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PERSPECTIVE

## ACLU's termination of whistleblower sparks debate over racially-coded language

By K. Chike Odiwe

**K**ate Oh (Oh) was an outspoken critic of her superiors at the American Civil Liberties Union (ACLU) during her five years of employment as a lawyer for the organization.

During her employment, Oh sent several scathing emails to human resources in which she complained about the conduct of her superiors. Oh believed that her superiors created what she described as a hostile workplace. She expressed her contention that the office operated with sexism, unmanageable workloads, and a fear-based culture. Oh considered herself to be a whistleblower and advocate for other women in the office.

The ACLU said that Oh's complaints about several superiors, all of whom were Black, used "racist stereotypes." The organization fired Oh in May 2022.

The National Labor Relations Board (NLRB) brought an unfair labor-practice case against the ACLU predicated on retaliation against Oh. A trial in the case concluded in March in Washington, and a judge is expected to decide in the next few months whether the ACLU had justification in terminating Oh.

The ACLU concedes that Oh, who is Korean American, never used any kind of racial slur. However, the organization says that her use of *racially coded* phrases demonstrated a pattern of willful anti-Black animus.



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The court documents revealed that in one instance, Oh expressed to a Black superior that she was "afraid" to talk with him. On another occasion, she told a manager that their conversation was "chastising." And in a meeting, she repeated a satirical phrase that likened her bosses' behavior to suffering "beatings."

The central question in Oh's case is whether her language amounted to racism or whether she merely spoke harshly about her bosses who happened to be Black.

To have a better grasp on the issues involved in Oh's case it is important to have a basic understanding of racially coded language (Coded Language). Coded Language is a form of covert racism that uses neutral terms as racialized terms

to disguise both explicit and implicit racial animus. Evelyn R Carter and Mary C Murphy, 2015. Group-based differences in perceptions of racism: "What counts, to whom, and why? Social and Personality Psychology Compass," 9(6): 269-280. It can trigger racial stereotypes and other negative associations without the stigma of explicit racism. Coded Language does not explicitly refer to race, despite being typically aimed at historically marginalized communities, ideas, and policies.

Oh's case is unusual in that the ACLU appears to be standing on the opposite side of their historical stance for freedom of expression. The core of the ACLU's defense is an argument for an expansive defi-

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nition of what constitutes Coded Language. The case raises an interesting inquiry surrounding the wide range of employee behavior and speech that labor law protects.

Congress established the NLRB to enforce the National Labor Relations Act (NLRA) and ensure fair labor practices in workplaces across the United States. The NLRA protects employees from discipline while engaging in protected activity such as their speech related to the terms and conditions of their employment. National Labor Relations Act, 29 U.S.C. §§ 151-69.

It appears that Oh's speech should be protected under the NLRA as critiques of the condition of her employment at the ACLU.

In February 2022, the ACLU hosted a virtual organization-wide meeting. The national political director, a Black man, had suddenly departed following multiple complaints about his abrasive treatment of subordinates. Oh, one of the em-

ployees who complained, expressed her skepticism that the conditions would improve. She said over zoom, "why shouldn't we simply expect that the beatings will continue until morale improves." Oh explained the metaphorical nature of her speech. The ACLU warned that Oh's comments were "dangerous and damaging," because she seemed to suggest that the former supervisor assaulted her. Oh recognized she had been wrong and apologized.

In March 2022, Ben Needham (Needham), who had succeeded the recently departed national political director, reported that Oh called her direct supervisor, a Black woman, a liar. According to his account, he asked Oh why she had not complained earlier. She responded that she was "afraid" to talk to him. Needham interpreted Oh's response to be Coded Language.

In April 2022, Amber Hikes (Hikes), the head of equity and inclusion, wrote to Oh, documenting a third

incident. "Calling my check-in 'chastising' or 'reprimanding' feels like a willful mischaracterization in order to continue the stream of anti-Black rhetoric you've been using throughout the organization," Hikes wrote in an email.

Given the ethnic background of her superiors, Oh's speech may have a tinge of what can be considered Coded Language. However, it does not seem that any of these incidents, single or combined, should be punishable under the NLRA. I would consider these instances a case where the speaker's intent should be given consideration. If neutral terms are used and the speaker's intent is not to offend on a race-based level then it should rightfully be deemed protected speech under labor law.

There is a fine line between Coded Language that may be protected under the NLRA and workplace speech that may create a hostile work environment and would be

unlawful under federal anti-discrimination laws. See *Fresenius USA Mfg., Inc.*, 358 N.L.R.B. 1261, 1269 (2012) (Member Hayes, dissenting), vacated, No. 12-1387 (D.C. Cir. 2014); *Corr. Corp. of Am.*, 347 N.L.R.B. 632, 636 (2006). Under Title VII it is unlawful for an employer to discharge, refuse to hire, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of an individual's race, color, religion, sex, or national origin. *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 799 801 (8th Cir. 2003).

Coded Language, even if aimed at criticizing an employee's terms and/or condition of employment, that rises to the level of harassment under Title VII of the Civil Rights Act of 1964 should be considered outside the scope of the NLRA's protections, even if it does not reach the current standard for unprotected speech.