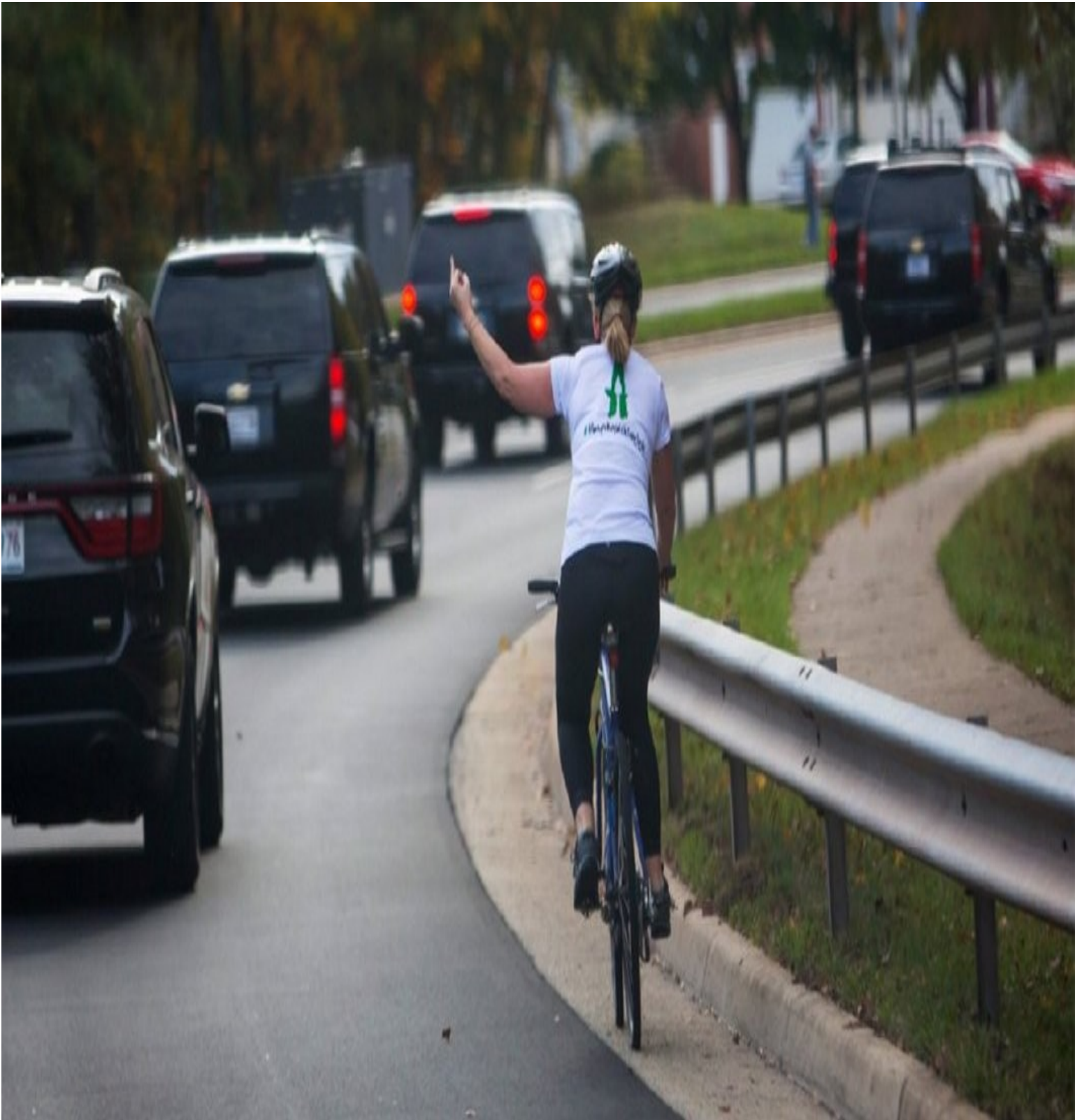


Can You Be Fired for Flipping off the President? Yes... Well... Maybe Not

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by Aaron Goldstein



There is a widespread myth in this country that the First Amendment protects free speech in the workplace. Employees who loudly state controversial opinions often think the First Amendment protects them from being fired as a result. When Google fired James Damore last summer for posting what many described as an anti-diversity manifesto, social media exploded with comments like “what happened to free speech?”

and “they can’t do that! It’s against the First Amendment!”

This idea is back in the news after 50-year-old marketing executive Juli Briskman was fired for posting a picture of herself on social media giving the middle finger to President Trump’s motorcade.

Unfortunately for Mr. Damore and Ms. Briskman, the First Amendment only limits the government’s ability to restrain speech, not private employers. But (and this being a legal issue, there is always a but), there are numerous other laws that can come into play when employers fire employees for expressing strong opinions on political or social issues.

The First Amendment may not protect Mr. Damore’s statements regarding diversity in the workplace, but the National Labor Relations Act (NLRA) might. The NLRA protects unionizing activity and prohibits employers from retaliating against employees for engaging in so-called “protected concerted activity” regarding the terms and conditions of employment. Mr. Damore’s statements could arguably constitute a complaint about working conditions, which he shared with co-workers in an attempt to change those working conditions. Described this way, Mr. Damore’s statements could be protected by the NLRA.

Likewise, the First Amendment may not protect Ms. Briskman’s one finger salute to the President, but anti-discrimination laws might. Prior to Ms. Briskman’s social media post, a male senior director at her company had responded to a discussion regarding Black Lives matter by posting “You’re a f----- Libtard a-----[.]” Ms. Briskman herself flagged the director’s comment for review by senior management. Rather than fire this senior director, Briskman’s employer allowed him to remove the comment and keep his job. Why would Ms. Briskman be fired after this male executive was allowed to keep his job? If a jury concluded that it had to do with Ms. Briskman’s gender, her employer could face serious liability.

Controversial statements in the workplace about social and political issues may not be protected by the First Amendment, but there are many other legal traps for unwary employers. If statements are shared among co-workers and relate to the terms and conditions of employment, they could be protected by the NLRA. And if employers selectively enforce rules regarding “inappropriate” speech, they could find themselves liable for discrimination claims.