

Political Speech Versus Title VII – Which Trumps Which?

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With the 2016 presidential election just a few months away, employers across the country are experiencing more political speech voiced by their employees, both at work and off duty. In a normal election year, this would not raise concern. However, given the controversial rhetoric defining the 2016 election cycle, employers are faced with something of a quandary when employees voice support for candidates with extreme views. On the other side of the same coin, employees have become disgruntled over company management openly backing specific candidates. This concern is not merely hypothetical. Recently, the CEO of Intel canceled a candidate's fundraiser after an outcry from within his company ranks.

Employees are not shy about voicing their political views outside of the workplace and particularly on social media platforms. While this activity may take place after work hours, the chances for coworkers to become offended by retweets or Facebook memes are likely to increase over the coming months. As the election nears, the presence of political bumper stickers, T-shirts, hats and other campaign paraphernalia being displayed in company parking lots and in the workplace will likely increase too, initiating more political rhetoric among employees.

A Career Builder poll conducted during the 2014 mid-term election found that while 42 percent of respondents avoided talking politics in the workplace, 44 percent said they talk about it but shut down the conversation when it gets heated. The remaining 14 percent said they engage in lively political debates at work. 23 percent indicated that political discussions at work had led to heated work exchanges or fights with a work colleague. But these statistics reflect a political environment prior to the current election cycle, when candidates did not make comments bearing on one's protected status.

Coupled with this is the notion that many private sector employees think that they have First Amendment rights to free speech in the workplace. While public sector employees may have such rights, those in the private sector don't; the First Amendment only applies to government restrictions on speech, so private sector employers may tamp down political expressions in the workplace. And, there may be good reasons for doing so.

An employee's (or even worse, a supervisor's) political endorsement may offend employees who fall within various minority groups, giving rise to a hostile work environment claim under Title VII. Political discussions can easily turn into heated, confrontational debates that quickly become personal. Thus, most employers would be well-advised to take action during this election cycle, even if they had not



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previously considered this issue, and particularly, equip management who work directly with the workforce with the tools to disarm and redirect heated workplace discussion and conduct.

Regardless of a political affiliation or personal worldview, employers have obligations under Title VII and state laws to maintain a workplace free of sexual, racial, religious and ethnic hostility or harassment. The same is prohibited as to disability-based harassment under the Americans with Disabilities Act and the Age Discrimination in Employment Act prohibits ageist remarks.

But this presidential election brings forth a new and stealthy medium of hostility and harassment. Employees who voice support in the workplace for a candidate's remarks related to protected classes may expose the company to liability under federal and state nondiscrimination and anti-harassment laws. For example, while it would be easy for management to tell an employee to stop wearing a political shirt containing curse words, the tougher decision is whether to ask an employee to stop wearing a "Make America Great Again" hat or an "I'm for Hillary" button, since neither directly insults, but may stand for something beyond the written phrase.

Employers may be well-advised to implement dress code policies that prohibit the wearing or display of any political endorsements at work, and this policy must be evenhandedly enforced. Another wrinkle is that under the National Labor Relations Act employers typically cannot prohibit employees from wearing union paraphernalia at work. If a worker is wearing a "SEIU for Hillary" button, employers in those instances should discuss their concerns and seek a compromise with the union. But outright removal of such a button could result in an unfair labor practice charge.

The need to curb political speech is particularly critical with respect to managers and supervisors. By openly supporting a candidate, a supervisor may, even unintentionally, send a message to the workforce of support for all of that candidate's views. This support, whether voiced at work, on social media or otherwise outside of the workplace, could come back to haunt employers in litigation over claims under Title VII.

Across the country, employees alleging discrimination or harassment have already pointed to derogatory remarks and racial-slurs made by co-workers and supervisors directed at President Barack Obama as circumstantial evidence in Title VII lawsuits. Because isolated or sporadic expressions of political support tainted with racial or sexist undertones do not alone constitute actionable harassment, such statements typically must be combined with other statements or conduct to create an overall mosaic of evidence suggesting an unlawful animus. However, such evidence could be used to bolster arguments in harassment/hostile work environment and disparate treatment cases.

To further complicate matters, various jurisdictions have laws which protect private sector employees from discrimination and retaliation based on political beliefs or speech. California, New York, Washington, D.C., and some cities have enacted such laws. Some other states (Colorado and North Dakota) prohibit discrimination based on lawful conduct outside of work, which could encompass political activity outside the workplace. In other states, such as Indiana, employers may be able to discriminate or retaliate against an employee on the basis of political belief, but employers are prohibited from acting in a way intended or calculated to influence the political opinions or actions of employees.

From this, it is clear that managers and supervisors should not be imposing their political opinions or views on subordinates (and they can, and should, be instructed not to do so). Further, employers must prohibit offensive dialogue about women, minorities and other protected groups even if it is in the

context of politics or endorsement of a particular candidate. In short, a politically neutral work environment is highly advisable in this climate.

Recommended action steps include retraining your employees, particularly your managers, about the requirements of Title VII and how those obligations may conflict with their individual political beliefs in this election cycle. Companies should remind employees of the need to maintain and preserve a culture of civility and respect for all employees, as well as customers and the public. Supervisors should exemplify a culture of tolerance, respect and professionalism.

Remind employees, particularly management, that what they post on social media can be seen by their co-workers and by others and, can affect their workplace interactions with co-workers. So, retweeting a candidate's insulting remarks on a particular group, making inflammatory posts on public blogs, or engaging in a rant that has political, racial or ethnic overtones may have consequences within the workplace. Private sector employers may wish to communicate that while the company supports everyone's right to vote and engage in the political process, they must do so in an environment of respect and ideally leave such discussion for nonwork time.

In short, it will be important for all employers in the coming months to remind employees, especially management, that inclusion and respect trump exclusion and disrespect.

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