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LITIGATION

Punished for politics: viewpoint discrimination

By Harmeet K. Dhillon and Maureen Pettibone Ryan

Venezuelan-American actress Maria Conchita Alonso stepped into a firestorm of controversy — and employment law issues — earlier this month after endorsing Tea Party darling Assemblyman Tim Donnelly for governor of California. Alonso's endorsement took the form of a tongue-in-cheek campaign video in which she provided a joking and at times very loose translation of Donnelly's message. Her translation included some off-color language, as well as a cameo from her pet Chihuahua, Tequila. The video spurred a backlash in the Latino community, with Alonso's critics focusing on her endorsement of the former Minuteman, her reference to the size of his "cojones," and the name of her pet which some argued played into negative stereotypes about Latinos. Amidst the controversy, Alonso resigned from an upcoming Spanish-language version of the play "The Vagina Monologues," stating publicly that she feared boycotts and protests would harm the production.

Following the resignation, the show's producer, Eliana Lopez (wife of embattled Sheriff Ross Mirkarimi, and herself no stranger to workplace controversy), indicated that Alonso was no longer welcome on the cast. "Of course she has the right to say whatever she wants. But we're in the middle of the Mission. Doing what she is doing is against what we believe," Lopez said.

Although Alonso has moved on, and in fact has been offered other employment opportunities as a result of the dust-up, her situation raises an interesting question: Can an employer actually or constructively terminate an employee based on to that person's political views, or base a hiring decision on political viewpoint criteria? The short answer is that it depends on whether the employer is public or private, and whether California statutory protections apply.

Most of the commentary on political viewpoint discrimination focuses on the First Amendment and common law, which prohibits terminations that violate public policy. These two doctrines, however, provide scant if any protection to employees of private companies. Fortunately for California employees, under a little-known provision of the California Labor Code, employers are barred from punishing, firing, or attempting to coerce employees to toe the political line.

California employees are entitled to special protections of their political rights under Labor Code Sections 1101 and 1102, which were passed in 1937. These provisions protect employees from being retaliated against, excluded from, or controlled by their employers with regard to the employees' political affiliations and actions. Section 1101 bars rules, regulations or policies that would forbid or prevent employees from engaging or participating in politics or from running for office. Section 1101 also prohibits companies from directing or controlling an employee's political activities and even from "tending" to do so. Section 1102 bars employers from coercing, influencing, or attempting to coerce or influence an employee's politics by threatening to fire the employee.

The case law on Sections 1101 and 1102 is limited but illuminating. First, an employee's right to political expression has been interpreted to include not only party affiliation but also "the espousal of a candidate or a cause, and some degree of action to promote the acceptance thereof by other persons." *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458 (1979) superseded by statute (holding that discriminating against LGBT employees in hiring, firing, and promotions deprived them of their right to organize politically for equal rights). This interpretation speaks directly to Alonso's actions in endorsing Donnelly, and if she were the employee of a private California employer, it would be unlawful to terminate or punish her based on her political endorsements.

CaptionAssociated Press
Maria Conchita Alonso at the AMPAS Theatre in Beverly Hills in 2012.

One of the earliest cases interpreting Sections 1101 and 1102 involved the House Un-American Activities Committee. To briefly summarize, a trial court instructed a jury that a person could not be terminated based on political beliefs, including communism. *Cole v. Loew's Inc.*, 8 F.R.D. 508 (S.D. Cal. 1948) *rev'd sub nom Loew's Inc. v. Cole*, 185 F.2d 651 (9th Cir. 1950). Plaintiff Lester Cole, one of the "Hollywood Ten," was terminated after he refused to testify while under Congressional subpoena as to whether he was a member of the Communist Party. Instead, he requested to read a written statement and that request was denied. The district court focused its inquiry on whether the testimony harmed Cole's employer, but the 9th U.S. Circuit Court of Appeals reversed, stating that Cole's actions constituted contempt of Congress, and that the jury had been improperly instructed regarding whether Cole's employers could terminate him. Ultimately, Cole and others settled out of court with MGM, Universal, Columbia and Warner Brothers. However, he was convicted of contempt of Congress, for which he served a year, and never worked under his own name again.

California statutory protections are broader than those afforded by federal law, including the First Amendment. Under federal law, as stated in the 9th Circuit case *Biggs v. Best, Best & Krieger*, 189 F.3d 989 (9th Cir. 1999), government employees may be fired "for purely political reasons" if the employee occupies "a policymaking or confidential position." In the *Biggs* case, Biggs was an associate at Best, Best & Krieger, a firm that provided city attorney services to the city of Redlands. After Biggs' husband and daughter campaigned against various Redlands politicians, the politicians threatened to fire the law firm unless the Biggs

family ceased their political activities. The family did not stop its activities, and Biggs was ultimately fired. She sued, alleging that her First Amendment rights had been violated. But on summary judgment, the court rejected Biggs' First Amendment claim because she was carrying out a "policymaking" role for her employer's client, and thus could be terminated for political reasons.

Even government employees in non-policymaking roles do not have unfettered First Amendment rights to discuss their political beliefs publicly. In *Connick v. Myers*, 461 U.S. 168 (1983), the Supreme Court ruled that although government employers "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression," an employee could nevertheless be fired for raising certain issues in the workplace. Connick involved an assistant district attorney who circulated a questionnaire regarding workplace changes that had been implemented by the new district attorney (father of famed crooner Harry Connick Jr.) The court held that because the questionnaire "touched upon matters of public concern in only a most limited sense" and because the questionnaire disrupted the office and undermined Connick's authority, her termination did not violate the First Amendment.

Employees of private companies are not protected by the First Amendment at all, as no state action is involved where an employee works solely for a private company. However, California courts are split over whether firing a person for exercising his or her free speech rights is a wrongful termination in violation of public policy, also known as a *Tameny* claim. For example, a newspaper was permitted to fire a reporter for contradicting its "editorial policy" in *Eisenberg v. Alameda Newspapers*, 74 Cal. App. 4th 1359 (Cal. Ct. App. 1999), but another newspaper that fired a reporter for endorsing a candidate publicly in violation of its editorial stance was unable to obtain summary judgment against that reporter. *Ali v. L.A. Focus Publication*, 112 Cal. App. 4th 1477 (Cal. Ct. App. 2003) disapproved of on other grounds in Reid v. Google, 50 Cal. 4th 512 (2010).

Alonso's case raises an important hypothetical: What if the employer does not object to an employee's politics but potential customers or clients do? For example, could a law firm refuse to staff an associate on a case if the client objected to the associate's political affiliation? Based on the Labor Code, the answer is no. Employers are not permitted to hide behind clients' or customers' prejudices as a justification for discrimination. If they were, they could refuse to hire women or religious or ethnic minorities and simply blame the discrimination on their customers or clients.

Although cases like Alonso's often lead to employees invoking the First Amendment, that sanctuary is largely unavailing to private employees. For non-government employees, the strongest protections for political affiliation and political speech are found in California's Labor Code, not the state or federal constitution or the common law. While these labor code sections are the subject of very little case law, they provide a powerful protection to California employees who otherwise could be terminated for their political views.

Harmeet K. Dhillon *is the managing partner of Dhillon & Smith LLP, where she frequently counsels employers on employment practices, including viewpoint discrimination.*

Maureen Pettibone Ryan *is a senior associate at Dhillon & Smith LLP, where she counsels and represents clients in employment discrimination and labor matters.*

HARMEET K. DHILLON
Dhillon & Smith LLP

MAUREEN P. RYAN
Dhillon & Smith LLP