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POLITICS IN THE WORKPLACE

IN A HEATED ELECTION, DISCUSSIONS CAN CROSS THE LINE INTO HOSTILE WORK ENVIRONMENT CLAIMS

By Robert Hellner, Heather Hili, and Jeffrey Koonankeil

The concept of "free speech" is as American as apple pie. However, any employment litigator or human resources professional can tell you that free speech and what is appropriate in the workplace are very different concepts. In this presidential election year, where the rhetoric from both parties is more polarized than ever, our understandings of free speech and appropriate workplace conversations are beginning to collide. Employers and risk managers need to take heed and ensure that political discussions do not cross the line into potential hostile work environment claims.

What's Covered?

The 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and the National Labor Relations Act all restrict employment actions, such as hiring or firing, that are based on race, religion, ethnicity, sex, age, and other protected categories. These laws also prohibit hostile work environments for those within a protected class. There is little doubt that employers that fail to address hostilities within the workplace that offend a protected class are risking liability.

Employers, however, often believe that all speech concerning political issues is protected. It is not. Take, for instance, the scenario in which employee Richard is discussing with another employee, Linda, the details of one of Donald Trump's speeches, including Trump's suggestion to restrict access for Muslims coming into the U.S. While Richard and Linda—and even their employer—may consider this political speech and, thus, entitled to some form of protection, they would be incorrect.

Religious affiliation is a protected class under federal law. Conceivably, then, another employee overhearing the discussion of restricting access to Muslims entering the U.S. could be offended. Whether that offense rises to the level of a hostile work environment under the law is a difficult question, one that requires a consideration of the tone of the conversation, prior comments made by the fellow employees, and perceived prior hostilities. The fact remains, however, that many employees and their employers mistakenly will believe that such potentially offensive conversations are somehow protected.

Finding Balance

Employers need to remember that just because conversations within the workplace may concern political issues raised by the presidential candidates this year, those issues may be perceived as offensive to employees within a protected class. So what can employers do?

First, employers must understand that political speech within the workplace is not in and of itself protected. Federal, state, and local antidiscrimination and hostile work environment laws still apply to conversations within the workplace, even if those conversations arise from the current political discourse. In other words, the political theme of a conversation will not insulate a discriminatory remark made in conjunction with the same.

Second, employers must engage employees earlier rather than later to ensure they understand what is appropriate political discourse within the workplace and what is not. Employers need to

ensure that employees always remain sensitive and respectful of protected classes.

Third, regardless of the First Amendment and free speech concerns, employers must remember that certain political activities within the workplace are protected and cannot be prohibited in any fashion. Notably, in cases like *Bland v. Roberts*, federal courts have confirmed that political speech is "entitled to the highest level of protection."

Such protections are further evidenced within the private sector. For instance, pursuant to the National Labor Relations Act, private employers cannot prohibit discussions about workplace conditions, or what are commonly referred to as concerted activity among their employees. Further, private employers must be careful so as not to abridge protected unionizing activities. For example, private employers cannot prohibit labor union insignia on employee clothing.

Private employers also cannot abridge the right of employees to complain about discriminatory conduct, lest they risk a retaliation claim. Examples of potential issues abound. Take, for instance, an employee who is offended by a comment made by a supervisor about the gender of one of the two lead presidential candidates. Were that employee to complain about the comment made by the supervisor, that complaint would be a protected activity.

Finally, private employers must be aware of the laws in a number of states, counties, and cities that prohibit employers from interfering with certain employee political activities. For example, in Oregon, employers are prohibited from threatening to fire employees in order to influence the way they vote.

Don't Forget Facebook

Social media only compounds the risks for employers. Many employees now interact outside of work via social media sites like Facebook and Twitter, thus intertwining their personal political opinions with their relationships in the workplace. In fact, according to William A. Herbert's research paper "Can't Escape from the Memory: Social Media and Public Sector Labor Law," the successful presidential campaigns of Barack Obama can be attributed, in part, to the masterful use of social media and other technologies. Courts are cognizant of this trend and even recognized in *Bland* by citing *City of Ladue v. Gilleo* that "liking a political candidate's campaign page communicates the user's approval of the candidate and supports the campaign by associating the user with it. In this way, it is the internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech."

This use of social media is important, as some states afford employees protections that prohibit private employers from taking adverse employment actions against employees for their political activities outside of the workplace. However, these same political activities may be cause for offense to other employees within protected classes.

Employers also should be aware of state laws governing employers in situations where the employer might be considered a joint employer with a public entity. In New York, for example, New York Labor Law Section 201-d(2)(a) explicitly prohibits a public employer from discriminating or retaliating against an employee because of "an individual's political activities outside of working hours, off of the employer's premises, and without use of the employer's equipment or other property, if such activities are legal."

Knowledge of the applicable laws concerning protected speech, political activities, and antidiscrimination—and the overlap between these laws—will become increasingly important and relevant as Election Day approaches. Therefore, employers must be vigilant and straightforward with their employees in the expectation that, regardless of the current political discourse, speech that harasses or discriminates against protected classes will not be tolerated. As political discourse grows more intense in the months to come, employers need to be more aware of potential hostilities in the workplace. CM

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