



Podcast Transcript

Social Justice Movements & Employee Dress Codes

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Kattman: Employees showing support for social justice movements are starting to wear their advocacy positions on their sleeve, or on their face coverings or T-shirts. What happens when one person's support for a social or political cause is considered offensive by another worker? Who gets to decide what is offensive and what is not, and how should employers decide what is allowed? I'm Amy Kattman, and you're listening to BakerHosts.

On today's episode we will answer these questions and others, including a breakdown of what could happen when employees wear clothing that relates to a social justice movement and how employers should deal with these concerns. Our guests are Eric Barnum, a partner in BakerHostetler's Atlanta office, and Todd Lebowitz, a partner in BakerHostetler's Cleveland office, both of whom are part of the Labor and Employment Group. Welcome to the show Todd and Eric.

Lebowitz: Thanks Amy.

Barnum: Thanks Amy, so happy to be here.

Kattman: Great well, Todd, you came across a situation recently that raised some of these issues. Can you tell us about it?

Lebowitz Yes Amy, thanks. So dealt with a client in the manufacturing sector who came to me and said we had an employee who was displaying a Confederate flag on his car in the company parking lot and another employee complained that this made him feel uncomfortable and unwelcome. So he said what do we do? And I said, "Why don't you talk to the Confederate flag guy, let him know it makes people feel uncomfortable and ask him to remove it out of concern for not offending his coworkers? Regardless of his intent, let's not pass judgement and let's not threaten any discipline. If he refuses then we can handle it as a situation where he was told he was doing something offensive and he refused to stop, but let's try to avoid that." So they have the discussion with him, and he agrees to remove it. But, he agrees to remove it after asking whether he can display an American flag and the company said, "yeah of course." And, so all's well that ends well, except in the course of the conversation, he says, "What about the two colored guys on second shift who wear Black Lives Matter shirts?" Well, HR I guess refocused the conversation on the Confederate Flag and then came back to me and said, "Well what do we do about the Black Lives Matter shirts?" And I said, "Well, first handle that the same way that you handled any shirt in support of civil rights. I don't see anything wrong with that. It's a show of support for civil rights. And, if any social and political messages on shirts are allowed by the dress code, then Black Lives Matter is perfectly acceptable. But wait, did he also say colored? Because let's not skip over that." Now for purposes of this discussion, we're gonna skip over that a little bit, because I really want to focus more on the social justice part of it. So, what happens when people wear social justice shirts to work and someone finds it offensive? I mean this one ended okay, but it got me thinking there are a lot of potential issues here.

Kattman: Eric, what's your reaction?

Barnum: So, I understand we are absolutely supposed to talk about social justice issues and how those expressions manifest themselves in the workplace. But I'm sorry, I gotta go back. It's 2020 and, colored probably says a lot about where this particular employee is coming from, and I have a feeling that particular employer might have to deal with him on some other levels sometime down the line. But, again, as Todd said, putting that aside just for the moment it is critically important where we at as a country right now, Amy and Todd, is really at the forefront of so many things. There's really a racial reckoning, if you will, happening right now in America as we confront the history of this country and this nation. Employers have to understand that people come from different backgrounds, different life experiences, and they bring those perspectives to the workplace. While most of, most employees and most employers want their employees to come together for one common good and that is the employer's objectives. We all bring to the workplace our own life experiences. Some of those are good, some of them can be quite jarring and they shape our experiences. So, as we look at this particular scenario, we have to ask ourselves, what is objectively offensive? That's often

the term that's used, and how we describe or how objectively offensive is defined has changed. And perhaps let me say it a different way. It's not that the definition has changed, but whose opinions are now recognized and whose perspectives now play a part in defining that has changed. And so objectivity has changed, and all of the perspectives that go into objectivity have changed and that's really important for employers to recognize as we grapple with these issues going forward.

Lebowitz: Yeah, that's a great point, Eric, and it seems like for employers part of the challenge is determining who gets to decide and how do you make that determination. It seems like in some sense the best way to handle this is on a case by case basis and if people are offended, coworkers are offended, then HR and the company should respect that and should ask the person wearing the clothing not to wear it anymore regardless of whether the intent was to offend or not. I think what makes this really hard is that there's black and there's white, maybe that's a bad analogy, but there's a continuum, right? Where there is, there's a lot of shades of gray. So, examples: wearing a swastika, no way, absolutely prohibited; wearing a Confederate flag shirt, definitely offensive to a lot of people; but then you can slowly start to get into grayer areas. Suppose somebody from Mississippi has a Mississippi state flag shirt that's got a, well the Mississippi state flag has a Confederate flag in it. Is that offensive? What if somebody loved the Dukes of Hazzard TV show and wears a Dukes of Hazzard logo shirt that shows the Duke Boys and the General Lee? What if somebody is a fan of, lives in Las Vegas and is a fan of UNLV and has a vintage Running Rebels tee shirt with the old logo on it of the Confederate looking guy with his pistols? I think you quickly get into a lot of gray and what becomes offensive to different people becomes really hard to determine, especially where there might be no intent to offend.

Kattman: Todd, you're right. There are so many shades of gray. Eric, how does an employer handle that?

Barnum: Well I think it's important for every employer to understand that there is no right answer. And there is no one size fits all or one answer is the balm to all that might, all the ailments of an employer or an employment workplace. Here's what I can tell you though. There are lots of wrong answers, and what I've seen over my career and I'm sure Todd would agree, that more often than not, employers get in trouble because of the many wrong answers, because of the many things that they do that land themselves in trouble. Most often, because they just don't think through it. And so, I would encourage every employer to think through the scenario with some deliberation, with some pause, keeping in mind the overall objectives of the workplace and the work environment you're trying to create for everyone in the workplace. And the right answer will more often than not reveal itself.

Kattman: You know, are there changes employers can make to their dress codes to try and avoid some of these issues?

Lebowitz: So I think there's at least one option that employers could do. Employers could try to avoid the issue entirely by adopting a dress code that prohibits any words, any logos, any pictures. A lot of companies do that. A lot of companies don't do that because they want employees to be comfortable, to wear clothes that they like, to not try to impose too much uniformity in the way people dress. So, there is that no word no logo no picture option, but even that can raise issues too. Eric, you want to talk about that a little bit?

Barnum: Sure. And this one's a bit near and dear to my heart. So, I'm in Atlanta, Georgia. This is football country, whether you're an ACC fan or an SEC fan, whether you root for Clemson or UGA, Alabama or Georgia Tech, LSU or Florida, we love our football down here. And, to suggest that anyone can't wear their Bulldog hat or their Yellowjackets hat to work, assuming hats are allowed, that, them's is fighting words as they say here in the South. But, you can imagine a scenario where, if you allow a Bulldog hat, a Georgia Bulldog hat, why wouldn't you allow a Georgia Tech hat? Okay, makes sense. But then why wouldn't you allow an Atlanta Braves hat? Well, some people find the use of Native American culture and Native American symbols as mascots to be offensive. Of course, if you allow a college football hat why wouldn't you allow a professional football team logo, including the Washington Redskins or from Todd's hometown the Cleveland Indians? Again, we're getting into using symbols of our Native American culture as mascots to professional sports teams, and we all are aware of the controversy surrounding the National Football League team in Washington, D.C. This allows for your exception to the rule to really fall apart and all of a sudden the exceptions become the rule, and it's a very, very slippery slope. So, if you go that route, it needs to be strictly enforced because of the scenario that I've just described. Because again, what is objectively offensive? The definition hasn't changed, and I really want people to hear this. Whose perspective on that objectivity is changing in America? And, the voices that are in the room, voices that have long been shut out of the room, we're now creating a space in our country where marginalized voices are being heard. And so what is objectively offensive to a group of people who all think, live and act the same is no longer the standard in America. And it shouldn't have been for a long time. And so you have to understand the voices that are being brought into the room when you talk about what is offensive. And I get it, employers are grappling with that and it's not an easy discussion to have, but as a friend of mine said to me the other day, there can be no progress, there can be no growth without friction. And that includes the American workplace.

Kattman: Eric, that's so true. It really is a challenging environment right now. Todd, do you want to share some final remarks with our audience?

Lebowitz: Yeah, I think Eric makes a great point that the workplace really is a melting pot and while a company's primary objective is to run the business it's a group of people that actually operate the business. And they're in there from day to day and they come from different backgrounds, and employers need to make some tough decisions. And dress codes are no exception. Do you, are you going to allow employees to express themselves and then if so, how are you gonna deal with these shades of gray? Or do you not allow them to express themselves in

any way? And like Eric said if you go that route you need to strictly enforce it and you don't even allow the UGA or Georgia Tech football hat. So these are tough decisions and with social justice in the front of everybody's mind right now these are decisions that employers are gonna have to continue to grapple at.

Kattman: Eric, how about you? Do you have some closing thoughts for our audience?

Barnum: Sure. I agree with everything Todd has said, and I would remind all of our listeners whether you're a manager or a supervisor or you're the person on the front line, everyone comes to the workplace with your own thoughts, your own perspectives, your own view of the world. But a lot of companies have value statements, mission statements that are intended to capture the essence of who they want to be as an organization. And for employers who are facing some of these tough decisions, I encourage you to look back to that mission statement. Look back to that value statement and ask yourself, are you living every day those values? Are you striving and driving toward that mission every day? And when you're grappling with some of these issues, keep those values and that mission statement in mind and you'll be okay. You'll be okay.

Kattman: Thank you Eric and Todd.

Barnum: Thank you so much.

Kattman: If you have any questions for our guests, their contact information is in the show notes. We've also included a link to our website where you'll find more information about BakerHostetler's labor and employment practice. As always, thanks for listening to BakerHosts.

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