires robust participation and that workers should not have to risk their jobs in order to speak up for their beliefs.

The statutory protections are completely neutral, applying equally to all political views. They do not favor one ideology over another. An employer cannot retaliate against an employee for supporting or opposing a candidate, a cause, or a movement, whether that view is mainstream, fringe, conservative, progressive, or unpopular.

This neutrality is central. Allowing employers to punish only some views would distort debate and silence dissent. The courts have confirmed that these laws are embedded in every employment contract, making political liberty a baseline condition of work in California.

Firing an employee for lawful political activity undermines this public policy. It chills expression, discourages workers from engaging in civic life, and creates fear across the workplace. That is exactly the harm the Legislature sought to prevent.

By attaching both civil and criminal consequences, California makes clear that political freedom cannot depend on pleasing an employer. Employees are citizens first, workers second.

Case law in action

Courts have applied these statutes in modern contexts. In May 2020, Sacramento Kings radio host Grant Napear was fired after tweeting "ALL LIVES MATTER" during the George Floyd protests. He sued under Labor Code Section 1102, claiming political retaliation. The federal court initially allowed his claim to proceed, holding that the tweet could constitute protected political activity if the termination was politically motivated. Ultimately, the Eastern District of California granted summary judgment to the employer, ruling that the evidence showed Napear was fired for reputational harm to the team, not because of his political views. Because federal jurisdiction was invoked, the court also evaluated his claim under constitutional balancing principles, consistent with First Amendment precedents.

The case highlights the central issue in political retaliation disputes: motive. Terminations based on an employee's political ideology or advocacy are unlawful under California law, but employers may act if they can show legitimate, non-political business reasons, such as reputational damage or workplace disruption.

First Amendment protections for public employees

For government workers, the First Amendment adds another layer of protection. The test, first set forth in *Pickering v. Board of Education* (1968) 391 U.S. 563, balances several factors:

- Did the employee speak on a matter of public concern?
- Was the employee speaking as a private citizen rather than as part of official duties?
- Does the employee's speech interest outweigh the employer's need for efficient operations?

The cases have gone both ways. In *Pickering*, the U.S. Supreme Court held that a teacher's letter critical of school spending was protected. In a later case, *Connick v. Myers* (1983) 461 U.S. 138, the court found that internal office grievances were not protected as free speech. Four years later, in *Rankin v. McPherson* (1987) 483 U.S. 378, the justices ruled that a clerical worker's remark hoping for a successful Reagan assassination attempt was protected because it caused no workplace disruption.

More recently, the high court ruled in *City of San Diego v. Roe* (2004) 543 U.S. 77 that a police officer's explicit videos in uniform were not protected, as they undermined public trust. In the 2006 case of *Garcetti v. Ceballos* (2006) 547 U.S. 410, the Supreme Court held that speech made pursuant to official duties - a prosecutor's internal memo - was not protected.

California also codifies protections for government workers in Government Code Section 3203, which bars restrictions on the political activities of public employees except in very limited circumstances.

When termination is still legal

Neither constitutional nor statutory protections are absolute. Employers may still take action against employees in the following areas:

- Non-political conduct: insults, gossip, or personal attacks.
- On-duty activity: campaigning or advocacy during work hours or using company resources.
- Harassment or threats: violence, hate speech, or targeted harassment.
- Conflicts of interest: roles requiring neutrality, such as election officials.
- Morals clauses: contractual provisions triggered by reputational harm beyond mere disagreement.

Employers may sometimes try to reframe political commentary as "hate speech" to justify discipline or termination, but California courts have made clear that motive matters. Speech that crosses into true threats, harassment, or unlawful discrimination is not protected.

But employers cannot simply label unpopular or controversial political views as "hate speech" in order to escape liability. In the Gay Law Students case, the California Supreme Court underscored that political activity includes the espousal of causes, even when divisive. The operative line is the one that lies between political advocacy and conduct that violates other valid laws or workplace rules. Detecting pretext will require an examination of timing, consistency of enforcement, and whether the employer tolerated similar conduct when the politics were different.

The Kirk assassination example

When Washington Post editor Karen Attiah weighed in on the Kirk tragedy by posting about gun violence and race, she was terminated within hours. Even though she had worked eleven years at the paper, the Post cited policy violations and safety concerns.

Had this occurred under California law, Attiah would likely have strong claims. Her commentary about gun control and racial justice lies squarely within statutory definitions of protected political activity. The Post would have to prove that the termination was based on genuine, non-political business concerns, not disagreement with her views. California law places this burden on the employer.

Recent legal developments

California expanded worker protections in 2024 with Senate Bill 399, creating Labor Code section 1137. This "Worker Freedom from Employer Intimidation Act" prohibits mandatory "captive audience" meetings on political or religious matters, including union campaigns. Employers face civil penalties of $500 per affected worker.

At the federal level, the National Labor Relations Board's *Stericycle, Inc.* decision, (2023) 372 NLRB No. 113, held that workplace rules are presumptively unlawful if they could reasonably be interpreted to chill employees' protected activity. This heightens scrutiny of broad social media and civility policies.

The Ninth Circuit recently recognized limits to *Garcetti*. In *Jensen v. Brown* (2025) 131 F.4th 677, it held that professors retain First Amendment protection for speech related to teaching and scholarship, reinforcing academic freedom.

Employee remedies

Wrongfully terminated employees in California have several avenues for challenging employer actions:

- Direct claims under Labor Code Sections 1101 and 1102.
- Wrongful termination in violation of public policy, which allows punitive damages.
- Section 1983 claims for public employees.
- PAGA actions for systemic violations.

Evidence is key. Posts, emails, and witness statements that show

political motive can be decisive. Timing between speech and firing often will help prove retaliation.

Employer risks

Employers face substantial consequences for unlawful terminations:

- Damages for lost wages and benefits.
- Emotional distress damages, often significant in cases involving retaliation or wrongful termination.
- Punitive damages in egregious cases.
- Attorney's fees, often exceeding damages.
- Criminal liability, since violations of §§ 1101 and 1102 can be misdemeanors.
- Reputational harm in high-profile cases.

Conclusion

California law draws a sharp line to protect expression. Employees' off-duty political activity is generally shielded. Public employees have constitutional backing; private employees have strong statutory safeguards. Neither group can be punished simply because an employer dislikes their views.

The firings following Charlie Kirk's assassination illustrate how volatile this area is. In most states, employers prevail. In California, the law tilts toward the employee. Employees do not have to choose between their paychecks and their politics.

No matter the cause, violence in the name of politics must always be rejected. A free society depends on words, debate, and ideas — not intimidation or bloodshed.

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