Implicit Bias Gone Explicit – Managing the Public Workplace in a Changing Environment

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I. Introduction

Incivility in American culture, political and otherwise, seems to be at an all-time high. A New York Times article cited various sources for its conclusion that "a culture of nastiness has metastasized in which meanness is routinely rewarded, and common decency and civility are brushed aside."[1] People's "increasingly digitized existence and engagement with their phones,"[1] social media, internet bullying and trolling, reality television, and the 24-hour news cycle all likely have contributed to this state of affairs. In a survey conducted by an author who studies and consults on civility in the workplace, more than half of the respondents cited being "overloaded" as the cause of their own uncivil behavior, and more than 40% said they had "no time to be nice."[2] The 2016 United States presidential election was indisputably one of the most uncivil elections in recent history, with political speech at times seeming indistinguishable from hate speech.

Not surprisingly, these uncivil behaviors—rudeness, lack of tolerance, disrespect, personal attacks—are showing up more frequently in the workplace. Whether these events are happening intentionally, or because employees are simply not valuing civility and lacking self-awareness, public employers need to understand and manage this trend, without running afoul of laws protecting free speech or political activity.

II. A Cultural Shift Away From Civility

An October 2016 survey conducted by Zogby Analytics found that Americans believed the 2016 Presidential election was the most uncivil in recent American politics.[3] The survey, which asked the same set of questions that had been posed in 2010, showed that people were more likely to find certain types of rude behavior acceptable in 2016 than they were in 2010.[2] For example, in 2010, 86% of respondents believed it was not acceptable to shout over someone you disagree with during an argument; in 2016, only 65% considered that unacceptable. In 2010, 73% of respondents believed it was not acceptable to question someone's patriotism because they have a different opinion; in 2016, only 52% believed considered that unacceptable. In 2010, 89% of respondents said that commenting on another's race or ethnicity in a political engagement was wrong; in 2016, only 69% of respondents believed that. The same trend occurred for belittling or insulting someone: in 2010, 89% of respondents considered that inappropriate, while in 2016, 74% of respondents had that view.

The above-cited survey was not a partisan survey. Nor is incivility limited to one side of the political aisle, or any other identifiable segment of society. Sociological studies have shown that when people are exposed to rude behavior in any form (even if they are not the target), it has a subconscious effect and can shape the person's judgments and decisionmaking.[4] Some readers may have noticed that the 2016 presidential election had an effect on their own conduct in terms of how civilly they expressed themselves about the election, either outside, or at, the workplace.

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[1] "Culture of Nastiness," New York Times, February 18, 2017.
[2] Christine L. Porath, "No Time to Be Nice at Work
[3] "2016 Presidential Campaign Reveals Chilling Trend Lines for Civility in U.S. Politics," Zogby Analytics.com, published Monday, 17 October 2016.
[4] Foulk, Erez, and Woolum, "Catching Rudeness is like Catching a Cold," cited in Mastering Civility, by Christine Porath, at page 42.

Did you find yourself making personal, belittling comments about the candidate you did not vote for?

As this article is being published in Spring 2017, hate crimes are on the rise, according to several sources. FBI data reports that hate crimes rose nationwide from 5,479 in 2014 to 5,850 in 2015.[5] The biggest increase was in anti-Muslim hate crimes, which rose by 67% in 2015. The Southern Poverty Law Center, which tracks hate crimes, counted 1,094 reports of harassment and intimidation between November 9, 2016 and December 12, 2017.[6] Psychological research has established that people are more likely to express explicit bias if they believe the bias is socially acceptable.[7]

As we appear to be moving towards a more polarized, more uncivil society, employers are more likely to be confronted with uncivil behavior in the workplace, including arguably political speech and perhaps overt expressions of explicit bias and other types of speech that have previously been considered taboo in the workplace.

III. Legal Parameters of Regulating Employee Conduct

A public employer's first step in managing employee behavior is to determine what rule, policy or law provides good cause to regulate unacceptable or disruptive conduct. Because most public employees (after passing a probationary period) have a property interest in their jobs and therefore cannot be disciplined without just cause and due process, the employer who is contemplating serious discipline must have in mind an agency rule or policy that prohibits the employee's conduct. The employer must also make sure that a contemplated adverse action is not based on protected speech or other protected activity. The following laws either enable employers to regulate employee conduct or provide limits of such employer decisions.

A. <u>Anti-Discrimination Laws</u>

Several federal and state laws protect employees and job applicants from harassment, discrimination, and retaliation in the workplace.[8] Under these laws, it is illegal to take an adverse action because of membership in any of these protected statuses or engagement in protected activity, and illegal to create a hostile work environment because of membership in a protected status.

- Race or Color;
- National Origin or Ancestry;
- Religious Creed;
- Physical or Mental Disability;
- Medical Condition;

[5] www.FBI.gov/news/stories/2015-hate-crime-statistics-released.
[6] "The Scope of Hate in 2016," New York Times, December 28, 2016.
[7] Allport, G.W. (1954) The Nature of Prejudice. Cambridge, MA: Perseus Books
[8] 42 U.S.C. § 2000e et seq.; Title VII of the Civil Rights Act of 1964 (Title VII); Age Discrimination in Employment Act of 1967 (ADEA); Americans with Disabilities Act of 1990 (ADA); California Fair Employment and Housing Act (FEHA).

- Marital Status;
- Sex (including pregnancy, childbirth);
- Gender (including gender identity, gender expression, and transgender);
- Age (40 and above);
- Sexual Orientation;
- Genetic information;[9]
- Opposition to Unlawful Harassment;
- Association with a person that has any of the protected characteristics; and
- Perception that a person has any of the protected characteristics.[10]

To the extent that uncivil behavior, or abusive, explicitly biased conduct occurs in the workplace, these laws provide just cause for the employer to impose discipline and otherwise regulate the behavior. To be legally actionably, harassment must be offensive both to the actual employee and to a reasonable person standard, and must be either severe or pervasive. Many agencies have "zero-tolerance" anti-harassment policies that are actually more strict than the law, and prohibit any conduct that meets the policy's definition, regardless of whether it is either severe or pervasive.

B. California Unruh Act

The California Unruh Act provides that all persons have "a right to be free from any violence, or intimidation by threat of violence… because of political affiliation" or other enumerated protected statuses such as sex, sexual orientation, race, religion, national origin and disability.[11]

C. California Labor Code

The California Labor Code prohibits an employer from having any policy that forbids or prevents employees from "engaging in or participating in politics," and from "controlling, directing, or tending to control or direct the political activities or affiliations of employees."[12]

D. First Amendment

Speech by public employees at work is afforded greater protection than that of private sector employees. In *Pickering v. Board of Education*,[13] the U.S. Supreme Court made it clear that public employers generally cannot stifle the First Amendment rights their employees would otherwise enjoy as citizens in commenting on matters of public interest. However, the Court also recognized that public employers have an interest in the effective and efficient fulfillment of their responsibilities. Therefore, a public employer's ability to maintain workplace efficiency must be balanced against a public employee's interest as a citizen in commenting upon matters

[9] Under Gov. Code, § 12926, subd. (g)(1).
[10] Gov. Code, §§ 12926, 12940, subd. (a),(h); 42 U.S.C. § 2000e et seq.; 29 U.S.C. § 621 et seq.; 42 U.S.C. § 12101 et seq.
[11] Civ. Code, § 51.7(a).
[12] Lab. Code, § 1101(a), (b).
[13] 391 U.S. 563 (1968).

of public concern. *Pickering* served as a springboard from which significant First Amendment analysis has developed over the past 40 years.

Using *Pickering* and its progeny, the federal Ninth Circuit Court of Appeal has established a five-factor analysis to determine whether public employee speech is protected by the First Amendment. The following factors must be analyzed in sequence and an employee will prevail on a First Amendment claim only if a court resolves all of the questions in the employee's favor:

- Did the employee speak on a matter of public concern?
- Did the employee speak as a private citizen or as a public employee pursuant his or her professional responsibilities?
- Was the employee's protected speech a substantial or motivating factor in the adverse employment action?
- Did the public employer have an adequate justification for treating the employee differently from other members of the general public?
- Would the public employer have taken the adverse employment action even absent the protected speech?[14]

1. Matter of Public Concern?

Whether speech is a matter of public concern depends on the *content, form, and context* of a given statement.[15] The "greatest single factor" in making this determination is the "content of the speech."[16] Speech involves a matter of public concern when it relates to "any matter of political, social, or other concern to the community"[10] or is relevant to the public's evaluation of the performance of governmental agencies.[17] Speech relating to the functioning of government is also a matter of inherent public concern.[18] Conversely, speech that deals with individual disputes and grievances, or internal office affairs (when it is not relevant to the public's evaluation of a government agency's performance) is generally not of public concern and not protected.[19] As to "form," when speech is conveyed through "internal employee grievances which were not disseminated to the public" this "cuts against a finding of public concern."[11] As to the consideration of "context," courts seek to decipher "the point of the speech."[20] The inquiry questions whether the "speech 'seek[s] to bring to light actual or potential wrongdoing or breach

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14 *Eng v. Cooley*, (9th Cir. 2009) 552 F.3d 1062, 1070, cert. den. by (2010) 130 S.Ct. 1047.

15 *Connick v. Myers* (1983) 461 U.S. 138, 147-148 [103 S.Ct. 1684].

16 *Desrochers v. City of San Bernardino* (9th Cir. 2009) 572 F.3d 703, 710.

17 *Coszalter v. City of Salem* (9th Cir. 2003) 320 F.3d 968, 973-74.

18 *Johnson v. Multnomah County, Or*. (9th Cir. 1995) 48 F.3d 420, 425 cert. den. by (1995) 515 U.S. 1161 [115 S.Ct. 2616].

19 *McKinley v. City of Eloy* (9th Cir.1983) 705 F.2d 1110, 1114; *Coszalter v. City of Salem* (9th Cir. 2003) 320 F.3d 968, 973.

20 *Chateaubriand v. Gaspard* (9th Cir.1996) 97 F.3d 1218, 1223.

of public trust,' or is . . . animated instead by 'dissatisfaction' with one's employment situation."[11]

2. Speaking as Private Citizen or Public Employee?

Statements are made in an employee's capacity as a citizen if the employee had "no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform."[21] When a public employee directs his or her speech outside the public agency itself, either to an elected official or an independent agency, this will often mean the speech is outside the scope of "official duties" and hence potentially subject to First Amendment protection. Courts often find public employee speech to a newspaper or other media organization outside of "official duties." Such speech would rarely be required by job duties.

3. Do Agency Interests Outweigh Employee's Free Speech Rights?

If an employee can prove the first two factors of the employee speech analysis, and can prove that the protected speech was a substantial motivating factor for an adverse action, the burden then shifts to the employer to show that its legitimate administrative interests outweigh the employee's First Amendment interests. This portion of the analysis is often referred to as the *Pickering* balancing test and asks "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[22] One pertinent consideration includes "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[23]

4. Would Employer Have Reached the Decision Anyway?

If a public employer is unsuccessful in proving that its administrative interests outweigh an employee's First Amendment rights, it still may prevail if it can show that it would have reached the same adverse employment decision even in the absence of the employee's protected conduct. This question relates to, but is distinct from, the employee's burden of showing that the protected conduct was a substantial or motivating factor. It asks whether the adverse employment action was based on protected and unprotected activities, and if the agency would have taken the adverse action if the proper reason (i.e., adverse action for unprotected activities) alone had existed. [9]

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21 *Posey v. Lake Pend Oreille School Dist. No. 84* (9th Cir. 2008) 546 F.3d 1121, 1127 n.2; *Freitag v. Ayers* (9th Cir. 2006) 468 F.3d 528, 544, cert. den. by (2007) 549 U.S. 1323 [127 S.Ct. 1918].

22 *Garcetti v. Ceballos* (2006) 547 U.S. 410, 418 [126 S.Ct. 1951].

23 *Rankin v. McPherson* (1987) 483 U.S. 378 [107 S.Ct. 2891], rehg. den., (1987) 483 U.S. 1056 [108 S.Ct. 31] *U.S. Dept. of Justice, I.N.S. Border Patrol, El Paso, Tex. v. Federal Labor Relations Authority* (1992) 955 F.2d 998.

For example, in *Bodett v. CoxCom*, the Ninth Circuit Court of Appeal upheld the termination of an employee who repeatedly advised an openly gay female subordinate that she should not date other women.[24] The employee claimed that her speech was protected by the First Amendment, but the Court found that it did not matter because the speech violated the employer's harassment policy. Thus, the employer had a legitimate business reason for her termination.

E. Bullying and Other Abusive Conduct

Workplace bullying is not illegal—yet. It has recently received greater media and legislative attention as a potentially growing area of concern in the workplace, state- and nationwide. In 2014, AB 2503 required employers to include, in the anti-harassment training that they are already required to provide to supervisors, a component about preventing "abusive conduct." That requirement went into place on January 1, 2015. AB 2503 defines abusive conduct as follows:

> …[C]onduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act does not constitute "abusive conduct," unless especially severe and egregious."[25]

Even though abusive conduct as defined above is not illegal, the law requires employers to train supervisors about preventing it. Bullying may nonetheless lead to claims and complaints of protected status harassment because the bully's motivations are not always clear. The definition is very similar to what is commonly understood as bullying, which can include, in addition to the above examples, isolating or excluding someone, persistent teasing, or spreading malicious rumors.

IV. Managing the Workplace

A. A Case in Point

At what point does an employee's workplace expression of his or her political or social views--for example about race, national origin, sexual orientation—cease being protected speech and start creating a hostile work environment? A California case involving employee speech criticizing affirmative action programs (before Proposition 209, which outlawed affirmative action programs) shows that even courts sometimes have difficulty drawing this line. *Department of Corrections v. State Personnel Bd. (Wallace)*.[26]

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[24] *Bodett v. CoxCom, Inc.* (9th Cir. 2004) 366 F.3d 736.

[25] Cal. Gov. Code 12950.1(g)(2).

[26] (1997) 59 Cal.App.4th 131 [69 Cal.Rptr.2d 34].

In that case, the California Department of Corrections and Rehabilitation (CDCR) terminated the employment of Wallace, a correctional sergeant, for comments he made to a subordinate employee, Picone, about the CDCR's affirmative action program. Under that program, the CDCR appointed certain Hispanic officers to one-year temporary terms as sergeants, even though they had not scored high enough on the promotional exam to receive such a position on a permanent basis. This created resentment among other employees who believed that the positions should go to people who had scored high enough on the promotion list to be promoted. Sometimes those one-year terms were extended. Officer Picone had taken the promotional exam, had scored too low to be in reach of a promotion, and was appointed to a one-year term as a sergeant under the affirmative action program. She then was appointed for a second one-year term, and had a particularly coveted assignment as the Investigative Gang Sergeant working second watch (6 a.m. to 2 p.m.), which was a highly desired watch.

Sergeant Wallace had been trying to get a second watch position for some time, in order to spend more time with his son, but he did not have enough seniority to get one. Other, Hispanic sergeants with less seniority were able to get such positions. When Wallace asked management about this, he was told that CDCR wanted minority females on the second watch positions to increase their visibility and demonstrate the agency's commitment to affirmative action.

While Officer Picone was serving her second one-year term as a sergeant, she chose not to take the sergeant's promotional exam. When her second one-year term ended, she reverted back to her officer position. Some employees (not Picone) believed that Picone had been "shafted," and should have received a promotion despite not taking the exam. Other employees, including Wallace, did not agree that Picone should have received a promotion and instead believed that she had been given undeserved preferential treatment in the first place based on her gender and race. Wallace expressed these opinions to others, also stating that he considered Picone a "lop" (prison slang to describe a poor performer) who had not deserved to wear the stripes in the first place. These comments got back to Picone, who was hurt by them, as she thought she had a good relationship with Wallace.

The conversation she had with Wallace about what she had heard was the basis for Wallace's termination. She approached him and asked to speak with him privately (at the end of her shift), which they did, moving to an area of the facility where no staff or inmates were present. She told him she had heard that he was talking bad about her and that she wanted it to stop. Wallace lost his temper, slapped the wall with his hand and said in a low voice, "I am tired of this Hispanic shit; us white guys are tired of being looked over." He told Picone he was sick and tired of "hearing about poor fucking Picone getting shafted." He was irate and clenching his teeth. Picone, stunned, told him he needed to stop talking like that or it was going to get him in trouble. She also told him she understood how he felt because her husband was a Caucasian officer for another laws enforcement agency, and that while the affirmative action program was not always fair, minorities had endured a lot. Picone started crying. Wallace also had tears in his eyes and seemed to be out of control. He grabbed Picone's shirt lapel and started shaking her, saying, "Do you understand what I'm saying? Do you understand what I'm feeling? We're sick and tired of it." He let go of her lapels after a few seconds.

Picone, who was still crying, asked Wallace to walk out of the facility with her so that the inmates would not see her crying. He did so, shielding her from the view of the inmates and other staff. At this point, Wallace had calmed down, but he told her that it was her own fault that she had not taken the sergeant's exam the second time and scored higher. She replied by telling him that she was not asking for sympathy and was trying to lie low and do her job and that she could not help how others felt.

Later that evening, Wallace asked another sergeant to call Picone at home and ask her if she willing to talk to him, and she was. Wallace called her and said, "What we talked about, you were right; but I am still entitled to my own opinion." Picone laughed and said, "Is that an apology?" The conversation then ended.

After the incident, Picone asked for a job change, which she did not get. She then requested and received a transfer to another facility. At Wallace's termination appeal hearing, she testified that the incident with Wallace had caused her to have reservations about working with him because she felt that his statements expressed hatred of her because of her race. (She did not file an internal discrimination complaint against him, but did file a DFEH charge.)

The CDCR charged Wallace with inefficiency, inexcusable neglect, intemperance, discourteous treatment of another employee, willful disobedience, unlawful discrimination and other failure of good behavior bringing discredit to the institution. Wallace appealed his termination to the State Personnel Board, overturned the termination and reduced it to a 30-day suspension. The Board sustained only the charges of discourteous treatment and other failure of good behavior, finding that the content of Wallace's statements was constitutionally protected but the manner in which he had delivered the statements was not.

The CDCR sought a writ of administrative mandamus from the Superior Court. The Superior Court concluded that the Board erred in finding that any part of Wallace's conduct was protected by the First Amendment. The Superior Court held that the Board's legal analysis was flawed and that their decision had "the potential of signaling to all disgruntled state workers an 'open season' on minority subordinates, to unleash venomous epithets under the guise of protected speech." The Superior Court concluded that Wallace's conduct had created an unlawful hostile work environment.

Wallace appealed. The Court of Appeal reversed, holding that the State Personnel Board had struck the proper balance of Wallace's freedom of expression interests and the CDCR's interests in regulating the workplace. The Court of Appeal held that the statements themselves were protected, but the physical conduct was subject to discipline and a 30-day suspension was appropriate. One justice dissented, disagreeing with each element of the majority opinion.

The Court found that Wallace's speech involved a matter of public concern: affirmative action. The Court rejected CDCR's argument that the speech was merely about a personal grievance, stating that "the fact that Wallace had been personally disadvantaged by the [affirmative action program] does not alter the fact preferential treatment in public employment on the basis of race, sex, ethnicity or national origin is not only a basis for personal grievance but, transcendentally, a matter of intense public concern." (Among other things, the Court cited

Proposition, 209, which had recently passed, but after the events upon which the case was based.) The Court also rejected CDCR's argument that Wallace's speech met the definition of "fighting words," which have no First Amendment protection. The Court asserted that Wallace's statements were not critical of Picone personally or her conduct, but were directed at the CDC and its policy. The Court also found that although Wallace had grabbed Picone's collar and shaken her for a few seconds, "this cannot reasonably be interpreted as an attempt to harm her physically."

Having found that Wallace's speech was protected, the court next balanced the CDCR's interest in promoting harmony and efficiency in the workplace against Wallace's interest in free expression. The Court concluded that Wallace's statements caused no actual harm to the CDCR because the Picone-Wallace conversation was private and not overheard by anyone, because it was not a "surprise" to Picone that Wallace opposed the affirmative action program, and because she told him that she understood his feelings and that her spouse was a Caucasian officer at another agency. The Court of Appeal did not believe that Wallace's statement engendered disharmony among employees, and instead found that the affirmative action program itself engendered disharmony among employees. The Court held that the State Personnel Board had struck the right balance between the CDCR's and Wallace's interests, and that it was appropriate to consider the content of Wallace's statement separately from the manner in which it was made

Finally, the court held that Wallace's statement had not created a hostile work environment, but in doing so the Court examined only the content of his statement, not his physical conduct. The Court asserted that "Except for the fact Picone is Hispanic, there is nothing in Wallace's statements which would suggest they were an attack on her personally rather than the CDCR's affirmative action program." The court said that because Picone initiated the conversation, and chose the time and place for it, and it lasted only a few minutes, the event was not severe or pervasive. In doing this analysis, the Court did not consider the undisputed fact that Wallace had grabbed Picone's shirt collar, shaken her by it, slapped the wall, was irate and clenched his teeth.

The dissent argued that Wallace's statements should not be "dissected" from the manner in which those statements were delivered. The dissent argued that Wallace's actions created a hostile work environment; the opinion challenged the majority's assertions that Wallace's statements were not an attack on her personally. Wallace was higher in rank, had told others she was a "lop" and didn't deserve her stripes in the first place. Plus, when she asked him to stop talking like that, he became angry and slapped the wall. Moreover, the incident so upset Picone that she asked for another assignment and was ultimately transferred because she felt that Wallace would not back her up if an urgent, dangerous situation arose at the facility. The dissent argued that the incident, though not pervasive, was severe, citing many cases holding that a single instance of harassing conduct may create an actionable hostile work environment.

Next, the dissent argued that even if Wallace's words could be considered separately from his conduct, the statement, "I am tired of this Hispanic shit," spoken in that time, place and manner, were not protected by the First Amendment because they were "extremely derogatory, directly referring to Picone's ethnicity, and when spoken by a superior officer in a quasi-military organization, carry an implicit threat to make her life at work miserable." The dissent further

stated, "There is a difference between an academic discussion regarding affirmative action and a verbal and physical tirade by a superior officer against a female, Hispanic, lower [ranking] officer in a quasi-military organization, accompanied by a use of force." The dissent also argued that more deference should have been granted to the CDCR's perception of the potential disruptiveness because the case involved correctional officers in a state prison, "where close working relationships are essential to fulfilling the public responsibilities." The dissent concluded that the Superior Court had made the correct ruling and applied the proper standards.

B. Drawing the Line Between the First Amendment and Illegal Harassment

This author believes that the dissent got it right in *Wallace*. And that the majority opinion is a product of its time (1997). The majority opinion created a fiction of considering the speech in a vacuum, and ignoring the undisputed fact that Wallace did make negative statements to Picone about the fact that her race and gender entitled her to something he could not obtain. Taking the majority's analysis to its logical conclusion, it would allow any hostile statement to be made about a protected status, as long as it somehow referenced a matter of "public concern," without analyzing the rest of the context, or the impact of that statement on the hearer. The majority's analysis would not prohibit a statement along the lines of "This Equal Employment Opportunity shit has got to stop. There are too many Mexicans in this country and in this agency. We white guys are feeling like it's time to make America great again." This statement, made by a Caucasian male employee to a Hispanic co-worker, clearly is a negative statement about a protected status. The fact that it also happens to reference current events does not render it protected speech. Although this statement alone, without any touching or violence or threat of violence would probably not meet the legal standard of being either severe or pervasive, it would certainly be prohibited by a "zero-tolerance" anti-harassment policy, and the employer with such a policy should take corrective action in a situation like this.

Rare will be the case where negative statements in the workplace that are directed to protected statuses escape regulation because they are protected speech. While agencies should certainly conduct a legal analysis to make sure that constitutional protections do not attach to the speech, there is no "but I was discussing current events" exception to the anti-discrimination laws. So, for example, employees cannot simply repeat offensive statements made by public figures, or play movies or other media at work that contain offensive content direct to protected statuses, or access and share (on employer-owned devices) websites containing offensive content. Employee A's First Amendment rights at work are limited by Employee B's right to come to work and not be subjected to hostile remarks based on protected statuses. To the extent that social media postings have an impact on the agency in this regard, the agency may be able to regulate it, but only if sufficient nexus exists to justify an infringement on employees' First Amendment rights. In those situations it is particularly critical to for attorneys to conduct a legal evaluation because the analysis is very fact-based.

V. Concrete Actions to Create a Culture of Civility

Fundamental to creating a culture of civility is a commitment at the highest level of management that such conduct will not be tolerated. Agencies should consider taking the following steps.

- The agency's leaders should model civility and realize that everything they do in the workplace sends a message about the organization's culture. For example, taking phone calls and/or checking emails during meetings and not listening to what others are saying sends a message, whether intended or not.
- Create a comprehensive Code of Conduct that defines professional behaviors and unacceptable behaviors and includes policies and procedures for response.
- Managers and Human Resources staff should understand that both an anti-harassment policy and an agency's catchall rule requirement courteous treatment of others are valid grounds for discipline.
- Managers and Human Resources staff should understand the difference between a zero-tolerance policy (which prohibits *any* instance of harassing conduct), and the legal standard (which outlaws conduct only when it reaches the "severe or pervasive" threshold).
- Agencies should discipline staff who violate engage in discourteous or destructive behavior toward co-workers.
- Agencies should establish as a job expectation/performance standard respectful, civil behavior, and make sure this standard is tracked in formal, written performance evaluations.
- Managers should receive training on how to have difficult conversations, and how to manage conflicts among subordinates.
- Upper level managers must hold accountable lower-level managers who do not effectively manage conflicts among their subordinates.
- Managers and Human Resources should consult legal counsel regarding the potential First Amendment implications of disciplining employees on protected speech.