

# OFFICE POLITICS: *GREEN V. FINKELSTEIN*'S CONSEQUENCES FOR TRANS EMPLOYEES

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In 2024, 691 bills targeting transgender<sup>1</sup> individuals (“anti-trans” bills) were introduced across forty-three states and the federal legislature.<sup>2</sup> In a time where one’s gender identity is considered to be a “political issue” to be debated,<sup>3</sup> trans employees face increasing challenges, and many must decide between being comfortable in their own skin or being safe in their workplace.<sup>4</sup> Public employers and employees in conservative states, such as Florida or Utah, face additional challenges.<sup>5</sup> Even where

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\* © 2025, All rights reserved. Juris Doctor, *cum laude*, Stetson University College of Law, May 2024; B.A., Political Science, minor in French, Central Connecticut State University, 2020.

1. “Transgender” or “trans” is an adjective that refers to someone whose gender does not align with their sex assigned at birth. See Laurel Wamsley, *A Guide to Gender Identity Terms*, NPR (June 2, 2021, 6:01 AM), <https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq>. This Article analyzes *Green v. Finkelstein* through a queer lens, examining the impact for transgender employees. As such, “gender” is used to describe an individual’s innate sense of themselves and their gender, and “sex,” or “sex” assigned at birth, refers to the description of “male” or “female” assigned to the individual at birth, typically based on external anatomy. *Id.* Where possible, definitions have been provided for LGBTQ related terms used in this Article; however, for a more robust introduction to the topics related to the LGBTQ community implicated here and terms used throughout, see *id.*

2. See *2024 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER, <https://translegislation.com/bills/2024> (last visited Mar. 30, 2025). Fifty-two of these bills passed in seventeen states; an additional four were successfully vetoed after being passed. *What Anti-Trans Bills Passed in 2024?*, TRANS LEGIS. TRACKER, <https://translegislation.com/bills/2024/passed> (last visited Mar. 30, 2025).

3. Since taking office, Donald Trump has signed multiple executive orders targeting trans people. See, e.g., Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025) (“[M]y administration will . . . us[e] . . . language and policies that recognize women are biologically female, and men are biologically male.”); Exec. Order No. 14,183, 90 Fed. Reg. 8757 (Jan. 27, 2025) (barring trans soldiers from serving in the military).

4. See Christian N. Thoroughgood et al., *Creating a Trans-Inclusive Workplace*, HARV. BUS. REV., Mar.–Apr. 2020, at 114, 114–23.

5. For example, as of January 1, 2025, it is impossible for public employers to comply with both EEOC guidance and state law in Florida and Utah. Compare *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015) (“[W]here, as here, a transgender female has notified her employer that she has begun living and working full-time as a woman, the agency must allow her access to the women’s restrooms.”), and *Sexual Orientation and Gender Identity (SOGI) Discrimination*, U.S. EQUAL EMP. OPPORTUNITY

legislation does not pose an explicit restriction on trans employees, vaguely written laws, broadly worded court decisions, or the intersection of a facially-neutral law with anti-trans policies may create additional challenges—*Green v. Finkelstein* created such a challenge.

When the Eleventh Circuit heard and decided *Green v. Finkelstein*, it analyzed baseless, sometimes false, comments by Broward County Assistant Public Defender, Ruby Green, pertaining to the Public Defender, Howard Finkelstein, during her campaign for election to the Public Defender position.<sup>6</sup> After Green's unsuccessful campaign ended, Finkelstein terminated her employment, citing to her comments as unprofessional and disruptive to the office environment.<sup>7</sup> Green sued, alleging her termination was unlawful retaliation for exercising her First Amendment rights.<sup>8</sup>

As with all First Amendment retaliation challenges by public employees, the court analyzed Green's claim under the *Pickering* test.<sup>9</sup> Under this test, Green was required to show "(1) [her] speech was on a matter of public concern made as a citizen, (2) [her] free speech interest outweigh[ed] [Finkelstein's] interest in efficiently executing the [Public Defender's Office's] objective, and (3) [her] speech played a substantial role in" her termination.<sup>10</sup>

Predictably, the court found that Green's baseless, and often false, negative comments about Finkelstein were not protected

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COMM'N, <https://web.archive.org/web/20250114215321/https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination> (last visited Mar. 30, 2025) ("The Commission has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity."), with FLA. STAT. § 553.865 (2024) (criminalizing entering a restroom that does not align with one's sex assigned at birth in a public building, if they refuse to leave when asked to do so), and UTAH CODE ANN. § 63G-31-302 (LexisNexis 2024) (criminalizing entering a changing room in a publicly owned facility that does not align with one's sex assigned at birth, unless the individual has surgically transitioned and legally changed the sex on the individual's birth certificate).

6. See *Green v. Finkelstein*, 73 F.4th 1258, 1261–62 (11th Cir. 2023). Green's comments included that Finkelstein did not work a lot, that he used drugs, and included insinuations that Finkelstein was a racist. *Id.*

7. *Id.* at 1262.

8. *Id.*

9. *Id.* at 1263 (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968)).

10. Caleb Spano, Digest, *Green v. Finkelstein*, 73 F.4th 1258 (11th Cir. 2023), 53 STETSON L. REV. 784, 785 (2024) (summarizing the test applied in *Green*); see also *Green*, 73 F.4th at 1263.

speech under the First Amendment.<sup>11</sup> While Green's speech was on a matter of public concern and made as a citizen, and her speech was the cause of her termination, the court held that Finkelstein's "interest in effective management of a public service" (the Public Defender's Office) outweighed Green's political speech.<sup>12</sup>

In finding that Green was unable to meet the second requirement of the *Pickering* test, the Eleventh Circuit addressed two points that weighed in favor of Finkelstein's interest in effective office management.<sup>13</sup> First, the court noted that Green's comments were largely "baseless, unfounded, or demonstrably false attacks on Finkelstein," which "should be afforded little—if any—weight under *Pickering*."<sup>14</sup> Second, the court noted that Green was a lawyer in the Public Defender's Office, which constituted a position of trust, and when she made such disparaging and harsh criticisms of office management, she lost that trust.<sup>15</sup>

Ultimately, the court held that a public "employer's interest in effective management outweighs the employee's interest [in speech] when the employee's [speech is] likely to frustrate the employer's mission."<sup>16</sup> While few would argue that Green's baseless or false statements should have been protected speech,<sup>17</sup> by painting with broad strokes, the Eleventh Circuit inadvertently created precedent that can be weaponized against trans public employees in states where they already face uphill battles to be themselves.<sup>18</sup>

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11. *Green*, 73 F.4th at 1267.

12. *Id.* at 1268–69; *see also* Spano, *supra* note 10, at 786.

13. *Green*, 73 F.4th at 1267–68.

14. *Id.* at 1267.

15. *Id.* at 1268. A position of trust is generally one where "the pertinent employee helps make policy, handles confidential information or must speak or act—for others to see—on the employer's behalf." *Id.* (citing *Shahar v. Bowers*, 114 F.3d 1097, 1103–04 (11th Cir. 1997)).

16. *Id.* at 1261.

17. *See id.* at 1267 and the cases cited therein for a more detailed analysis of First Amendment protection, or lack thereof, for false statements by public employees in political contexts.

18. One might argue that the holding of *Green* is actually quite narrow since it takes Green's position of trust into consideration and, thus, federal, state, or local governments would only apply the holding to attorneys or other professionals who handle confidential information or speak for the government agency. First, this argument ignores a fundamental part of American jurisprudence: when faced with new challenges or unknown legal questions, courts routinely analogize to what they have previously held or decided, something the Eleventh Circuit itself did when analyzing whether Green's statements were afforded First Amendment protection. *See id.* at 1265 ("Although no direct analog exists in

As anti-trans legislation continues to become more common, with some states attempting to pass legislation creating state policy that “a person’s sex is an immutable biological trait and that it is false to ascribe to a person a pronoun that does not correspond to such person’s sex,”<sup>19</sup> fear of and violence against trans people increases.<sup>20</sup> As a consequence of the politicization of trans identities, anti-trans legislation, and the resulting fear of and violence against trans people, the mere existence of trans employees could be interpreted as “disruptive” to the workplace. Whether and to what extent one’s gender expression<sup>21</sup> might be protected speech is undetermined and unlikely to be held to be protected speech in the coming years;<sup>22</sup> however, trans speech is not limited to an individual’s gender expression.

A trans employee might speak about how the state or local government’s policies harm them as a trans person.<sup>23</sup> Alternatively, a trans employee might speak about how their coworkers misgendering or deadnaming them creates a hostile work environment.<sup>24</sup> Each of these examples would constitute protected speech, since they relate to issues of political or social

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our precedents, we see no reason why statements made during an interview on a publicly disseminated podcast would not be afforded First Amendment protection. . . . Appearing on a podcast is the modern-day equivalent of the letter-to-the-editor that the Supreme Court analyzed in *Pickering*.”) (citation omitted). Further, it ignores that trans public defenders and trans public employees exist—a firearm that kills one is no less a murder weapon than a firearm that kills hundreds.

19. See, e.g., H.B. 599, 2024 Leg., Reg. Sess. (Fla. 2024).

20. See Nicole Narea & Fabiola Cineas, *The GOP’s Coordinated National Campaign Against Trans Rights, Explained*, VOX (Apr. 6, 2023, 3:50 PM), <https://www.vox.com/politics/23631262/trans-bills-republican-state-legislatures>; *The Toll of America’s Anti-Trans War*, 19TH (Aug. 26, 2024, 6:00 AM), <https://19thnews.org/2024/08/the-toll-of-americas-anti-trans-war-series/>.

21. Gender expression refers to how one presents themselves and might include hair styles, clothing, wearing make-up, or painting one’s fingernails. See Wamsley, *supra* note 1.

22. For an in-depth analysis of gender expression as First Amendment protected speech, see Charlie Ferguson, Comment, *We’re All Born Naked and the Rest is Speech: Gender Expression and the First Amendment*, 172 U. PA. L. REV. 829 (2024).

23. Both empirical data and anecdotal accounts from trans individuals show that anti-trans legislation directly and negatively impacts trans people. See EMILY GREYTAK, THE IMPACTS OF ANTI-TRANSGENDER LAWS AND POLICIES: EVIDENCE FROM EMPIRICAL RESEARCH 3–5, 9–10, 15 (2024), <https://www.aclu.org/publications/the-impacts-of-anti-transgender-laws-and-policies-evidence-from-empirical-research>.

24. “Misgender” means to refer to an individual using a pronoun or title that does not align with the individual’s gender identity; both transgender and cisgender individuals can be misgendered. See Zawn Villines, *Misgendering: Why It Matters, and Why It Is Harmful*, MED. NEWS TODAY (July 7, 2023), <https://www.medicalnewstoday.com/articles/misgendering>. In this context, “deadname” means to refer to a trans individual by the name they were given at birth that they no longer use. See Taylor Koles, *The Semantics of Deadnames*, 181 PHIL. STUDS. 715, 715 (2024).

concern, that would implicate the Eleventh Circuit's holding from *Green*. Under the broadly worded holding of *Green*, each of these examples would allow a supervisor to terminate a trans employee's public employment, if the supervisor *believed* that the trans employee's comments would cause disruption to the office space.<sup>25</sup> In states like Florida, Idaho, and Utah, where anti-trans rhetoric is rampant, it is unlikely that a supervisor would not be able to justify their belief that the trans employee's speech would disrupt the workplace and disrupt the employer's mission. In essence, this creates a work environment where trans public employees must exercise extreme care in what they say about their experiences at work, to whom they say it, and in what context, or they risk losing their jobs.<sup>26</sup>

This Article does not propose a solution, nor does it intend to criticize the holding in *Green v. Finkelstein* or take any political stance, beyond advocating for the protection of queer employees. Rather, this Article intends to highlight how facially neutral caselaw can easily be weaponized by governments with anti-LGBTQ agendas to target LGBTQ employees by examining *Green's* inadvertent consequences on trans public employees.

Each trans person working in the public sector of a state where anti-trans bills are being constantly introduced and passed will have to decide whether to be extremely sensitive and accommodating to the policies and rhetoric that targets their very existence or to risk their job. Trans people (and parents of trans kids) living in states with anti-trans legislation have grappled with, and continue to grapple with, the idea of leaving their homes and moving to states without anti-trans laws and where state law expands protections for trans people.<sup>27</sup> For others, leaving their

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25. The Eleventh Circuit explicitly rejected *Green's* argument that her comments did not actually disrupt the office environment, citing to caselaw for the proposition and highlighting "[t]he obvious disruptive potential of *Green's* statements [and] the fact that *Finkelstein's* decision to terminate *Green* was based on these potential disruptions" in supporting its conclusion "that the government's interest outweigh[ed] *Green's*" interest in her speech. *Green v. Finkelstein*, 73 F.4th 1258, 1268 (11th Cir. 2023).

26. Whether and to what extent state whistleblower acts or Title VII's retaliation prohibition would provide protection under these circumstances is outside the scope of this Article. Requirements and caselaw under state public whistleblower acts vary by state, and the current administration has expressed reluctance towards Title VII protecting trans individuals. See Narea & Cineas *supra* note 20; *Fact Sheet: Donald Trump on LGBTQ Issues: Transgender Americans*, GLAAD (Aug. 20, 2024), <https://glaad.org/fact-sheet-trump-transgender/>.

27. See, e.g., Stephanie Colombini, *As Conservative States Target Trans Rights, a Florida Teen Flees for a Better Life*, NPR (May 11, 2023, 4:20 PM), <https://www.npr.org/>

home isn't an option; finances, family, work, community, and hundreds of other factors may prevent a trans person from leaving a state where anti-trans policies are common. Some trans people do not *want* to leave states with anti-trans policies, simply because it's their home.

Regardless of anti-trans legislation, the weaponization of facially neutral decisions, or First Amendment jurisprudence, one thing is certain: anti-queer policies cannot erase us, and we will not be silenced.

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sections/health-shots/2023/05/11/1172589936/as-conservative-states-target-trans-rights-a-florida-teen-flees-for-a-better-lif; Annie Connell-Bryan et al., *Conservative States Are Blocking Trans Medical Care. Families Are Fleeing.*, POLITICO (Nov. 27, 2022, 1:02 PM), <https://www.politico.com/news/2022/11/27/trans-medical-care-red-states-families-00064394>.