

Religious Expression in the Municipal Workplace

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The Equal Employment Opportunity Commission (EEOC) on July 22, 2008, approved a new 94-page compliance manual on religious discrimination under Title VII of the 1964 Civil Rights Act. To supplement the new compliance manual, the EEOC issued a 10-page fact sheet in question- and-answer form on religious discrimination and Title VII.

In the fact sheet, the following question is raised which applies to municipalities: "How might First Amendment constitutional issues arise in Title VII religion cases?" The EEOC responded that "[t]he First Amendment religion and speech clauses ('Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech') protect individuals against restrictions imposed by the government, not by private entities, and therefore do not apply to rules imposed on private sector employees by their employers." According to the EEOC, "government employees' religious expression is protected by both the First Amendment and Title VII" citing to guidelines issued during President Clinton's term on religious exercise and religious expression in the federal workplace. An example given by the EEOC, would be a municipality contending that granting a requested religious accommodation would pose an undue hardship because it would constitute government endorsement of religion in violation of the Establishment Clause of the First Amendment.

The following federal workplace guidelines are helpful for municipalities to address employees' religious exercise and religious expression when the employees are acting in their personal capacity within the workplace and the public does not have regular exposure to the workplace.

Employees should be permitted to engage in private religious expression in personal work areas not regularly open to the public to the same extent that they may engage in non-religious private expression, subject to reasonable content and viewpoint-neutral standards and restrictions: such religious expression must be permitted so long as it does not interfere with the municipality's carrying out of its official responsibilities.

Employees should be permitted to engage in religious expression with fellow employees, to the same extent that they may engage in comparable non-religious private expression, subject to reasonable and content-mutual standards and restrictions: such expression should not be restricted so long as it does not interfere with workplace efficiency. Although municipalities are entitled to regulate such employee speech based on reasonable predictions of disruption, they should not restrict speech based on merely hypothetical concerns, having little basis in fact, that the speech will have a deleterious effect on workplace efficiency.

Employees are permitted to engage in religious expression directed at fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views, to the same extent as those employees may engage in comparable speech not involving religion. Some religions encourage adherents to spread the faith at every opportunity, a duty that can encompass the adherent's workplace. As a general matter, proselytizing is as entitled to constitutional protection as any other form of speech – as long as a reasonable observer would not interpret the expression as government endorsement of religion. Employees may urge a colleague to participate or not participate in the religious activities to the same extent that, consistent with concerns of workplace efficiency, they may urge their colleagues to engage in or refrain from other personal endeavors. But employees must refrain from such expression

when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome.

Where the public has access to the municipal workplace, all municipalities must be sensitive to the Establishment Clause's requirement that expression not create the reasonable impression that the municipality is sponsoring, endorsing, or inhibiting religion generally, or favoring or disfavoring a particular religion.

Consistent with its fully protected character, employee religious speech should be treated, within the municipal workplace, like other expression on issues of public concern: in a particular case, a municipality can discipline an employee for engaging in speech if the value of the speech is outweighed by the municipality's interest in promoting the efficiency of the public service it performs through its employee. Rules regulating employees' speech, like other rules regulating speech, must be carefully drawn by the municipality to avoid any unnecessary limiting or chilling of protected speech.

Editor's Note: This article is not intended to provide legal advice to our readers. Rather, this article is intended to alert our readers to new and developing issues and to provide some common sense answers to complex legal questions. Readers are urged to consult their own legal counsel or the author of this article if the reader wishes to obtain a specific legal opinion regarding how these legal standards may apply to their particular circumstances. The author of this article, Jerry L. Pigsley, can be contacted at 402/434-3000, or at Harding & Shultz, P.O. Box 82028, Lincoln, NE 68501-2028, or jpigsley@hslegalfirm.com.

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