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An Irony Between War And The Workplace

The world of politics often illuminates the chasm between what we consider acceptable in our society as opposed to our workplaces. For example, in the workplace, it is generally illegal for most employers to inquire about, scrutinize, or take action against employees because of their religion. In the political arena, however, religious beliefs are widely publicized, closely scrutinized, and frequently the basis for differentiating candidates. Likewise, an employee's age typically may not be considered in differentiating among employees, though age is often a concern in assessing a politician's qualifications. The recent flap over the comments of General Stanley McChrystal regarding President Obama's performance as Commander-in-Chief highlights another irony. Most people predicted, and accepted matter-of-factly, that General McChrystal would be fired from his position because of his criticism of his boss. This is ironic because so many employees believe that they can ignore or criticize their boss without fear of repercussion. More critically for employers, many supervisors apparently believe the same, and thus tolerate behavior and remarks far worse than what were attributed to General McChrystal.

The law in most states, including Maryland, is that employment is "at-will" unless the terms of the employment are governed by a contract. This means that an employer and an employee are free to terminate the employment relationship at any time and for any reason without notice. There are, of course, exceptions to this rule. First, an employee may not be terminated for a reason that violates fair employment statutes such as Title VII of the 1964 Civil Rights Act, the Age Discrimination and Employment Act, the Family Medical and Leave Act, the Americans With Disabilities Act, and any number of other similar EEO laws at the federal, state and local levels. This means that an employee generally cannot be fired, among other grounds, because of his or her sex, age, religion, national origin, or disability. Similarly, an employee may not be fired for a reason that contravenes a clear mandate of public policy (known as a wrongful discharge). Typically, such mandates of public policy are found in the Constitution and laws of a state. For example, in Maryland, an employee may not be fired for refusing to take a lie detector test, for filing a worker's compensation claim, for serving on a jury, or for refusing to commit a criminal act. Without attempting to articulate every exception to the employment at-will rule, it should be apparent that, as several commentators have observed, the rule is like Swiss cheese; full of holes.

Although Swiss cheese is known for its holes, it nevertheless has substance. The employment at-will rule, notwithstanding its exceptions, is likewise substantial. Thus, the reality is that employers enjoy nearly unfettered

discretion to terminate employees. But as Stan Lee (Spiderman) wrote, “With great power comes great responsibility.” Whether Lee was paraphrasing the Book of Luke or Franklin Roosevelt, he highlights that what can be done and what should be done are two distinct concepts, and employers should not misinterpret the ability to act lawfully as a recommendation to act cavalierly. Employers should treat their employees fairly, and, more importantly, should work to create the impression that employees are being treated fairly. This is because people act based on their perception of realty. Many historians have argued that the United States was born of the invalid perception that the colonies were being treated unfairly relative to the King’s subjects in England — the point being that whatever the truth of the situation, the colonies perceived their treatment to be unfair and acted accordingly. Employees who perceive they are being treated unfairly are less likely to be happy and productive and more likely to quit or sue based on their perceived mistreatment.

Given the wide-spread acceptance of General McChrystal’s fate, it is somewhat surprising that so many employees believe that they can behave badly toward and criticize their supervisors with impunity. Sometimes it is because employees mistakenly believe that they have a constitutional right of free speech in the workplace that protects their comments to their supervisors (in private workplaces, this impression is wrong). Sometimes it is because, remarkably, supervisors put up with such behavior. Thus, supervisors are often unaware that neither the Constitution nor EEO laws obligate them to tolerate insults or insubordinate behavior. Inadequate supervisory training also hurts, for frequently an employee tries to shield herself from punishment by lacing her comments with buzzwords like “hostile workplace” or similar terms that freeze the supervisor who has heard about it but does not really understand those terms. Supervisors so frozen frequently are afraid to enforce even legitimate rules because they fear being charged with "retaliation," another term with which they may have passing familiarity.

This is a mistake and often leads to an escalation rather than an abatement of the underlying issue. Although an employer is obligated to investigate and take prompt remedial action in response to legitimate claims of discrimination, it should not allow itself or its supervisors to shrink from enforcing legitimate work rules simply because an employee complains or incorrectly appends a label of discrimination to a complaint. To be sure, an employer may not retaliate against an employee because of a legitimate complaint about prohibited discrimination, even if unsubstantiated or inartfully expressed, but often complaints reflect only petty bickering and not discrimination. For instance, many employees refer to a hostile workplace as one in which they are expected to follow rules or work with a coworker or supervisor they do not like. Unless that personality conflict is the result of illegal animus based on a legally protected characteristic or the rule is being selectively enforced for such discriminatory reasons, the complaint will likely not support a viable legal claim. This is not to say that such gripes should not be investigated and resolved, but it is important for employers and supervisors to appreciate the difference between complaints that implicate statutory rights and those that do not. And, while it is true that employers should strive to be fair in addressing concerns, it is also important to remember that fairness does not necessarily mean acceding to an employee's wishes.

Fortunately, the fix for this problem is straightforward and comparatively simple (admittedly, there is some devil in the details, but the essence is easy and commonsensical).

First, employers should establish clear work rules (including work rules on behavior and decorum), inform employees of those rules, and enforce the rules evenhandedly. Requiring employees to interact appropriately with one another is both fair and legal.

Second, employers need to train supervisors on basic EEO and employment law principles (including sexual and other kinds of harassment) so that they will not be intimidated by an employee who loosely characterizes his or her treatment as “discriminatory” or as constituting a “hostile workplace.” Supervisors need to understand what these terms mean and that they are not synonymous with employee dissatisfaction or even unfair treatment. In this regard, supervisors need training on the importance of unbiased enforcement of the employer’s rules. It does little good to promulgate rules only to have them go unenforced by supervisors. Trouble comes also when rules are enforced selectively.

Finally, employers need to communicate to supervisors that an important part of their job is lawfully managing their workforce. Employers should ensure their actions comply with applicable law and that they can demonstrate the legitimacy (i.e., nondiscriminatory nature) of their decision-making. A supervisor who is not enforcing rules evenhandedly is one who is likely hurting morale and possibly creating potential liability for his or her employer. To be effective, supervisors need to understand the difference between what they can consider in making decisions and what they must not consider and what constitutes a protected complaint and what constitutes petty bickering, rudeness, or insubordination. Moreover, supervisors must understand that, to be effective, they must also have the fortitude to act lawfully and fairly. Only by doing so can employers avoid lawsuits and develop a more productive, happier workforce. It may even help supervisors keep from being called names – and that would not be the least bit ironic.
