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Dangerous Water Cooler Chatter: When Political Conversation at the Workplace Becomes Evidence of Discrimination

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There is possibly no more dangerous place in the office than the water cooler. It's the place where gossip is shared, where scenes of the prior night's episode of *The Office* or the *Dave Chappelle Show* are recited, word for word, and it's the place at times where politics is hotly debated. Further, while political discussions amongst employees can in and of themselves be problematic, they can also lead to liability for discrimination.

Take this year's two major candidates for the office of President of the United States. The Republican nominee, Senator John McCain, if elected, will take office at the age of 72. Meanwhile, the Democratic nominee Senator Barack Obama, is a black man with a Muslim-sounding name (Senator Obama is a Christian). Given these characteristics in particular, certain negative commentary could become the base upon which an employment

this topic?

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discrimination case is built.

How so? Consider the following scenario: Mr. Ali is a Muslim laborer who works for XYZ Company, a large, nonunion manufacturer with over 500 employees. Mr. Smith, Mr. Ali's immediate supervisor, is Christian. This fall, excited from just witnessing one of the presidential debates, Mr. Smith said to others at the office that he will not vote for Barack Obama because "He's a violent terrorist -- the name says it all." Mr. Ali responded by stating that not all Muslims and people with Muslim names are violent. Mr. Smith responds by rolling his eyes. Two weeks later, Mr. Smith fired Mr. Ali based upon a complaint that Mr. Ali threatened another employee with physical violence. Now, XYZ is defending Mr. Ali's Title VII religious discrimination claim.

Consider also this scenario: Mr. Jones is a 25-year old line supervisor for XYZ who, in that same conversation, says that he will not vote for John McCain because he does not believe someone of Senator McCain's age is fit to handle such a demanding position. Many of the employees that he supervises are also participating in this conversation, including Mr. Brown, who is 55 years old. A month prior, Mr. Jones placed Mr. Brown on provisional status due to work performance issues. Mr. Jones specifically noted that Mr. Brown was "too slow" on his Performance Improvement Plan. Three weeks after his water cooler comment, Mr. Jones terminated Mr. Brown for failure to improve his productivity. Mr. Jones subsequently filed a claim under the ADEA.

Do Mr. Smith's and Mr. Jones's proclamations negatively affect XYZ's ability to defend the respective discrimination claims? Absolutely. Such evidence would most likely be considered unlawful discrimination, substantially hindering XYZ's ability to prevail on summary judgment. The context in which Mr. Smith and Mr. Jones made their comments, along with their proximity to their subordinates' discharges, likely will prevent a trial court from finding that they were 'stray remarks' too isolated, remote, abstract or ambiguous to support a finding of discrimination.

Mr. Smith's belief that all Muslims are violent is evident from his water cooler comment. Mr. Jones' viewpoint regarding the capabilities of a person of a more advanced age is likewise evident from his water cooler comment. It is not unforeseeable that a jury might make the inferential leap to conclude that the supervisors' stereotypical beliefs provided the rationale for firing their employees.

In any year, political speech can present exposure for private employers. Political opinion is as varied as the number of people who hold them, and the passion with which it is held can be explosive. Unabated discussion of such matters may, at the very least, inhibit employer efforts to foster the atmosphere of respect and teamwork, and at worst, lead to physical confrontation between co-workers. Employers should understand the potential consequences of allowing political discussions at the jobsite in this environment of diverse candidates and issues because it may unwittingly involve animus based upon race, religion, or national origin.

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What to Do?

The best way for an employer to protect itself in this type of situation is to engage the supervisory staff and executives in training as to the importance of their non-work-related comments.

It is far more feasible to regulate and moderate the conversations of managers and supervisors than it is to implement and enforce a blanket ban on all political speech, which may cause serious morale problems and could, on its face, appear to be unreasonable.

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