NYC Seeks to Curb Speech About Illegal Aliens

New York City is seeking to use an overly broad ordinance against discriminatory harassment to restrict speech about illegal aliens, such as use of the word ”illegal alien” to describe workers or tenants. That violates the First Amendment. Its Commission on Human Rights is targeting such speech in recent ”immigration guidance.” The Commission states, ”Even an employer’s single comment made in circumstances where that comment would signal discriminatory views about one’s immigration status or national origin may be enough to constitute harassment. The use of the terms ‘illegal alien’ and ‘illegals,’ with the intent to demean, humiliate, or offend a person or persons in the workplace, amounts to unlawful discrimination under the NYCHRL.”

That explicitly forbids speech based on its viewpoint, even though the First Amendment,Â above all else, was intendedÂ to prevent viewpoint-based restrictionsÂ on speech. And it’s not just employers whose speech about immigration the Commission seeks to restrict. The CommissionÂ states, ”It is illegal for a person’s employer, coworkers, or housing provider such as landlords to use derogatory or offensive terms to intimidate, humiliate, or degrade people, including by using the term ”illegal alien,” where its use is intended to demean, humiliate, or offend another person.” It also cites tenants as an example of people whose speech is restricted.

The city also is trying to forbid most if not all reporting of illegal aliens to the federal government. The Commission forbids such reports if the person making the report is ”motivated” by the illegal alien’s ”immigration status.” But what other motive could a reporting party legitimately have? The whole reason to report an illegal alien to the federal government is precisely because of their immigration status.

Yet, the Commission bans not just the threat of reporting, but also most if not all actual reports as well. It declares: ”Employer threats to call federal immigration authorities can constitute unlawful harassment under the NYCHRL when motivated, in whole or in part, by animus related to the employee’s actual or perceived immigration status”. While reporting a violation of the law to the police is otherwise permitted, it is a violation of the NYCHRL when such action is taken or threats to take such action are made based solely on a discriminatory or retaliatory motive.”

The immigration guidance explicitly describes certainÂ actual reportsÂ as violations, such as the following example: ”At a rest stop, a bus driver of a coach bus company voluntarily identifies to federal immigration authorities passengers whom he perceives to be foreign based on their ethnicity and the language they are speaking. He invites the federal immigration authorities to do a search on the coach bus, telling the agent, ”Go ahead, round up the ”illegals.”” While the bus driver is hardly the most sympathetic reporter (he is relying partly on ethnicity), the guidance also bans reporting motivated by an illegal alien’s ”immigration status,”even apart from ethnicity.

The Commission apparently believes it can punish virtually all such reports, because such reports are, by their very nature, made with a discriminatory motive as defined under the city’s ordinance, which treats ‘immigration status” as a protected characteristic. This belief is wrong. Not only does the Commission’s interpretation improperly interfere with enforcement of federal immigration law, thus triggering federal preemption, but it also violates freedom of petition. The First AmendmentÂ freedom of petitionÂ generally covers even reports made with an ulterior or discriminatory motive. For example, the Supreme Court ruled that a company’s First Amendment freedom of petition gave it the right to file a factually well-grounded lawsuit, regardless of its motive for

filing it. The company's motive was allegedly retaliatory and discriminatory in violation of the National Labor Relations Act, but the Supreme Court said that did not strip it of First Amendment protection, in its decision in *BE&K Construction v. NLRB* (2002).

The Commission threatens to impose $250,000 fines in the guidance, as authorized by the City's "human rights" ordinance. The Commission also fails to describe any real-world example or situation in which it would be legal under the ordinance to report an illegal alien to the federal government. The specter of such huge fines and no safe harbor for reporting will have a huge chilling effect on citizens, discouraging them from exercising their First Amendment right to petition federal officials to remove illegal aliens.

The New York Post provided this description of how New York City will be enforcing its ordinance:

> *It's now against the law in New York City to threaten someone with a call to immigration authorities or refer to them as an "illegal alien" when motivated by hate.*
>
> *The restrictions " violations of which are punishable by fines of up to $250,000 per offense "are outlined in a 29-page directive released by City Hall's Commission on Human Rights.*
>
> *"Alien" "used in many laws to refer to a "noncitizen" person " is a term that may carry negative connotations and dehumanize immigrants, marking them as "other," " reads one passage of the memo. "The use of certain language, including "illegal alien" and "illegals," with the intent to demean, humiliate, or offend a person or persons constitutes discrimination."*

So as Jazz Shaw notes at Hot Air, merely "using the same phrase" "illegal alien" "that appears all through Title 8 of

federal law" "can now land you in hot water" in New York City. Even though the Supreme Court itself uses the term "illegal alien."

Even if it didn't reach speech about illegal aliens, New York City's ordinance would still be overly broad, because it defines far too much other speech about racial, sexual, or religious topics as discriminatory harassment. That's because, unlike federal law, it expressly rejects the requirement that speech must be "evere or pervasive" to constitute racial, sexual, or discriminatory harassment. As the immigration guidance explains, "severity or pervasiveness" is not needed for a violation. So speech doesn't have to be "severe"or "pervasive" to constitute harassment in New York City, whether it is "harassment" based on immigration status, or sexual, racial, or religious harassment. New York state law was also recently revised to eliminate the "severe or pervasive"requirement, in legislation passed by New York's left-leaning legislature.

Due to the lack of a "severe or pervasive" requirement in the city's ordinance, some judges have allowed employees to sue over a single offensive, non-threatening utterance by a co-worker, such as anti-gay remarks. That has turned the city's antibias ordinance into a harsh, unconstitutional speech code. (New York's ordinance does allow an employer sued for offensive workplace speech to raise the affirmative defense that the speech amounted to nothing more than "petty slights," but in practice, this defense doesn't seem to work very well).

New York City's ordinance reaches beyond workplaces to housing and public accommodations. And it does not exempt colleges from its sweeping definition of harassment, even though courts have struck down campus speech codes that defined sexual or racial harassment in a way similar to New York"s ordinance. Courts have struck down sexual harassment policies in colleges and high schools because they lacked a "severe or pervasive" limit. They reasoned that punishing speech that is not severe

or pervasive violates the First Amendment. (See, e.g., Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001); DeJohn v. Temple University, 537 F.3d 301 (3d Cir. 2008)).

Moreover, the fact that speech has the "purpose" of creating a hostile environment doesÂ notÂ strip it of protection on campus, if it does not actually cause more than transitory offense. So even if New York's ordinance were limited to speech about illegal aliens that is "intended" to "offend" someone (the primary focus of the Commission's recent document), it would still be unconstitutional as applied to just using the term "illegal alien." As law professor Eugene Volokh notes, otherwise protected speech generally does not lose its protection merely because the speaker has a forbidden mental motive for speaking it.

Reporting illegal immigrants to ICE also does not lose its protection merely because the Commission views the report as discriminatory or hateful. Freedom of petition does not lose its protection merely because the petitioner has a discriminatory or ulterior motive, as the Supreme Court made clear in *BE&K Construction v. NLRB* (2002). This is a good thing, because people often mistakenly attribute bad or subversive motives to their political adversaries, or people with unpopular views. For example, as Supreme Court Justice Douglas noted in *Elfbrandt v. Russell*, "People often label as "communist" ideas which they oppose; and they often make up our juries. "

Speech about racial or sexual issues that offends someone (like immigration, which progressives view as a racial issue) still is constitutionally protected speech, especially if it is not severe or pervasive.

The severity requirement provides needed breathing space for free speech. Under campus hostile-environment harassment policies that lacked a "severe or pervasive" limit, "students

and campus newspapers have been charged with racial or sexual harassment for expressing commonplace views about racial or sexual subjects, such as criticizing feminism, affirmative action, sexual harassment regulations, homosexuality, gay marriage, or transgender rights, or discussing the alleged racism of the criminal justice system."

Core political speech about topics like immigration can sometimes be protected even if it is severe or pervasive. A federal appeals court dismissed a racial harassment lawsuit over a professor's racially-charged anti-immigration emails on First Amendment grounds, even though they offended Hispanic college staff to the point of being severe and pervasive in the eyes of a federal judge because those racially-charged emails were not aimed at any specific Hispanic employee. (*SeeÂ Rodriguez v. Maricopa Community College District*, 605 F.3d 703 (9th Cir. 2010)). Those constitutionally-protected emails would run afoul of New York City's law, which wouldnâ't even require the Hispanic staff to show that the emails were severe or pervasive.

Contrary to what New York City may think, there isÂ no blanket "harassment" exception to the First Amendment. A federal appeals court made that clear, when it struck down a campus racial harassment code that was used to punish people for speech that created a "hostile environment" based on the "subjective" reactions of listeners. A more severe impact than just hurt feelings is needed to justify banning speech on campus. (*See Dambrot v. Central Michigan University,* 55 F.3d 1177 (6th Cir. 1995)).

Even in non-academic workplaces, New York City's ordinance is unconstitutionally overbroad. The fact that speech is offensive is not sufficient reason for the government to ban it in a private workplace. The Oregon Supreme Court overturned the application of a religious harassment rule to a private employer's religious expression on freedom-of-religion grounds. Concurring, Justice Unis noted that the religious

harassment regulation violated free speech because it did not require that conduct be serious enough to create a subjectively hostile environment. That was so even though the regulation did require that the conduct be unwelcome and create an objectively (as opposed to subjectively) hostile work environment. (*SeeÂ Meltebeke v. Bureau of Labor and Industries*, 903 P.2d 351 (Or. 1995)).

The Supreme Court requires that conduct be not just unwelcome, but also severe or pervasive enough to make the work environment both subjectively *and* objectively hostile, before it is legally considered harassment under federal law. (*SeeÂ Harris v. Forklift Systems*, 510 U.S. 17 (1993)).

Even the "severe or pervasive" standard found in federal law is not sufficiently protective of speech, so it is alarming that New York City has eliminated that modest limit on liability. Under the "severe or pervasive" test, courts have allowed the speech of different speakers to be grouped together in assessing whether speech is "pervasive." That means that no individual speaker needs to have said anything offensive more than once, as long as the cumulative effect of all the different employees, speech is pervasive in the eyes of the complainant. The net effect of such rulings is that employers often have to adopt a "zero tolerance" policy for offensive speech to avoid lawsuits, as Professor Volokh has noted.

The Commission's document is aimed partly at getting employers to suppress speech about illegal immigration by their employees. Laws are not supposed to pressure private entities like employers to restrict someone's constitutionally-protected speech. For example, the First Amendment was violated when a government official pressured a local chamber of commerce not to run ads from a particular businessman in its publication, as the New York federal appeals court ruled in 1991 in *Rattner v. Netburn*. Courts have also ruled that government officials should not pressure or otherwise direct

private employers to restrict speech protected by the First Amendment. (*See, e.g, Reuber v. U.S.*, 750 F.2d 1039 (D.C. Cir. 1985)).

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