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A Quarterly Legal Update for Business
December 1994

Limits to Expression and Conduct in the Workplace

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The First Amendment's free speech guarantee goes a long way, but not far enough to protect employees who harass co-workers, do not follow dress codes, spread lies about the company or simply complain too much. Today's employer needs to know how much control it lawfully may exercise over language and conduct in the work place. In this first installment of a two part series, we will provide a general overview of the First Amendment and review the employer's prerogative to establish rules to comply with Title VII of the Civil Rights Act of 1964 (see related article on page 3).

The First Amendment: Public v. Private Employer

Although many people assume the First Amendment allows an individual to express himself as he chooses as long as it does not directly threaten anyone with immediate bodily harm, not all employees are afforded this degree of freedom.

The First Amendment only guarantees protection against *governmental* interference with expression. Thus, if an individual is employed by a municipal fire department, a public school system, a town or city, or the state or federal government, certain types of speech will indeed be protected. Before that speech will be protected, however, its content must be of public concern and the individual's First Amendment right must outweigh the interest of the government, as an employer, in conducting an orderly and effective workplace.

"Public concern" does not mean that the speech must be for the public good; rather, it must be related to a subject that is of general concern to the public. For example, comments by public employees about politics, even if extreme, are likely to be protected. On the other hand, a public employee's criticism about grievance procedures and other internal office practices is not.

Different rules apply to private, or non-governmental, employees because they do not have First Amendment guarantees in the workplace. The conduct and speech of private employers and employees is governed largely by Title VII of the Civil Rights Act of 1964 (see page 3 for a more complete explanation of the law).

As a practical matter, this statute in many ways requires a prudent employer to develop, implement and enforce workplace rules regarding employee speech and behavior. It is in this way that the language and conduct of many private employees is influenced.

The Employer Should Establish Workplace Rules

Although a private employer may not terminate an employee in bad faith, for reasons that contravene public policy or in violation of Title VII, it does have considerable discretion in controlling employees' conduct in the workplace. Failure to prohibit dis-

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criminatory expression -- be it speech or conduct -- may result in liability for the employer.

An employee handbook or manual is one way to inform employees about such workplace rules. Most employment experts strongly recommend that employers adopt and enforce policies prohibiting all types of discriminatory harassment, including discriminatory expression. Be aware, however, that once an employer creates such rules, it is legally obligated to follow them.

To avoid a sexual harassment claim, a private employer is well advised to clearly prohibit the reading or display of sexually suggestive or explicit materials in the lunchrooms, mailrooms or other common areas in the workplace . Employers should be aware that placement of a potentially offensive poster or cartoon in a private locker or on an individual's desk facing the owner of the material, might also lead to a claim.

It would be prudent for an employer simply to ban such materials throughout the workplace. While provocative pictures and posters typically are only *part* of a sexual harassment claim, they alone could give rise to a claim if a judge or jury found that they created a hostile work environment. They could be used at trial to demonstrate an employer's insensitivity to sexual harassment.

Though sexual harassment has received considerable attention of late, it is important to remember that claims of discrimination and harassment under Title VII may be premised on race, religion and national origin and employers should adopt prohibitions encompassing these discriminatory bases. Rest assured, a private employee has no "First Amendment right" to engage in conduct that exposes his or her employer to Title VII liability, including punitive damages.

Dress Codes

Sex discrimination. While an employer has considerable latitude to require its employees to follow a dress code, there are limits. Sex discrimination may result if an employer requires its female employees to dress in a certain manner that does not apply to male employees and thereby is demeaning to women. For instance, requiring female employees to wear a uniform, but allowing men in comparable job positions to dress in customary business attire would be improper. Similarly, if the uniform subjects the employee to harassment because it is too provocative, the employer could be violating Title VII.

It is important to understand that an employer is not required to treat men and women exactly alike. As long as customary grooming regulations apply to both sexes, and one sex is not more burdened by the rule than the other, the actual conditions imposed may vary by gender.

Dress as Related to Race and Religion. Dress codes that prohibit certain types of dress or grooming reflective of an employee's national origin (a dreadlocks hairstyle or a beard) or part of an employee's religious tradition (a female employee's refusal to wear trousers or a Jewish man's refusal to remove a yarmulke) may well lead to a claim unless they meet the business necessity test outlined below.

Dress codes that apply unequally to men and women or that clash with an employee's national origin or religion generally will be found improper unless there is a business necessity for the specific requirements at issue, (i.e. facial hair and hair length restrictions may make sense when done for safety or sanitary reasons or it imposed by a manufacturer for employe safety reasons). In the absence of a business necessity the result may be more troubling.