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The GSH 60-Second Memo

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The Other Office Politics

By Matthew J. Feery, Esq.

Over the years, I have noticed that there are two general questions I receive when people find out I practice employment law. The first question is whether I am the person the asker of the question can call should she want to sue her employer. That always leads to the awkward response, "Well, probably not... um, I actually represent management side, so there's a better chance that I'm the one helping fire you. Want another beer?" The second question, which comes a bit later, usually follows the form of "Can I be fired [or not hired or not promoted] because of [random non-performance-based reason]." And the answer to that question typically takes the form, "Well, yeah. That's unfair, and your boss sounds like a jerk, but that's legal. Want another beer?"

Most people are familiar with the standard protected classes - race, sex, age, religion, etc. - but beyond that, many people feel that if something is unfair, then it must somehow be illegal. Yet that is often not the case, at least in employment law. You can be fired for a host of reasons in at-will employment, such as for being a Cubs fan (an option I'm thankful my employers have decided to forego) or for not inviting someone to your happy hour (something you would never do, of course, because you like everyone you work with). And, perhaps

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most pertinently these days, you can usually be fired for being of the "wrong" political affiliation (not your political affiliation - the other one).

I was reminded of this the other day when I received a text from a friend (a diehard Democrat) who said her boss (a diehard Republican) had just described President Obama in some rather unflattering terms. My friend let the comment slide rather than get into an argument with her boss over his views of President Obama's policies, in part because she was afraid she would lose her job. When I saw her later that day, she asked me what recourse she would have should her boss one day fire her simply for being a Democrat. This is not just an academic question. In the past several months, there have been several news stories about employees who claim they were fired for their political beliefs, including a waitress in Illinois who claims she was terminated for wearing a Tea Party bracelet during her shift.

The answer to my friend's question is that her hypothetical termination, if really just based on her political affiliation, is likely legal. Unlike federal or state government employees, private sector employees often have little recourse if they are fired for their political beliefs. Neither Title VII nor any other federal law governing the employment practices of private employers prohibits discrimination on the basis of political beliefs. And while some states, such as New York, do prohibit discrimination based on political beliefs or affiliation, many states, including Wisconsin, have no such prohibition. After the federal and state level, employees are left with city or county ordinances for protection, such as the City of Madison's Equal Opportunity Ordinance, which prohibits discrimination based on political beliefs, which it defines as "one's opinion, manifested in speech or association, concerning the social, economic and governmental structure of society and its institutions." Madison City Ordinances §39.03. And this discussion leaves aside those private employers who have a company-goal or agenda dedicated to a particular political issue or agenda, where the employer can argue that having employees of like-minded political affiliation is a benefit.

This is not to say that employers should make decisions based on an employee's political affiliation or turn a blind eye to any workplace harassment based on an employee's political affiliation. Claiming that an employment decision was based solely on political affiliation likely won't protect you from allegations that your offered reason is really just pretext for an illegal discriminatory animus, such as one based on race or sex. For example, a terminated employee who happens to be a social conservative and who expresses his views in a religious context could claim that his termination was based on his religion, not his politics. Moreover, employers should actively deal with any harassment in the workplace that is based on political affiliation. Not only does such harassment likely violate any well-written anti-harassment policy, but it also risks lowering employee morale and creating unnecessary strife. There is also the very real risk that you will face allegations that a supervisor's or coworker's political statements against a particular candidate or particular issue were, in reality, discriminatory statements based on race, sex, or another illegal

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factor.

It is perhaps inevitable that politics will be a common topic of discussion in your workplace in the months ahead, and civil discourse is good. But when that discourse stops being civil and turns into disagreement verging on argument and harassment, then it should be dealt with like any other employee issue. On the bright side, after the upcoming elections are over and the right side wins (your side, of course), this issue will once again subside for a few years until the next election or hot-button national discussion, and we can focus instead on disagreeing vehemently with coworkers over other topics, such as sports or the office thermostat.

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