



CLIENT NEWS BRIEF

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COMMUNITY COLLEGE PROFESSOR'S RACIALLY-CHARGED WEBSITE AND EMAILS WERE PURE SPEECH AND NOT UNLAWFUL HARASSMENT

In Rodriguez v. Maricopa County Community College District (9th Cir. May 20, 2010) __F.3d__ (2010 WL 1997405), the United States Court of Appeals for the Ninth Circuit determined that a community college district employee's racially-charged website and emails distributed on and through the district's email and technology system did not constitute unlawful harassment or create a hostile work environment in violation of Title VII and the Equal Protection Clause.

Professor Walter Kehowski ("Kehowski") sent three emails over a distribution list maintained by the Maricopa County Community College District ("District") to every District employee with an email address. The emails contained statements such as: "It's time to acknowledge and celebrate the superiority of Western Civilization." The District also had a technology policy that encouraged faculty to develop District-hosted websites to use as learning tools. In one of the three emails at issue, Kehowski provided a link to such a website maintained by him on the District's web server, containing sentiments such as: "(t)he only immigration reform imperative is preservation of White majority." A certified class of the District's Hispanic employees sued the District, its governing board and two District administrators (the chancellor and president) claiming the District failed to respond properly to the statements, resulting in harassment and a hostile work environment.

The court held that the objection to Kehowski's speech was based entirely on his point of view and the government may not silence speech simply because the ideas are considered to be offensive. The court noted that the U.S. Constitution embraces the heated exchange of views, even when they concern sensitive topics like race. Moreover, the court opined that because other employees were free to discuss race and culture through the District's email list and web server, it was not lawful to single out Kehowski's speech for suppression simply based on his opinions on those issues.

Further, the court discussed the application of laws regarding harassment. Citing Frisby v. Schultz (1988) 487 U.S. 474, 486, the court distinguished speech that is directed at a particular individual in the workplace from speech intended for the general public (i.e., "pure speech"). Kehowski's statements were deemed by the court to be pure speech, not directed at any individual, and "were the effective equivalent of standing on a soap box in a campus quadrangle and speaking to all within earshot." The words were considered by the court to be offensive based only on their meaning, not on any conduct or implicit threat of conduct.

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The court stated "(t)hose offended by Kehowski's ideas should engage him in debate or hit the 'delete' button when they receive his emails."

The court addressed the District's responsibility as an employer in unlawful harassment situations. Relying on previous decisions, the court stated that employers are required to investigate claims of harassment reasonably and appropriately. Although a warning or other discipline may be warranted against the harasser, the employer should focus on deterring and stopping the conduct, if such conduct is considered to be unlawful harassment. In this case, Kehowski's speech was not deemed to be unlawful harassment, rather it was pure speech; therefore, the District was not required to take any specific action against Kehowski. Additionally, the District did not endorse Kehowski's views nor did it adopt them as the District's official position. In fact, the District disseminated an email from the president of the college condemning Kehowski's ideas and a press release from the chancellor of the college stating that the District's views were different from those expressed in Kehowski's messages. Because the District allowed the use of District resources (i.e., email lists and web servers) on a content-neutral basis, the court held that facilitating campus discussion in this way does not suggest official endorsement of the resulting speech. The court concluded that the District did not violate the employees' right to be free of workplace harassment or their right to equal protection.

This case highlights the issues that can arise when a district or government agency in the higher education context, where there is a great amount of academic freedom and encouragement to exchange ideas freely, opens general discussion forums such as email lists and websites hosted by the district but maintained and used by employees.

If you have any questions regarding this decision, please do not hesitate to contact one of our [seven offices](#) located statewide, or consult our [website](#).

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