

Client Alert
November 2016

Words Matter

By November 8, millions of Americans will have voted. As a law firm practicing in the public and private sector for more than three decades, we do not endorse candidates. However, given that much of our practice is in labor and employment and education, we feel that it is our responsibility to advise our clients about the legal consequences of some of the speech that is being used in this election.

This presidential election, from the beginning, has produced certain so-called “colorful” comments and ideas from some candidates. According to media outlets, as well as our own clients, some of these words and concepts are now being replicated in negative ways in workplaces and educational environments, not only in person but through emails, texts, and social media posts.

This brief alert reminds employers and schools how to address, from a legal perspective, inappropriate comments and ideas that may be dispersed in the workplace by electronic communication or otherwise.

It may be obvious to most of you that this language is not acceptable in the workplace, but the fact that it has entered into the national discourse makes it important to reinforce your anti-discrimination/harassment policies with your employees, contractors, and students. Below is a sampling of the words and ideas recently heard:

- People can be treated differently based on race, nationality, or religion;
- Women can be groped or touched in a sexual manner without consent;
- Mocking individuals with disabilities is permissible;
- Locker rooms are appropriate places to make sexual and sexist comments;
- Women should be judged on their size or appearance;
- Adopting policies that have a disproportionate impact on minorities is permissible;
- Individuals of a particular race or religion can be discriminated against and targeted;
- An individual’s nationality may affect his ability to impartially or effectively do his job.

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In the context of a school or workplace, any of the above could, depending on circumstances, rise to the level of unlawful harassment or discrimination in violation of the federal or state Constitution, Title VI, Title VII, Title IX and multiple other State and Federal Discrimination laws. If an employer or school knows or reasonably should know that comments like the ones above were made, it should take immediate and appropriate steps to investigate and determine what occurred. If harassment or discrimination occurred, the employer or school should take prompt and effective steps reasonably calculated to end the inappropriate behavior, prevent it from recurring, and to remedy any harm. Inaction could create a hostile work environment for everyone in our increasingly diverse workforces and schools.

Employers are reminded that workplace decorum is governed by a myriad of civil rights laws, the violation of which can carry serious consequences including personal liability, emotional distress, punitive damages, and attorneys' fees. In a climate where the hurling of insults and discriminatory comments are commonplace and threaten at times to unravel the fabric of civility, leaders need to set the "tone from the top" and make clear that illegal discrimination of any kind will not be tolerated in the workplace.

WORDS DO MATTER

This Alert has been drafted by Kier Wachterhauser, with the assistance of Arthur Murphy, Michael Maccaro, and Felicia Vasudevan. If you have any questions, please contact any of the above attorneys, or the attorney responsible for your account, or call (617) 479-5000.

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