EEOC to Gadsden Flag Lovers: Shut Up or Face Costly Lawsuits

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Libertarian think tanks have been known to distribute lapel pins that display the **Gadsden flag,** reading "Don't Tread on Me." The flag has also been **used** by the U.S. military, in patriotic displays, by Second Amendment supporters, and others. But such free expression is **now under siege** from Obama's appointees at the federal Equal Employment Opportunity Commission.

"Wearing 'Don't Tread on Me' insignia could be punishable racial harassment" in the eyes of the EEOC, **notes** UCLA Law Professor Eugene Volokh. On June 3, the EEOC reversed the U.S. Postal Service's dismissal of a Tea Party-hating black employee's racial harassment complaint alleging that "a coworker (C1) repeatedly wore a cap to work with an insignia of the Gadsden Flag, which depicts a coiled rattlesnake and the phrase 'Don't Tread on Me.'" It ruled "that the Complainant's claim must be investigated to determine the specific context in which C1 displayed the symbol in the workplace."

In its ruling, the EEOC chose to ignore both **the First Amendment**, and the Supreme Court's repeated admonition that harassment must be **"severe or pervasive**" to constitute discrimination forbidden by Title VII of the Civil Rights Act.

The EEOC will only grow bolder in restricting speech in the future, especially if it no longer fears retaliatory budget cuts from conservative lawmakers. Congress looks likely to have a **more liberal cast** in the future, and most Democrats **back bans on hate speech** in public opinion **polls**. Liberal senators such as Tim Kaine have recently pushed for **large budget increases** for federal civil rights agencies, as has the **Obama administration.** The EEOC's budget rose significantly after liberals took control of Congress in 2006, then fell slightly in real terms after conservatives took control of the House in 2010.

The EEOC issued its June 3 ruling even though it admitted that "the Gadsden Flag originated in the Revolutionary War in a non-racial context." *See* ***Shelton D. v. Brennan***, 2016 WL 3361228 (EEOC June 3, 2016). Indeed, as others have noted, **it is** a "symbol of America's independence."

The EEOC speculated that the cap might nevertheless have somehow conveyed racism in the postal work environment, since "in 2014, African-American New Haven firefighters complained about the presence of the Gadsden flag in the workplace," and racists in Nevada "draped the bodies of two murdered police officers with the Gadsden flag" during a "shooting spree."

The complainant also argued the flag was racist because it is "a historical indicator of white resentment against blacks stemming largely from the Tea Party." The EEOC did not rely on that reasoning, although a left-wing law professor **expressed sympathy with it.** As Volokh notes, that professor's defense of the EEOC's ruling as properly targeting speech with a perceived sexual or racial motive logically suggests that the EEOC could silence a wide array of political speech. That's because speech critical of left-leaning politicians who are women or minorities is frequently depicted by left-leaning journalists as sexist or racist. For example, prominent media figures claim it is sexist to say of Hillary Clinton that "'**She doesn't connect**. She isn't likable. She doesn't inspire. She seems shrill. 'She shouts.'" That **she wears a $12,000 jacket.** That **her success is due to her marriage to Bill Clinton.** That she is '**polarizing**, calculating, disingenuous, insincere, ambitious, inevitable, entitled, over confident,' or 'secretive.'"

Those who defend or minimize the EEOC's decision **say** that it was not definitively declaring the cap's wearer to be racist, citing the EEOC's statement that "we are not prejudging the merits of Complainant's complaint. Instead, we are precluding a procedural dismissal that would deprive us of evidence that would illuminate the meaning conveyed by C1's display of the symbol."

But that misses the point. Even if the cap's wearing *did* have a veiled, racist meaning (which seems extremely unlikely), the EEOC still had no basis for demanding an investigation, as Title VII only covers harassment that is "severe or pervasive," not subtle or ambiguous. Defenders of the EEOC's decision simply ignore the "severe or pervasive" requirement.

The EEOC simply ignored the fact that to be racial harassment under Title VII, the cap had to be *both* racist, *and* severe or pervasive enough to create a hostile or abusive work environment. The latter requirement has led the U.S. Supreme Court to stated that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" doesn't rise to the level of illegal harassment. *See* ***Meritor Savings Bank v. Vinson*** (1986). Thus, federal appeals court **rulings** in the past had ruled that even using the N-word in the workplace is generally not enough to create a racially hostile environment when the hateful epithets are merely overheard or learned about second-hand, or when they are not repeated more than few times. *See, e.g.,* ***Witt v. Roadway Express*** (1998) and ***Bolden v. PRC*** (1995).

If you get rid of the "severe or pervasive" requirement, a vast array of political speech can be banned as racial harassment. Under campus "hostile environment" harassment codes, students have been subjected to **disciplinary proceedings,** in violation of the First Amendment, merely for expressing commonplace opinions about sexual and racial issues, such as criticizing feminism or affirmative action. (See the examples cited in the *Amicus* brief of Students for Individual Liberty, *et al.*, filed in *Davis v. Monroe County Board of Education*, available in Westlaw at 1998 WL 847365.)

The fact that someone else is wearing a cap that you suspect is motivated by racism -- even on a regular basis -- is much less hurtful than being called a hateful racial epithet even once (and thus is logically insufficient for Title VII liability, under the "severe or pervasive" test). If, as the Supreme Court has emphasized, a single racial epithet aimed at the complainant doesn't rise to that level, then less offensive conduct – such as the wearing of a cap not even aimed at the complainant – surely doesn't. As federal appeals courts have repeatedly noted in cases such as ***Gleason v. Mesirow Financial***(1997), "the impact of 'second-hand harassment' [words or conduct overheard by a complainant] is obviously not as great as the impact of harassment directed at the plaintiff." But the EEOC has previously ignored that settled legal principle in finding an agency liable under Title VII merely because of the unfortunate fact that two of its employees repeatedly wore **confederate flag T-shirts**, a ruling that law professor Volokh criticized **at this link**.

When conduct is not flagrantly racist or sexist, even multiple instances of offensive comments aimed at you generally don't show "severe or pervasive" harassment. *See, e.g.*, ***Duncan v. General Motors*** (2002); ***Skouby v. Prudential Insurance*** (1997).

While the U.S. Postal Service itself can ban some racist utterances even if they don't constitute illegal racial harassment (public employers can generally ban rude speech regardless of whether it is illegal), the EEOC can't, because it only has jurisdiction over the USPS under Title VII, which bans only discrimination, not racist speech in general (much less non-racist speech like the Gadsden flag). Since the EEOC's ruling was interpreting a law that governs both public and private workplaces (Title VII), its ruling thus menaces free speech in private workplaces as well.

Unfortunately, the Supreme Court has never ruled on the extent to which the First Amendment is a defense to harassment charges based on speech, even when the speech is a necessary part of the employer's business. That makes the EEOC's decision gutting Title VII's "severe or pervasive" requirement a serious threat not just to the marketplace of ideas, but to individual participants in the marketplace.

Lower courts have only occasionally shed light on this subject. In *DeRochement v. D & M Printing Co.* (discussed **here** and **here**), a court dismissed a sexual harassment claim against a print shop over a printing order that offended an employee, citing the First Amendment. And in *Stanley v. Lawson* (1997), a court rejected a woman's attempt to base a sexual harassment claim in part on the magazines her employer sold, relying on the First Amendment. By contrast, an arbitrator in the *EZ Communications* case dismissed a First Amendment defense to a sexual harassment claim, even though it was based on on-air radio commentary.

In ***Rodriguez v. Maricopa Community College***, 605 F.3d 703 (9th Cir. 2010), a federal appeals court relied on the First Amendment to quash a racial harassment suit against a professor for sending anti-immigration emails, which a college's Hispanic employees claimed created a hostile work environment in violation of Title VII and the Fourteenth Amendment. The appeals court refused to allow such liability over speech not aimed at individual Hispanic employees. But that case involved a university, so one can imagine a pro-censorship judge claiming it does not apply outside the university, where "academic freedom" does not apply.

As UCLA's Eugene Volokh **notes**, hostile-environment regulations can already reach a variety of core political speech, as long as it is "severe" or "pervasive." If the EEOC succeeds in getting rid of the "severe or pervasive" requirement for harassment claims, workplace censorship of political speech will expand dramatically, and multiply its suppression of speech.

When the Obama EEOC issues a baseless ruling against a federal agency, the Obama administration tends not to appeal that ruling, since essentially it would be appealing its own decision. That's unfortunate, because even liberal judges sometimes rule against the EEOC when its position is transparently baseless (although they are much more indulgent toward the EEOC than their conservative colleagues).

As legal commentator Walter Olson **observes**, the EEOC is contemptuous of the law, logic, the rules of evidence, and limits on its jurisdiction:

> Judges appointed by Presidents of both political parties have lately made a habit of smacking down the commission's positions, often in cases where it has tried to get away with a stretchy interpretation of existing law. See, for example, the Fourth Circuit's rebuke of "**pervasive errors and utterly unreliable analysis**" in EEOC expert testimony, Justice Stephen Breyer's scathing majority opinion in *Young v. U.P.S.* on the **shortcomings of the EEOC's legal stance** (in a case the plaintiff won), or these **stinging defeats** dealt out to the commission in three other cases."

When minority complainants bring baseless harassment lawsuits against federal agencies, a liberal Justice Department will sometimes mount only a feeble defense, out of ideological affinity for them or the trial lawyers who represent them. That can result in an unjustified verdict for the complainant. For example, when a well-meaning Cajun employee handed out "coonass" certificates to co-workers he liked, irrespective of their race, to both white and non-white co-workers (as Wikipedia **notes**, "many Cajuns use the word in regard to themselves"), a black employee who received one took advantage of this to sue for racial harassment. He won a jury verdict from a liberal Washington jury after left-wing judge Harold Greene refused to dismiss the lawsuit. A liberal Justice Department then dropped any appeal, even though it had good grounds for an appeal, for two reasons. First, the conduct at issue was not racially-motivated (as a federal appeal court required for racial harassment liability, in*Caver v. City of Trenton*, 420 F.3d 243 (3d Cir. 2005)). Nor was it "severe or pervasive" compared to workplaces that were deemed not to be racially hostile by federal appeals courts. *See, e.g.*, ***Witt v. Roadway Express*** (1998) and ***Bolden v. PRC***(1995). The U.S. Attorney's Office in Washington, DC ignored my email citing these cases, which also noted that the prospect of a successful appeal could be used to settle the case for an amount well below the jury's verdict.