

5-16-97

THE WHITE HOUSE
WASHINGTON

May 16, 1997

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Bowles

MEMORANDUM FOR THE PRESIDENT

FROM: TODD STERN 

SUBJECT: Religious Expression in the Federal Workplace

In the attached memo, Chuck Ruff recommends that you approve issuance of a Presidential Memorandum and accompanying guidelines on religious expression in the workplace. DPC strongly concurs, while DOJ and OPM object.

The idea for guidelines and an initial draft came from the Christian Legal Society, American Jewish Congress, and People for the American Way. Our Counsel's Office then proposed White House participation, if the guidelines were limited to the federal workplace. **The basic principle of the guidelines is that religious expression in the federal workplace should receive the same level of protection as non-religious expression, with only limited exceptions, where, for example, the speech would violate the Establishment Clause as an official endorsement of religion, or constitute harassment or coercion.**

OPM and DOJ object on policy, not legal grounds. Both doubt the need for guidelines, saying that accommodating workplace religious expression hasn't been a significant problem. OPM also worries that the illustrations included in the guidelines -- such as religious proselytizing or pro-life advocacy -- may be seen by employees as a needless invitation to divisive conduct. Chuck answers by saying that problems involving religious expression in the workplace are likely to become more common, and defends the illustrations as necessary to demonstrate the principle that speech shouldn't be proscribed just because some find it offensive.

DPC concurs strongly with Counsel and sees the guidelines as especially useful since (1) the Religious Freedom Restoration Act may be overruled this spring by the Supreme Court, and (2) Republicans on the Hill have offered a religious liberty amendment that we will not be able to support. John Podesta concurs with Counsel, but questions the wisdom of including the pro-life illustration.

Approve memo/guidelines ☒Disapprove ☐Discuss ☐

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THE WHITE HOUSE
WASHINGTON

May 1, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES F.C. RUFF
Counsel to the President

SUBJECT: RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE

We are preparing to put into final form a Presidential Memorandum and accompanying Guidelines addressing the issue of religious expression in the federal workplace. These documents reflect the principles that led to your issuance of guidelines on religious expression in the public schools two years ago. Before the documents are presented to you for approval, however, we wanted to solicit your reactions on the substance of the proposal and the process we have followed.

BACKGROUND

For the past year the Counsel's Office, in conjunction with representatives from the Christian Legal Society, People for the American Way, the American Jewish Congress and the Department of Justice, has worked on developing guidelines governing religious expression in the federal workplace. Representatives from the National Catholic Conference, the National Council of Churches, the Baptist Joint Committee on Public Affairs, the Union of American Hebrew Congregations, the National Association of Evangelicals, the Equal Opportunity Commission, and the Office of Personnel Management have also, from time to time, been involved in these discussions.

The idea for this project originated with the Steve MacFarlane of the Christian Legal Society, Marc Stern of the American Jewish Congress, and Eliot Mincberg of People for the American Way in response to the 1995 proposed EEOC guidelines addressing harassment in the workplace. The sections of the proposed EEOC guidelines addressing religious harassment were controversial and generated wide-ranging opposition from religious groups who believed that the EEOC guidelines might be construed by employers as prohibiting all religious activity in the workplace. MacFarlane, Stern, and Mincberg believed that a set of guidelines dealing with religious expression in the workplace could be drafted which would be acceptable to most, if not all, religious organizations.

Accordingly, MacFarlane, Stern, and Minberg drafted a set of proposed guidelines which they circulated to various religious groups in the hopes that these guidelines could be issued as the product of a broad alliance of religious organizations. The Counsel's Office, however, suggested that it might be possible to issue the guidelines as a joint project of the White House and the religious groups if the guidelines were modified to meet certain objections and if they were narrowed to apply only to the federal workplace. The religious groups agreed and a draft entitled "Guidelines on Religious Exercise and Religious Expression in the Federal Workplace" was completed earlier this month. In its final form, the draft sets forth general principles and offers hypothetical examples illustrating the appropriate application of the principle involved.

The federal agencies that have been involved in the process, the Department of Justice, the Office of Personnel Management and the Equal Employment Opportunity Commission have signed off as to the basic propriety of issuing of the Guidelines. DOJ has also signed off on the constitutionality and legal validity of the principles and hypotheticals set forth in the Guidelines. DOJ and OPM, however, have raised policy objections to the Guidelines. These objections are discussed in Section V. below.

RELIGIOUS EXPRESSION IN THE WORKPLACE - GENERAL PRINCIPLES

The basic principle underlying the guidelines is that religious expression in the federal workplace should be entitled to the same level of protection accorded non-religious expression. For example, if a federal employee is allowed to display a poster with a non-religious message in her office, she should be allowed to display a poster with a religious message. Similarly, if employees are allowed to use space for non-religious meetings they should be allowed to use the same space for religious meetings.

The Guidelines also reflect that special restriction upon religious speech may be required in some circumstances. This would occur when an employee's private speech is perceived as an official endorsement of religion, thus violating Establishment Clause prescriptions, or when the religious speech in question constitutes religious harassment or is coercive. The Guidelines also make clear that religious speech, like non-religious speech, can be restricted when it unduly interferes with workplace efficiency.

RESOLUTION OF ISSUES ARISING UNDER THE GUIDELINES

The Guidelines state that they are not intended to create any new right, benefit, or responsibility enforceable by any party against the United States, its agencies, its officers, or any person. Rather persons with questions regarding interpretations of the Guidelines are directed to bring those questions to the Office of the General Counsel in their department or agency. There are no other enforcement provisions.

PROPOSED ISSUANCE OF THE GUIDELINES

The Guidelines would be distributed by OPM as an attachment to a Presidential Memorandum announcing your support for the principles contained in the Guidelines and directing the heads of all agencies to comply with its provisions. The religious groups envision an announcement ceremony similar to the one surrounding the issuance of guidelines addressing religious expression in the public schools.

AGENCY OBJECTIONS

As noted previously, DOJ and OPM have raised policy objections to the Guidelines. Specifically, both agencies have questioned the need for the issuance of the Guidelines on grounds that accommodating religious expression has not been a significant problem in the federal workplace and issuing the Guidelines, accordingly may raise more problems than it solves. OPM is additionally concerned with the potential impact of some of the hypotheticals contained in the document. Of particular concern to OPM is the Guidelines' use of controversial and potentially divisive examples of expression, such as religious proselytization or the advocacy of pro-life positions, as illustrations of what is legally permissible. The agency argues that these illustrations may be read by federal personnel, including supervisors, as an active invitation to engage in the potentially divisive conduct (rather than as a mere illustration of their rights to engage in that conduct) with the result being a dramatic increase in divisive expression in the federal workplace and a subsequent harm to federal workplace morale. For similar reasons, OPM also objects to the hypothetical which indicates that an applicant for federal employment can not be compelled to take a religiously objectionable oath as a condition of employment. OPM asserts that this example may actively encourage persons to avoid the oath requirement.

There are, however, strong counter arguments to DOJ's and OPM's positions. First, while it may be true that accommodation of religious expression in the federal workplace has not yet been a significant problem, these issues will likely become more common as religious organizations direct their attention to workplace issues. As noted in Section I, guidelines on religious expression in the workplace would have been issued and disseminated by religious organizations with, or without, our participation. The process leading to the development of these Guidelines thus has arguably only allowed us to get out front on a difficult issue.

Second, OPM's objection to the use of hypotheticals involving controversial religious expression may be descriptively accurate but it misses the fundamental point that examples involving controversial expression are absolutely necessary to illustrate the first amendment principle at stake. The principle that is at the heart of the Guidelines is that speech may not proscribed simply because it might be found offensive. This principle, by definition, can not be demonstrated by examples using non-controversial speech. OPM is correct that offensive speech or proselytization by supervisors raises a special set of concerns, particularly when the

activity approaches coercion or harassment, but the Guidelines recognize the specific problems associated with the speech of supervisors and address them directly.

Finally, OPM's objection to the loyalty oath hypothetical may be addressed on a number of counts. First, the conclusion that this hypothetical will encourage persons to avoid the oath requirement seems unlikely as a practical matter. Second, the right to forego loyalty oaths on religious grounds is protected under the Religious Freedom Restoration Act if not the constitution and the argument as to why people should not be informed of their rights is not readily apparent. Third, the religious groups have made clear that any changes in the existing document could easily lead to an unraveling of the agreement as a whole.

RECOMMENDATIONS

Given your support for the policies and principles contained in the Presidential Memorandum and Guidelines, we recommend that we finalize the documents and prepare them for your execution. Draft copies of the documents are attached for your reference.

_____ Prepare Presidential Memorandum and Guidelines for Execution

_____ Explore agency objections further

_____ Discuss

(May 1 Draft)

MEMORANDUM FOR ALL HEADS OF AGENCIES

SUBJECT: Religious Exercise and Religious Expression in the Federal Workplace

Religious freedom is central to the American system of liberty. Our nation's founders erected the twin pillars of this freedom, guaranteeing the free exercise of religion and prohibiting the establishment of religion by the state, in the very First Amendment to the Constitution. Throughout our history, men and women have come to this nation to escape religious persecution and secure this precious freedom. They and others have built a nation in which religious practices and religious institutions have thrived -- exactly because each individual has been able to choose for himself or herself whether and, if so, how to worship.

In the four years I have served as President, nothing has given me greater joy than the efforts of this Administration, in tandem with a broad coalition of individuals and organizations, to support freedom of religion. In 1993, I was proud to reaffirm the rightful and historic place of religion throughout our society when I signed the Religious Freedom Restoration Act, which protects the exercise of religion from being inappropriately burdened. In 1995, I was similarly proud to protect appropriate religious expression in the public schools when I directed the Secretary of Education to issue guidance to public school districts on the extent of permissible prayer and other speech of a religious character.

Today I focus on the federal workplace, directing all heads of federal agencies to comply with Guidelines on Religious Exercise and Religious Expression in the Federal Workplace to be distributed today by the Office of Personnel Management. All civilian executive branch agencies, officials, and employees must follow these Guidelines carefully. Strict adherence to these Guidelines will ensure that federal employers will respect the rights of those who engage in religious practices or espouse religious beliefs, as well as those who reject religion altogether. In particular, it establishes the following principles:

First, federal employers shall permit employees to engage in personal religious expression (as they must permit other constitutionally valued expression) to the greatest extent possible, consistent with interests in workplace efficiency and requirements of law. Of course, work is for work, and an agency may restrict any speech that truly interferes with its ability to perform public services. In addition, the agency may have a legal obligation to restrict certain forms of speech that intrude unduly on the legitimate rights of others. But when an agency allows non-religious speech, because that speech does not impinge on these interests, the government also usually must allow otherwise similar speech of a religious nature. The one exception to this principle of neutrality -- an exception mandated by the Establishment Clause -- is when religious speech would lead a reasonable observer to conclude that the government is endorsing religion. Subject to this exception, an agency may not typically subject religious speech to greater restrictions than other speech entitled to full constitutional protection, and therefore shall allow much of this speech to go forward.

Second, federal employers may not discriminate in employment on the basis of religion. This means that an agency may not hire or refuse to hire, promote or refuse to promote, or otherwise favor or disfavor a potential, current, or former employee because of his or her religion or religious beliefs. It means that an agency, or any supervisor within the agency, may not coerce an employee to participate in religious activities (or to refrain from participating in otherwise permissible religious activities) by offering better (or threatening worse) employment conditions. And it means that an agency shall prevent any supervisor or any employee from engaging in religious harassment or creating, through the use of intimidation or pervasive or severe ridicule or insult, a religiously hostile environment.

Third, an agency must reasonably accommodate employees' religious practices. The need for accommodation arises in many circumstances -- for example, when work schedules interfere with Sabbath or other religious holiday observances or when work rules prevent an employee from wearing religiously compelled dress. Once again, governmental interests in workplace efficiency may be at stake in such cases. But an agency, as specified in greater detail in the Guidelines, must always accommodate an employee's religious practice in the absence of non-speculative costs and may need to accommodate even when doing so will impose some hardship.

All of these principles are related. All are but variants or applications of a single rule of neutrality and fairness -- that federal employers shall treat employees with the same respect and consideration, regardless of their religious beliefs. Whether by allowing religious speech, preventing religious coercion or harassment, or making accommodations to religious practice, the government must act to ensure that the federal workplace is generous to followers of all religions, as well as to followers of none. The Guidelines will advance this goal. Although they doubtless will leave unresolved many difficult questions, arising from specific factual contexts and circumstances, they will clarify the obligations and appropriate commitments of the government, acting as an employer, to protect and enhance religious freedoms.

William Jefferson Clinton

(May 1 Draft)

**Guidelines on Religious Exercise and
Religious Expression in the Federal Workplace**

The following Guidelines, addressing religious exercise and religious expression, shall apply to all civilian executive branch agencies, officials, and employees in the federal workplace.

These Guidelines principally address employees' religious exercise and religious expression when the employees are acting in their personal capacity within the federal workplace and the public does not have regular exposure to the workplace. The Guidelines do not comprehensively address whether and when the government and its employees may engage in religious speech directed at the public. They also do not address religious exercise and religious expression by uniformed military personnel, or the conduct of business by chaplains employed by the federal government. Nor do the Guidelines define the rights and responsibilities of non-governmental employers—including religious employers—and their employees. Although these Guidelines, including the examples cited in them, should answer the most frequently encountered questions in the federal workplace, actual cases sometimes will be complicated by additional facts and circumstances that may require a different result from the one the Guidelines indicate.

Section 1. Guidelines for Religious Exercise and Religious Expression in the Federal Workplace. Federal employers shall permit personal religious expression by Federal employees to the greatest extent possible, consistent with requirements of law and interests in workplace efficiency as described in this set of Guidelines. Federal employers shall not discriminate against employees on the basis of religion, require religious participation or non-participation as a condition of employment, or permit religious harassment. And federal employers shall accommodate employees' exercise of their religion in the circumstances specified in these Guidelines. These requirements are but applications of the general principle that federal employers shall treat all employees with the same respect and consideration, regardless of their religion (or lack thereof).

A. Religious Expression. As a matter of law, federal employers shall not restrict personal religious expression by employees in the federal workplace except where the employee's interest in the expression is outweighed by the government's interest in the efficient provision of public services or where the expression intrudes upon the legitimate rights of other employees or creates the appearance, to a reasonable observer, of an official endorsement of religion. The examples cited in these Guidelines as permissible forms of religious expression will rarely, if ever, fall within these exceptions.

As a general rule, agencies may not regulate employees' personal religious expression on the basis of its content or viewpoint. In other words, agencies generally may not suppress employees' private religious speech in the workplace while leaving unregulated other private employee speech that has a comparable effect on the efficiency of the workplace—including ideological speech on politics and other topics—because to do so would be to engage in presumptively unlawful content or viewpoint discrimination. Agencies, however, may, in their discretion, reasonably regulate the time, place and manner of all employee speech, provided such regulations do not discriminate on the basis of content or viewpoint.

The federal government generally has the authority to regulate an employee's private speech, including religious speech, where the employee's interest in that speech is outweighed by the government's interest in promoting the efficiency of the public services it performs. Agencies should exercise this authority evenhandedly and with restraint, and with regard for the fact that Americans are used to expressions of disagreement on controversial subjects, including religious ones. Agencies are not required, however, to permit employees to use work time to pursue religious or ideological agendas. Federal employees are paid to perform official work, not to engage in personal religious or ideological campaigns during work hours.

(1) Expression in Private Work Areas. Employees should be permitted to engage in private religious expression in personal work areas not regularly open to the public to the same extent that they may engage in nonreligious private expression, subject to reasonable content- and viewpoint- neutral standards and restrictions: Such religious expression must be permitted so long as it does not interfere with the agency's carrying out of its official responsibilities.

Examples

- (a) An employee may keep a Bible or Koran on her private desk and read it during breaks.
- (b) An agency may restrict all posters, or posters of a certain size, in private work areas, or require that such posters be displayed facing the employee, and not on common walls; but the employer typically cannot single out religious or anti-religious posters for harsher or preferential treatment.

(2) Expression Among Fellow Employees. Employees should be permitted to engage in religious expression with fellow employees, to the same extent that they

may engage in comparable nonreligious private expression, subject to reasonable and content-neutral standards and restrictions: such expression should not be restricted so long as it does not interfere with workplace efficiency. Though agencies are entitled to regulate such employee speech based on reasonable predictions of disruption, they should not restrict speech based on merely hypothetical concerns, having little basis in fact, that the speech will have a deleterious effect on workplace efficiency.

Examples

- (a) In informal settings, such as cafeterias and hallways, employees are entitled to discuss their religious views with one another, subject only to the same rules of order as apply to other employee expression. If an agency permits unrestricted nonreligious expression of a controversial nature, it must likewise permit equally controversial religious expression.
- (b) Employees are entitled to display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. So long as they do not convey any governmental endorsement of religion, religious messages may not typically be singled out for suppression.
- (c) Employees generally may wear religious medallions over their clothes or so that they are otherwise visible. Typically, this alone will not affect workplace efficiency, and therefore is protected.

(3) Expression Directed at Fellow Employees. Employees are permitted to engage in religious expression directed at fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views, to the same extent as those employees may engage in comparable speech not involving religion. Some religions encourage adherents to spread the faith at every opportunity, a duty that can encompass the adherent's workplace. As a general matter, proselytizing is as entitled to constitutional protection as any other form of speech -- as long as a reasonable observer would not interpret the expression as government endorsement of religion. Employees may urge a colleague to participate or not to participate in religious activities to the same extent that, consistent with concerns of workplace efficiency, they may urge their colleagues to engage in or refrain from other personal endeavors. But employees must refrain from such expression when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome. (Such

expression by supervisors is subject to special consideration as discussed in Section B.2 of these guidelines.)

Examples

- (a) During a coffee break, one employee engages another in a polite discussion of why his faith should be embraced. The other employee disagrees with the first employee's religious exhortations, but does not ask that the conversation stop. Under these circumstances, agencies should not restrict or interfere with such speech.
- (b) One employee invites another employee to attend worship services at her church, though she knows that the invitee is a devout adherent of another faith. The invitee is shocked, and asks that the invitation not be repeated. The original invitation is protected, but the employee should honor the request that no further invitations be issued.
- (c) In a parking lot, a non-supervisory employee hands another employee a religious tract urging that she convert to another religion lest she be condemned to eternal damnation. The proselytizing employee says nothing further and does not inquire of his colleague whether she followed the pamphlet's urging. This speech typically should not be restricted.

Though personal religious expression such as that described in these examples, standing alone, is protected in the same way, and to the same extent, as other constitutionally valued speech in the federal workplace, such expression should not be permitted if it is part of a larger pattern of verbal attacks on fellow employees (or a specific employee) not sharing the faith of the speaker. Such speech, by virtue of its excessive or harassing nature, may constitute religious harassment or create a hostile work environment, as described in Part B(3) of these Guidelines, and an agency should not tolerate it.

(4) Expression in Areas Accessible to the Public. Where the public has access to the federal workplace, all federal employers must be sensitive to the Establishment Clause's requirement that expression not create the reasonable impression that the government is sponsoring, endorsing, or inhibiting religion generally, or favoring or disfavoring a particular religion. This is particularly important in agencies with adjudicatory functions.

However, even in workplaces open to the public, not all private employee religious expression is forbidden. For example, federal employees may wear personal religious jewelry absent special circumstances (such as safety concerns) that might require a ban on all similar nonreligious jewelry. Employees may also display religious art and literature in their personal work areas to the same extent that they may display other art and literature, so long as the viewing public would reasonably understand the religious expression to be that of the employee acting in her personal capacity, and not that of the government itself. Similarly, in their private time employees may discuss religion with willing coworkers in public spaces to the same extent as they may discuss other subjects, so long as the public would reasonably understand the religious expression to be that of the employees acting in their personal capacities.

B. Religious Discrimination. Federal agencies may not discriminate against employees on the basis of their religion, religious beliefs, or views concerning religion.

(1) Discrimination in Terms and Conditions. No agency within the executive branch may promote, refuse to promote, hire, refuse to hire, or otherwise favor or disfavor, an employee or potential employee because of his or her religion, religious beliefs, or views concerning religion.

Examples

- (a) A federal agency may not refuse to hire Buddhists, or impose more onerous requirements on applicants for employment who are Buddhists.
- (b) An agency may not impose, explicitly or implicitly, stricter promotion requirements for Christians, or impose stricter discipline on Jews than on other employees, based on their religion. Nor may federal agencies give advantages to Christians in promotions, or impose lesser discipline on Jews than on other employees, based on their religion.
- (c) A supervisor may not impose more onerous work requirements on an employee who is an atheist because that employee does not share the supervisor's religious beliefs.

(2) Coercion of Employee's Participation or Nonparticipation in Religious Activities. A person holding supervisory authority over an employee may not, explicitly or implicitly, insist that the employee participate in religious activities as a condition of continued employment, promotion, salary increases, preferred job

assignments, or any other incidents of employment. Nor may a supervisor insist that an employee refrain from participating in religious activities outside the workplace except pursuant to otherwise legal, neutral restrictions that apply to employees' off-duty conduct and expression in general (e.g., restrictions on political activities prohibited by the Hatch Act.) .

This prohibition leaves supervisors free to engage in some kinds of speech about religion. Where a supervisor's religious expression is not coercive and is understood as his or her personal view, that expression is protected in the federal workplace in the same way and to the same extent as other constitutionally valued speech. For example, if surrounding circumstances indicate that the expression is merely the personal view of the supervisor and that employees are free to reject or ignore the supervisor's point of view or invitation without any harm to their careers or professional lives, such expression is so protected.

Because supervisors have the power to hire, fire, or promote, employees may reasonably perceive their supervisors' religious expression as coercive, even if it was not intended as such. Therefore, supervisors should be careful to ensure that their statements and actions are such that employees do not perceive any coercion of religious or non-religious behavior (or respond as if such coercion is occurring), and should, where necessary, take appropriate steps to dispel such misperceptions.

Examples

- (a) A supervisor may invite co-workers to a son's confirmation in a church, a daughter's bat mitzvah in a synagogue, or to his own wedding at a temple.

but—A supervisor should not say to an employee: "I didn't see you in church this week. I expect to see you there this Sunday.

- (b) On a bulletin board on which personal notices unrelated to work regularly are permitted, a supervisor may post a flyer announcing an Easter musical service at her church, with a handwritten notice inviting co-workers to attend.

but—A supervisor should not circulate a memo announcing that he will be leading a lunch-hour Talmud class that employees should attend in order to participate in a discussion of career advancement that will convene at the conclusion of the class.

- (c) During a wide-ranging discussion in the cafeteria about various non-work-related matters, a supervisor states to an employee her belief that religion is important in one's life. Without more, this is not coercive, and the statement is protected in the federal workplace in the same way, and to the same extent, as other constitutionally valued speech.
- (d) A supervisor who is an atheist has made it known that he thinks that anyone who attends church regularly should not be trusted with the public weal. Over a period of years, the supervisor regularly awards merit increases to employees who do not attend church routinely, but not to employees of equal merit who do attend church. This course of conduct would reasonably be perceived as coercive and should be prohibited.
- (e) At a lunch-table discussion about abortion, during which a wide range of views are vigorously expressed, a supervisor shares with those he supervises his belief that God demands full respect for unborn life, and that he believes it is appropriate for all persons to pray for the unborn. Another supervisor expresses the view that abortion should be kept legal because God teaches that women must have control over their own bodies. Without more, neither of these comments coerces employees' religious conformity or conduct. Therefore, unless the supervisors take further steps to coerce agreement with their view or act in ways that could reasonably be perceived as coercive, their expressions are protected in the federal workplace in the same way and to the same extent as other constitutionally valued speech.

(3) Hostile Work Environment and Harassment. The law against workplace discrimination protects federal employees from being subjected to a hostile environment, or religious harassment, in the form of religiously discriminatory intimidation, or pervasive or severe religious ridicule or insult, whether by supervisors or fellow workers. Whether particular conduct gives rise to a hostile environment, or constitutes impermissible religious harassment, will usually depend upon its frequency or repetitiveness, as well as its severity. The use of derogatory language in an assaultive manner can constitute statutory religious harassment if it is severe or invoked repeatedly. A single incident, if sufficiently abusive, might also constitute statutory harassment. However, although employees should always be guided by general principles of civility and workplace efficiency, a hostile environment is not created by the bare expression of speech with which some

employees might disagree. In a country where freedom of speech and religion are guaranteed, citizens should expect to be exposed to ideas with which they disagree.

The examples below are intended to provide guidance on when conduct or words constitute religious harassment that should not be tolerated in the federal workplace. In a particular case, the question of employer liability would require consideration of additional factors, including the extent to which the agency was aware of the harassment and the actions the agency took to address it.

Examples

- (a) An employee repeatedly makes derogatory remarks to other employees with whom she is assigned to work about their faith or lack of faith. This typically will constitute religious harassment. An agency should not tolerate such conduct.
- (b) A group of employees subjects a fellow employee to a barrage of comments about his sex life, knowing that the targeted employee would be discomforted and offended by such comments because of his religious beliefs. This typically will constitute harassment, and an agency should not tolerate it.
- (c) A group of employees that share a common faith decides that they want to work exclusively with people who share their views. They engage in a pattern of verbal attacks on other employees who do not share their views, calling them heathens, sinners, and the like. This conduct should not be tolerated.
- (d) Two employees have an angry exchange of words. In the heat of the moment, one makes a derogatory comment about the other's religion. When tempers cool, no more is said. Unless the words are sufficiently severe or pervasive to alter the conditions of the insulted employee's employment or create an abusive working environment, this is not statutory religious harassment.
- (e) Employees wear religious jewelry and medallions over their clothes or so that they are otherwise visible. Others wear buttons with a generalized religious or anti-religious message. Typically, these expressions are personal and do not alone constitute religious harassment.

- (f) In her private work area, a federal worker keeps a Bible or Koran on her private desk and reads it during breaks. Another employee displays a picture of Jesus and the text of the Lord's Prayer in her private work area. This conduct, without more, is not religious harassment, and does not create an impermissible hostile environment with respect to employees who do not share those religious views, even if they are upset or offended by the conduct.
- (g) During lunch, certain employees gather on their own time for prayer and Bible study in an empty conference room that employees are generally free to use on a first-come, first-served basis. Such a gathering does not constitute religious harassment even if other employees with different views on how to pray might feel excluded or ask that the group be disbanded.

C. Accommodation of Religious Exercise. Federal law requires an agency to accommodate employees' exercise of their religion unless such accommodation would impose an undue hardship on the conduct of the agency's operations. Though an agency need not make an accommodation that will result in more than a *de minimis* cost to the agency, that cost or hardship nevertheless must be real rather than speculative or hypothetical: the accommodation should be made unless it would cause an actual cost to the agency or to other employees or an actual disruption of work, or unless it is otherwise barred by law.

In addition, religious accommodation cannot be disfavored vis-a-vis other, nonreligious accommodations. Therefore, a religious accommodation cannot be denied if the agency regularly permits similar accommodations for nonreligious purposes.

Examples

- (a) An agency must adjust work schedules to accommodate an employee's religious observance—for example, Sabbath or religious holiday observance—if an adequate substitute is available, or if the employee's absence would not otherwise impose an undue burden on the agency.
- (b) An employee must be permitted to wear religious garb, such as a crucifix, a yarmulke, a head scarf, or hijab, if wearing such attire during the work day is part of the employee's religious practice or expression, so long as the wearing of such garb does not unduly interfere with the functioning of the workplace.

- (c) An employee should be excused from a particular assignment if performance of that assignment would contravene the employee's religious beliefs and the agency would not suffer undue hardship in reassigning the employee to another detail.
- (d) During lunch, certain employees gather on their own time for prayer and Bible study in an empty conference room that employees are generally free to use on a first-come, first-served basis. Such a gathering may not be subject to discriminatory restrictions because of its religious content.

In those cases where an agency's work rule imposes a substantial burden on a particular employee's exercise of religion, the agency must go further: an agency should grant the employee an exemption from that rule, unless the agency has a compelling interest in denying the exemption and there is no less restrictive means of furthering that interest.

Examples

- (a) A corrections officer whose religion compels him or her to wear long hair should be granted an exemption from an otherwise generally applicable hair-length policy unless denial of an exemption is the least restrictive means of preserving safety, security, discipline or other compelling interests.
- (b) An applicant for employment in a governmental agency who is a Jehovah's Witness should not be compelled, contrary to her religious beliefs, to take a loyalty oath whose form is religiously objectionable.

D. Establishment of Religion. Supervisors and employees must not engage in activities or expression that a reasonable observer would interpret as government endorsement or denigration of religion or a particular religion. Activities of employees need not be officially sanctioned in order to violate this principle; if, in all the circumstances, the activities would leave a reasonable observer with the impression that government was endorsing, sponsoring, or inhibiting religion generally or favoring or disfavoring a particular religion, they are not permissible. Diverse factors, such as the context of the expression or whether official channels of communication are used, are relevant to what a reasonable observer would conclude.

Examples

- (a) At the conclusion of each weekly staff meeting and before anyone leaves the room, an employee leads a prayer in which nearly all employees participate. All employees are required to attend the weekly meeting. The supervisor neither explicitly recognizes the prayer as an official function nor explicitly states that no one need participate in the prayer. This course of conduct is not permitted unless under all the circumstances a reasonable observer would conclude that the prayer was not officially endorsed.
- (b) At Christmas time, a supervisor places a wreath over the entrance to the office's main reception area. This course of conduct is permitted.

Section 2. Guiding Legal Principles. In applying the guidance set forth in section 1 of this order, executive branch departments and agencies should consider the following legal principles.

A. Religious Expression. It is well-established that the Free Speech Clause of the First Amendment protects government employees in the workplace. This right encompasses a right to speak about religious subjects. The Free Speech Clause also prohibits the government from singling out religious expression for disfavored treatment: "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression," *Capitol Sq. Review Bd. v. Pinette*, 115 S.Ct. 2448 (1995). Accordingly, in the government workplace, employee religious expression cannot be regulated because of its religious character, and such religious speech typically cannot be singled out for harsher treatment than other comparable expression.

Many religions strongly encourage their adherents to spread the faith by persuasion and example at every opportunity, a duty that can extend to the adherents' workplace. As a general matter, proselytizing is as entitled to the same constitutional protection as any other form of speech. Therefore, in the governmental workplace, proselytizing should not be singled out because of its content for harsher treatment than nonreligious expression.

However, it is also well-established that the government in its role as employer has broader discretion to regulate its employees' speech in the workplace than it does to regulate speech among the public at large. Employees' expression on matters of public concern can be regulated if the employee's interest in the speech is outweighed by the

interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. Governmental employers also possess substantial discretion to impose content-neutral and viewpoint-neutral time, place and manner rules regulating private employee expression in the workplace (though they may not structure or administer such rules to discriminate against particular viewpoints). Furthermore, employee speech can be regulated or discouraged if it impairs discipline by superiors, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise, or demonstrates that the employee holds views that could lead his employer or the public reasonably to question whether he can perform his duties adequately.

Consistent with its fully protected character, employee religious speech should be treated, within the federal workplace, like other expression on issues of public concern: in a particular case, an employer can discipline an employee for engaging in speech if the value of the speech is outweighed by the employer's interest in promoting the efficiency of the public services it performs through its employee. Typically, however, the religious speech cited as permissible in the various examples included in these Guidelines will not unduly impede these interests and should not be regulated. And rules regulating employee speech, like other rules regulating speech, must be carefully drawn to avoid any unnecessary limiting or chilling of protected speech.

B. Discrimination in Terms and Conditions. Title VII of the Civil Rights Act of 1964 makes it unlawful for employers, both private and public, to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's ... religion." 42 U.S.C. § 2000e-2(a)(1). The federal government also is bound by the equal protection component of the Due Process Clause of the Fifth Amendment, which bars intentional discrimination on the basis of religion. Moreover, the prohibition on religious discrimination in employment applies with particular force to the federal government, for Article VI, clause 3 of the Constitution bars the government from enforcing any religious test as a requirement for qualification to any Office. In addition, if a government law, regulation or practice facially discriminates against employees' private exercise of religion or is intended to infringe upon or restrict private religious exercise, then that law, regulation or practice implicates the Free Exercise Clause of the First Amendment. Last, under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, governmental action that substantially burdens a private party's

exercise of religion can be enforced only if it is justified by a compelling interest and is narrowly tailored to advance that interest.

C. Coercion of Employee's Participation or Nonparticipation in Religious Activities. The ban on religious discrimination is broader than simply guaranteeing nondiscriminatory treatment in formal employment decisions such as hiring and promotion. It applies to all terms and conditions of employment. It follows that the federal government may not require or coerce its employees to engage in religious activities or to refrain from engaging in religious activity. For example, a supervisor may not demand attendance at (or a refusal to attend) religious services as a condition of continued employment or promotion, or as a criterion affecting assignment of job duties. Quid pro quo discrimination of this sort is illegal. Indeed, wholly apart from the legal prohibitions against coercion, supervisors may not insist upon employees' conformity to religious behavior in their private lives any more than they can insist on conformity to any other private conduct unrelated to employees' ability to carry out their duties.

D. Hostile Work Environment and Harassment. Employers violate Title VII's ban on discrimination by creating or tolerating a "hostile environment" in which an employee is subject to discriminatory intimidation, ridicule, or insult sufficiently severe or pervasive to alter the conditions of the victim's employment. This statutory standard can be triggered (at the very least) when an employee, because of her or his religion or lack thereof, is exposed to intimidation, ridicule, and insult. The hostile conduct—which may take the form of speech—need not come from supervisors or from the employer. Fellow employees can create a hostile environment through their own words and actions.

The existence of some offensive workplace conduct does not necessarily constitute harassment under Title VII. Occasional and isolated utterances of an epithet that engenders offensive feelings in an employee typically would not affect conditions of employment, and therefore would not in and of itself constitute harassment. A hostile environment, for Title VII purposes, is not created by the bare expression of speech with which one disagrees. For religious harassment to be illegal under Title VII, it must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Whether conduct can be the predicate for a finding of religious harassment under Title VII depends on the totality of the circumstances, such as the nature of the verbal or physical conduct at issue and the context in which the alleged incidents occurred. As the Supreme Court has said in an analogous context:

[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive.

The use of derogatory language directed at an employee can rise to the level of religious harassment if it is severe or invoked repeatedly. In particular, repeated religious slurs and negative religious stereotypes, or continued disparagement of an employee's religion or ritual practices, or lack thereof, can constitute harassment. It is not necessary that the harassment be explicitly religious in character or that the slurs reference religion: it is sufficient that the harassment is directed at an employee because of the employee's religion or lack thereof. That is to say, Title VII can be violated by employer tolerance of repeated slurs, insults and/or abuse not explicitly religious in nature if that conduct would not have occurred but for the targeted employee's religious belief or lack of religious belief. Finally, although proselytization directed at fellow employees is generally permissible (subject to the special considerations relating to supervisor expression discussed elsewhere in these Guidelines) such activity must stop if the listener asks that it stops or otherwise demonstrates that it is unwelcome.

E. Accommodation of Religious Exercise. Title VII requires employers "to reasonably accommodate ... an employee's or prospective employee's religious observance or practice" unless such accommodation would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). For example, by statute, if an employee's religious beliefs require her to be absent from work, the federal government must grant that employee compensation time for overtime work, to be applied against the time lost, unless to do so would harm the ability of the agency to carry out its mission efficiently. 5 U.S.C. § 5550a.

Though an employer need not incur more than *de minimis* costs in providing an accommodation, the employer hardship nevertheless must be real rather than speculative or hypothetical. Religious accommodation cannot be disfavored relative to other, nonreligious, accommodations. If an employer regularly permits accommodation for nonreligious purposes, it cannot deny comparable religious accommodation: "Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986).

In the government workplace, if neutral workplace rules—that is, rules that do not single out religious or religiously motivated conduct for disparate treatment—impose a substantial burden on a particular employee's exercise of religion, the Religious Freedom Restoration Act requires the employer to grant the employee an exemption from that neutral rule, unless the employer has a compelling interest in denying an exemption and there is no less restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

F. Establishment of Religion. The Establishment Clause of the First Amendment prohibits the government—including its employees—from acting in a manner that would lead a reasonable observer to conclude that the government is sponsoring, endorsing or inhibiting religion generally or favoring or disfavoring a particular religion. For example, where the public has access to the federal workplace, employee religious expression should be prohibited where the public reasonably would perceive that the employee is acting in an official, rather than a private, capacity, or under circumstances that would lead a reasonable observer to conclude that the government is endorsing or disparaging religion. The Establishment Clause also forbids federal employees from using government funds or resources (other than those facilities generally available to government employees) for private religious uses.

Section 3. General. The Guidelines shall govern the internal management of the civilian executive branch. They are not intended to create any new right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. Questions regarding interpretations of these Guidelines should be brought to the Office of the General Counsel in each department and agency.

THE WHITE HOUSE
WASHINGTON

MAY 14, 1997

RECOMMENDED TELEPHONE CALL

TO: SENATOR BOXER

DATE: ON OR BEFORE NOON MAY 15, 1997

RECOMMENDED BY: SUSAN BROPHY, LEGISLATIVE AFFAIRS
TRACEY THORNTON, LEGISLATIVE AFFAIRS

PURPOSE: TO THANK THE SENATOR FOR HER LEADERSHIP IN
OPPOSING THE SANTORUM BILL ON "PARTIAL-
BIRTH ABORTION" AND TO ASK HER TO CONSIDER
VOTING FOR DASCHLE IF HER ALTERNATIVE DOES
NOT PREVAIL

BACKGROUND:

On March 20, 1997, the House of Representatives passed a bill identical to the one you vetoed last year by a vote of 295-136, a veto-proof margin. The Senate will vote on the Daschle substitute tomorrow as well as a Feinstein-Boxer substitute to the underlying bill sponsored by Senator Santorum (R-PA).

Both substitutes would ban all post-viability abortions with exceptions for life and health of the mother. The differences between them go to the definition of health. The Daschle alternative contains a very strict definition of health making it unlawful to abort a viable fetus unless the physician certifies that continuation of the pregnancy would threaten the mother's life or risk grievous injury to her health. Grievous injury does not include any condition that is not medically diagnosable or any condition for which termination of pregnancy is not medically indicated. Senator Daschle intends to cover a mental health condition only when it manifests itself in some serious physical way. The Feinstein-Boxer exception covers "serious adverse health consequences to the woman".

5/15/97
call made
per Betty
Curren -
Reg Affairs -
C. Cleveland.
COS

Senator Daschle's approach is not supported by the pro-choice movement because of its narrow health definition. Senator Boxer has privately indicated her very strong reservations about the Daschle alternative but she has not said that she will vote against it. She is concerned that the women who were here when you vetoed the bill may not be covered under Daschle. We have told her that we believe they would be and have asked Daschle to make that clear in his remarks on the floor.

TOPICS OF DISCUSSION:

1. Tell Senator Boxer that you are very grateful for her work to protect a woman's right to choose. Say that we would not have been able to hold the line as we have so far were it not for her courage and the strength of her convictions. Ask for her assessment of the vote situation in the Senate.
2. She may tell you that Daschle is leaning towards voting for Santorum if Daschle's alternative does not pass. Let her know that you had a conversation with Senator Daschle earlier today and he did not raise that possibility with you. Tell her that you are concerned about the veto override vote and that you know how difficult this matter is for many of her colleagues. Tell her that you think it is important to pass either her alternative or Daschle's so that at least there are two different bills, one in the Senate recognizing the need to protect the mother's health and the other an extreme House measure that will be vetoed. Tell her she should vote for Daschle's alternative if her's does not pass.

**CONTACT PERSON AND
TELEPHONE NUMBERS(S):**

Senator Boxer
202-547-1015 or White House Operator

DATE OF SUBMISSION:

May 14, 1997

ACTION:

Chron

THE WHITE HOUSE
WASHINGTON

May 14, 1997

RECOMMENDED TELEPHONE CALL

TO: SENATOR BREAUX

DATE: ON OR BEFORE NOON MAY 15, 1997

RECOMMENDED BY: SUSAN BROPHY, LEGISLATIVE AFFAIRS *SB*
TRACEY THORNTON, LEGISLATIVE AFFAIRS

PURPOSE: TO ASK THE SENATOR TO SUPPORT THE DASCHLE
ALTERNATIVE ON LATE-TERM ABORTION

BACKGROUND:

On March 20, 1997, the House of Representatives passed a bill identical to the one you vetoed last year by a vote of 295-136, a veto-proof margin. The Senate will vote on the Daschle substitute tomorrow as well as a Feinstein-Boxer substitute to the underlying bill sponsored by Senator Santorum (R-PA).

Both substitutes would ban all post-viability abortions with exceptions for life and health of the mother. The differences between them go to the definition of health. The Daschle alternative contains a very strict definition of health making it unlawful to abort a viable fetus unless the physician certifies that continuation of the pregnancy would threaten the mother's life or risk grievous injury to her health. Grievous injury does not include any condition that is not medically diagnosable or any condition for which termination of pregnancy is not medically indicated. Senator Daschle intends to cover a mental health condition only when it manifests itself in some serious physical way. The Feinstein-Boxer exception covers "serious adverse health consequences to the woman".

TOPICS OF DISCUSSION:

1. Tell Senator Beaux that you recognize and respect the fact that he is pro-life and that you would never ask him to

5/15/97
Call made
per Betty
Currie, Leg
Affairs informed
C. Clewell
copied
Bowles
~~Haley~~

do anything that would in any way compromise his position. But say that you really believe that Daschle's alternative is a pro-life position since it would actually prevent abortions of viable fetuses. A simple ban on one procedure will not stop a single abortion; it would merely result in abortion by other methods, all of which may pose a greater and therefore unacceptable risk to the woman's health.

2. Tell him that while you will not yield on the issue of protecting the health of the mother, you are supporting Daschle's very strict definition of health in hopes of bringing this matter to closure -- neither side is happy with Daschle's alternative. Ask him to vote for Daschle so that we can begin to bring this divisive matter to a close once and for all. Say that the Senate's acceptance of the Daschle approach will send a signal that it time to find a moderate solution to this issue which includes a total ban while protecting the life and great injury to the health of the woman.

CONTACT PERSON AND
TELEPHONE NUMBERS(S):

Senator Breaux
202-543-9011 or White House Operator

DATE OF SUBMISSION:

May 14, 1997

ACTION: