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Limits to Expression and Conduct in the Workplace (part 2)

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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 final installment of a two part series, we will provide a general overview of the extent to which an employer may lawfully limit an employee's speech or conduct.

Title VII

As discussed in the last issue, an employer must make certain that speech, conduct and dress codes in the workplace do not violate Title VII, the federal law making it illegal for an employer to discriminate on the basis of race, color, sex, national origin and religion, and corresponding state anti-discrimination statutes.

What about speech and conduct that an employer views as undesirable but which does not violate Title VII? For example, what may an employer do about an employee who publicly claims that electronic components manufactured by the company are over priced? That the company's repairs are of poor quality? What about the employee who is a chronic complainer about the working conditions provided by the employer? May an employer require its employees to speak only English on the job?

"Complaint" Speech

Although a public employee may speak of his or her employer in a disparaging way and be protected by the First Amendment, if the speech is of public concern, a private employee has considerably less protection. Thus, while a public school teacher may not be dismissed for writing a letter to the editor of a newspaper criticizing the school board, a private employee may be discharged for stating that the product he or she produces is second-rate.

As a general rule, a private employer must distinguish between two types of employee "complaint" speech. The first is where the employee simply bad-mouths the company or objects to company policy or management. For example, may an employee voice an opinion that the department store for which he or she works has an unjust return policy or that its prices are inflated?

An employer in New Hampshire has considerable latitude in responding to comments of this nature as state and federal courts in New Hampshire have held that an employee's expression of disagreement with management is not an act that is protected as a matter of public policy and that discharging the employee because of this speech will not be second-guessed. Although New Hampshire courts have not gone this far, a Michigan court held that it was not

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unlawful for a company to dismiss an employee who disparaged a competitor's product.

Employers should be aware, however, that at least one court has said if an employee is disciplined or fired for criticizing his or her employer, the employee may sue for wrongful discharge (although this decision has been sharply criticized). Outside the political realm, however, an employer safely may take action against an employee for disparaging the company, its products or its policies.

If, on the other hand, the employee's speech involves complaints or comments regarding the terms and conditions of the workplace, an employer must not take action that is perceived to be a threat of termination. Under the federal National Labor Relations Act, it is unlawful to fire an employee for acting together with other employees to change, affect or discuss their working conditions.

The practical effect of this law is to protect groups of employees who, for example, are critical of the length of their coffee breaks, the color of their smocks or the manner in which they are paid. Note, however, that if only one employee speaks up about these issues, on behalf of him or herself and not a group, then that speech may *not* be protected and an employer may have more leeway in dealing with the employee. Before taking any action against either one employee opinion or complaint about working conditions, an employer must carefully evaluate whether the activity falls into a protected category.

The New Hampshire Whistleblowers' Protection Act, RSA 275-E:2, states that a private or public employee in New Hampshire may not be fired, demoted or discriminated against for reporting that the employer violated any law or for participating in an investigation that concerns an employer's potentially unlawful activities. Examples would include reporting theft by management employees to the police, notifying authorities of OSHA or environmental violations or contacting the Labor Department about wage and hour violations.

In order to gain the protection of the Act, the employee must first bring the alleged violation to the attention of the employer, unless the employee has reason to believe that the employer will not remedy the violation. Penalties for violation of the Whistleblowers' Act may include reinstatement, back pay, fringe benefits, seniority rights and injunctive relief. Also note that firing an employee for reporting illegal activity or safety problems would constitute an action for wrongful discharge.

English-Only Rules

Rules requiring employees to speak English-only while at work may be found to constitute unlawful discrimination based on national origin under Title VII. While the Equal Employment Opportunity Commission discourages such rules and in fact makes them illegal absent a business necessity, a federal court of appeals in California recently upheld a work rule requiring bilingual employees to speak only English while on the job.[1]

In that case, the employer produced poultry and meat products in the San Francisco area, and the president of the company testified that the English-only rule was implemented to promote racial harmony and enhance safety, since English speaking employees were distracted by Spanish while operating machinery. The English-only rule did not apply when employees were at lunch or on break.

Although the court never addressed the adequacy of the employer's "business necessity" defense, the dissenting opinion noted that a reason such as workplace safety would most likely be viewed as a business necessity. Therefore, if an employer desires to have an English-only workplace rule, it would be wise to consider carefully whether there is a bona fide business necessity.

Although one court has rejected the EEOC guidelines, it is unclear whether other courts will follow this case and find in favor of such rules.

[1] Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993), reh'g denied, 13 F. 3d 296 (1993), cert. denied, __ U.S. __, 1994 WL31891, (U.S., June 20, 1994).