



Implicit Bias Gone Explicit: Managing the Public Workplace in a Changing Environment

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Agenda

- Uncivil Behavior is On the Rise
- Legal Parameters of Regulating Employee Conduct and Speech
- Case Studies
- Concrete Actions to Ensure Civility in the Workplace

Civility on the Decline

October 2016 Zogby Survey

Percentage of people who considered it unacceptable to shout over someone you disagree with during an argument:

In 2010: 86%

In 2016: 65%

October 2016 Zogby Survey

Percentage of people who considered it unacceptable to question someone's patriotism because they have a different opinion than yours:

In 2010: 73%

In 2016: 52%

October 2016 Zogby Survey

Percentage of people who considered it unacceptable to comment on someone's race or ethnicity in a political engagement:

In 2010: 89%

In 2016: 69%

Hate Crimes Are Increasing

- Hate crimes rose nationwide from 5,479 in 2014 to 5,850 in 2015. The biggest increase was in anti-Muslim hate crimes, which rose by 67% in 2015. Source: FBI.
- Southern Poverty Law Center counted 1,094 reports of harassment and intimidation between 11-9-16 and 12-12-16.

Scientific Research

- When people are exposed to rude behavior in any form (even if they are not the target), it affects their judgment and decision making.
- People are more likely to express explicit bias if they believe the bias is socially acceptable.

Legal Parameters of Regulating Employee Conduct and Speech

Applicable Laws

- Anti-Discrimination Laws
- California Unruh Act
- California Labor Code
- First Amendment
- Bullying and Abusive Conduct

Anti-Discrimination Laws

- Prohibit taking adverse action against employee (discrimination), or creating hostile work environment for employee (harassment), based on protected status.

Protected Statuses

- Race, Color
- National Origin, Ancestry
- Religion
- Disability, Medical Condition
- Marital Status
- Age
- Gender, Sexual Orientation
- Genetic Information

Elements of Illegal Harassment

- Harassing Conduct
- Based on Protected Status
- Objectively Offensive
- Subjectively Offensive
- Severe or Pervasive

Zero-Tolerance Harassment Policy

While the law requires harassment to reach a certain threshold to be actionable (severe or pervasive), an agency may (and should) have a “zero tolerance” anti-harassment policy that allows an agency to discipline employees for even just one instance of harassing conduct.

California Unruh Act

- All persons have a “right to be free from any violence, or intimidation by threat of violence...because of political affiliation” or other enumerated protected statuses such as sex, sexual orientation, race religion, national origin or disability.

California Labor Code § 1101

- An employer may not have a policy that forbids or prevents employees from “engaging in or participating in politics.”
- An employer is prohibited from “controlling, directing, or tending to control or direct the political activities or affiliations of employees.”

First Amendment

- Public employers generally cannot stifle the First Amendment rights their employees would otherwise enjoy as citizens in commenting on matters of public interest, and yet....
- Public employers have an interest in the effective and efficient fulfillment of their responsibilities.
 - *Pickering v. Board of Education*, 391 U.S. 563 (1968).

First Amendment Analysis

- Did employee speak on matter of public concern?
- Did employee speak as a private citizen or as public employee as part of job duties?
- Was the protected speech a substantial or motivating factor in an adverse action?

First Amendment Analysis

- Did public employer's interests outweigh the employee's free speech rights?
- Would the public employer have taken the adverse employment action even absent the protected speech?

Bullying

- Workplace bullying is not illegal.
- In 2014, AB 2503 required employers to add to anti-harassment training a section about preventing “abusive conduct.”

Bullying

- Abusive conduct is defined (in AB 2503) as conduct “with malice, that a reasonable person would find hostile, offensive and unrelated to the employer’s legitimate business interests.”

Putting it into Practice

Dept. of Corrections v. Wallace

- California Court of Appeal decision involving California Department of Corrections and Rehabilitation (CDCR) employee making comments criticizing CDCR's Affirmative Action policies.
 - 59 Cal.App.4th 131 (1997)

Case Study – Facebook Posting

Employees Juan and Dwayne are peers at work, and Facebook friends. Juan, who was born in Mexico, complains to you about Dwayne's Facebook postings which contain racial slurs against Hispanics.

What action can you take?

Case Study-Supreme Court

On the day that Neil Gorsuch was confirmed as a U.S. Supreme Court Justice, attorneys in the City Attorney's office start an email thread (on City email) decrying his appointment as "tragic," and "a rip-off."

What can or should the City do?

Case Study – Black Lives Matter

The Police Chief “likes” her friend’s Facebook posting in which the friend asserts that “ALL Lives Matter, not just Black Lives.” This happens a few days after protests in the City about the Police Department’s shooting of an African-American motorist.

What can or should the City do?

Case Study – Muslims

Ashley and Charlotte are coworkers in the City, good friends, and attend the same Christian church. Within earshot of Jamila, who wears the Hijab, they agree that the United States would be a safer place if all Muslim immigrants were banned.

What can or should the City do?

Case Study –Argument

City employees Fred and Ethel get into an argument in the cafeteria while others are present. After Ethel expressed her opinion that men simply don't make good secretaries, Fred retorted, "Right, and women can't lead."

What can or should the City do?

Case Study – “My culture”

Marco, who is Latino, has been telling his co-workers that he voted for Trump because “my culture is very dominant, and it’s causing problems,” and if something isn’t done, “you’re gonna have taco trucks on every corner.”

What can or should the City do?

Action Plan

Create a Culture of Civility

- Leaders should model civility.
- Cities should establish and enforce workplace conduct rules requiring courtesy, dignity and respect towards others.
 - Conduct that appears to be “low grade” needs to be stopped immediately and not tolerated.

Create a Culture of Civility

- Most misconduct will be covered by either the City's anti-discrimination policy, anti-harassment policy, or policies requiring courteous treatment of others.
- When considering discipline involving arguably protected speech, conduct a legal analysis.

Create a Culture of Civility

- Managers should hold subordinates accountable for the “soft skills” of effective interpersonal relations.
 - These skills should be discussed in detail in performance evaluations, especially where it’s an area for improvement.

Thank You

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