

CONFIDENTIAL REPORT

April 25, 2024

*Investigation
of Case #63*

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I. INTRODUCTION

Jackson Lewis P.C. conducted an investigation of Rule 27 reports regarding Representative E. Werner Reschke. The reports referenced public comments made by Representative Reschke regarding Muslims and atheists that were reported to make individuals at the Capitol uncomfortable. Exhibit 1 contains a partial transcript of an interview given by Representative Reschke (“the Rapert Interview”). I also reviewed a separate report that Representative Reschke threatened members of the LGBTQ+ community. This Report contains factual findings based upon the information made available in the course of investigating this matter.

II. INVESTIGATIVE FRAMEWORK / PROCESS

Set forth below is a summary of the relevant sections of Rule 27 and a description of the investigative process.

A. RULE 27

As relevant to this Report, Rule 27¹ states that the Legislative Branch is committed to providing a safe and respectful workplace. Rule 27(1)(b). “Members of the Legislative Assembly ... are expected to conduct themselves in a manner that is free of harassment and to discourage all harassment in the workplace and at professional meetings, seminars, or at any event at which the Legislative business is conducted.” Rule 27(1)(e). Rule 27 is designed to provide options to redress harassing behavior, discriminatory behavior, retaliation, or other behavior prohibited by the rule. Rule 27(1)(f)(A). *See also* Rule 27(1)(g) (“This rule is designed to provide options to those who are experiencing or observing harassing behavior, discriminatory behavior, retaliation or other behavior [prohibited by the rule].”

¹ The conduct which is the subject of this report occurred under the current version of Rule 27 (HCR 28).

1. Harassment Under Rule 27

Harassment that creates a hostile work environment is prohibited by Rule 27. Rule 27(8)(a). Harassment is defined as “verbal or physical conduct...that denigrates or shows hostility toward an individual or group of individuals.” Rule 27(4)(a). Examples include, but are not limited to: “(A) Name calling, slurs or stereotyping; (B) Threatening, intimidating or hostile acts that relate to a protected class; (C) Belittling, demeaning or humiliating a person or persons because of a protected class; or (D) Displaying written or graphic material that is described in subparagraphs (A) to (C) of this paragraph.”

A hostile work environment is created by “behavior that is unwelcome and is so severe or pervasive that it either affects a person’s ability to function in the workplace or denies the person the benefits of the workplace.” Rule 27(4)(b).

“Conduct that is inconsistent with a safe, respectful and inclusive workplace but that does not rise to the level of creating a hostile work environment under [Rule 27] may be addressed under the Legislative Branch Respectful Workplace Policy...” Rule 27(4)(c).²

As relevant to this matter, the Rule defines protected class to include religion, gender identity or expression and sexual orientation. Rule 27(3)(w).

2. Discrimination Under Rule 27

Rule 27 also prohibits conduct that constitutes “an unlawful practice that aids or abets discrimination in a place of public accommodation under the laws of the state.” Neither discrimination nor place of public accommodation are defined by the Rule. In the employment law context, discrimination is generally understood to mean treating an individual differently with respect to the terms or conditions of employment due to a protected class. The Oregon Bureau of

² The Respectful Workplace Policy provides that “prohibited conduct could occur anywhere and in any manner, as long as it has a nexus to legislative work or activity”. Section 4(c).

Labor and Industries defines public accommodations as a private business or organization that offers goods or services to the public. This includes any place that offers the public something, whether it is goods, services, lodging, amusement or otherwise. ORS 659A.400 defines public accommodation to include any place that is open to the public and owned or maintained by a public body, as defined in ORS 174.109, regardless of whether the place is commercial in nature. ORS 174.109 defines public body as “state government bodies, local government bodies and special government bodies.” ORS 174.111 defines state government as “the executive department, the judicial department and the legislative department.” ORS 174.114 defines legislative department as “the legislative assembly, the committees of the legislative assembly and all administrative divisions of the legislative assembly and its committees, whether denominated as boards, commissions or departments or by any other designation.” For purposes of this investigation, I have assumed, but not decided, that Rule 27 prohibits discrimination of those protected by the Rule due to their protected class.³

3. Freedom of Speech and Expression

“[Rule 27] is designed to provide options to those who are experiencing or observing harassing behavior, discriminatory behavior or other behavior prohibited by [the Rule] to seek information, report behaviors or file complaints to address and resolve concerns, while also: (A) Enhancing options available to victims who seek to remain anonymous; and (B) Ensuring that fundamental freedoms of speech and expression are protected as core values in the Legislative Branch.” Rule 27(1)(f)(B). The freedoms of speech and expression are not further referenced in Rule 27.

³ Rule 27 also provides “in all investigations, the investigator shall consider whether the conduct that is the subject of the investigation constitutes discrimination by denigrating or showing hostility toward a protected class or toward an individual because of the individual’s status as a member of a protected class.” Rule 27(14)(e)(c). See also the sections of Rule 27(1)(f) and (g), quoted on page 2 above.

The First Amendment of the United States Constitution protects citizens' right to free speech. These constitutional guarantees only protect from interference by the government. *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451, 461-62, 72 S. Ct. 813, 820 (1952). Spoken speech is not the only form of protected conduct. Forms of expression or symbolism containing elements of communication are protected by the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 2539 (1989). The rights of free speech and expression allow people to communicate their opinions without restriction to certain viewpoints. *303 Creative LLC v. Elenis*, 600 U.S. 570, 143 S. Ct. 2298, 2310-11 (2023).

Minimal exceptions exist allowing the government to limit free speech. Defamation, incitement of imminent lawless action, obscene materials, child pornography, true threats, and fighting words are exceptions. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Hess v. Indiana*, 414 U.S. 105, 108, 94 S. Ct. 326, 328 (1973). *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304 (1957). *New York v. Ferber*, 458 U.S. 747, 764 (1982). *Elonis v. United States*, 575 U.S. 723, 746, 135 S. Ct. 2001, 2016 (2015). *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942). However, the government still cannot ban unprotected speech if a significant amount of protected speech is banned in the process. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255, 122 S. Ct. 1389, 1404 (2002).

Despite the rights to freedom of speech and expression, harassing verbal conduct in the workplace can create civil liability for a hostile work environment. To establish a claim for hostile work environment, an employee must show that they faced harassing verbal or physical conduct, the conduct was unwelcome, and the conduct was severe or pervasive enough to alter the condition of employment. *Frehoo, Inc. v. Bureau of Lab. & Indus.*, 319 Or. App. 548, 558, 510 P.3d 888, 894-95 (2022). Verbal conduct alone can create a hostile work environment. *Black v. Zaring*

Homes, 104 F.3d 822, 826 (6th Cir. 1997). Thus, when unwanted harassing words are severe or pervasive and alter the conditions of employment, the victim need not suffer unwanted physical abuse to have a successful claim for a hostile work environment.

4. Mandatory Reporting

As stated above, this matter was assigned to me by the Legislative Equity Officer (“LEO”) following reports from two mandatory reporters under Rule 27. Rule 27(2)(b) requires certain individuals, including members of the legislative assembly, to report behavior prohibited by Section 11 of Rule 27. A member of the assembly’s reporting duty is triggered when an individual advises the reporter that the individual may be experiencing conduct prohibited by the Rule. Rule 27(2)(b). In this matter, one or more of the mandatory reporters advised the Legislative Equity Officer that they had been approached by others expressing concerns regarding Representative Reschke’s comments about Muslims and atheists. One reporter noted that an individual who did not want to be identified felt that their work at the Capitol was adversely impacted by Representative Reschke’s comments. Additionally, one or more mandatory reporter was advised that Representative Reschke engaged in a pattern of behaviors similar to the comments made in the Rapert Interview.

5. Who is Protected Under Rule 27?

Rule 27 provides that “any individual who experiences behavior prohibited by the Rule may utilize its reporting options ...” Rule 27(2)(A); *see also* Rule 27(1)(f) and (g).

6. Religion

Rule 27 does not define religion. Muslims are a religious group. Additionally, cases addressing the protections against religious discrimination have held that religion can include a lack of religious beliefs. [Meltebeke v. Bureau of Labor & Indus.](#), 322 Or. 132, 143-44, 903 P.2d

[351, 358 \(1995\). *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 210-11, 68 S. Ct. 461, 465 \(1948\).](#)

B. ROLE OF THE INVESTIGATOR

1. Engagement and Independence

The LEO hired Jackson Lewis P.C. to conduct an independent investigation regarding the conduct reports regarding Respondent Reschke. My investigation was independent from the Legislature, which did not conduct, direct, or otherwise manage or influence my investigation in any manner. No representatives of the Legislature imposed limits on my access to information, nor required or prohibited any specific investigative steps. I had sole discretion to employ investigative resources, techniques, and processes appropriate in my professional judgment to complete the investigation and issue this Report.

The facts and findings set out in this Report are my own and are based on my evaluation of the evidence collected and reviewed. No changes or edits were made to this Report by anyone other than me, and no draft or advance copy of the Report was shown to or reviewed by anyone, except in connection with the draft review process required under Rule 27 and outlined below.

2. Facial Review

Rule 27 requires a facial review of conduct reports to determine whether the reported conduct, when taken on its face, could be prohibited by Rule 27. I conducted a facial review of the reports and determined the following:

- The reports that Representative Reschke threatened the LGBTQ+ community did not implicate Rule 27. This report related to Representative Reschke's invitation to a prayer vigil in southern Oregon in July 2022, that was reported to be threatening to members of the LGBTQ+ community. I determined that this report did not

implicate Rule 27 because there was no indication that the invitation impacted anyone who worked or had business at the Capitol. Based upon my facial review, I did not investigate this report.

- I conducted a facial review regarding the reports regarding Representative Reschke's comments regarding Muslims and atheists and concluded that Rule 27 might be implicated. I proceeded to investigate those reports.

3. Determination

Rule 27 directs the investigator to use best practices in conducting the investigation and to make findings of fact relevant to the allegations. Unlike investigations regarding the conduct of those who are not members of the Legislative Assembly, investigators are not asked to determine whether Rule 27 has been violated by a member. Rule 27(14)(d)(B)&(E). However, as stated above, Rule 27 directs the investigator to consider "whether the conduct that is the subject of the investigation constitutes discrimination by denigrating or showing hostility toward a protected class or toward an individual because of the individual's status as a member of the protected class. The investigator shall report the investigator's considerations under this subparagraph in the investigator's draft, written findings. If the investigator determines that the conduct "constitutes discrimination by denigrating or showing hostility toward an individual because of the individual's status, as a member of a protected class, the investigator may not specify in the investigator's draft, written findings the protected class to which the individual belongs." Rule 27(14)(d)(C). While I concluded that Representative Reschke's comments were disrespectful to Muslims and atheists, I did not find that the comments standing alone constituted discrimination under the Rule.

4. The Report

Section 14(d)(A) requires the Investigator to prepare draft written findings of fact at least eight (8) days before the investigation is concluded and to provide that draft to the Complainants⁴ and the Respondent. A draft of this Report was provided to Respondent on April 17, 2024. Under Rule 27, the Respondent had seven (7) days to provide responses to the draft written findings. Rule 27(14)(d)(C). I received no comments from Respondent.

III. INTERVIEWS / DOCUMENTS REVIEWED

I reviewed relevant documents and press reports and interviewed 12 witnesses in addition to the Respondent. I do not identify third-party witnesses by name in this Report because some witnesses are unwilling to participate in investigations unless I provide assurances that they will not be identified by name in my reports.

My Report describes conduct that I found to be supported by the evidence collected in the course of my investigation. When appropriate, I identify the absence of evidence or conflicts in evidence that I was unable to resolve. My Report does not detail every piece of information that I collected in my investigation, but, instead, contains the information that I believe is necessary to explain my factual findings and provide the Conduct Committee with information to enable it to determine whether a violation of Rule 27 occurred.

IV. FINDINGS

My findings follow.

1. On or about January 17, 2024, Representative Reschke was interviewed by Jason Rapert in a program entitled Save the Nation. Representative Reschke informed me

⁴ There were no complainants.

that he participated in the interview from his home before the 2024 legislative session began.

2. During the interview, the following exchange occurred:

Jason Rapert: *Tell people about why you think it's important that Christians should be involved in government and voting and be a part of the authority in our country. What drew you as a Christian to do it and what would you tell those people that are listening today?*

Rep. Reschke: *What drew me to it was primarily looking at our history and the men and women who were part of that history in building this nation. Whether it's George Washington, whether it was Madison, whether it was Abraham Lincoln, whether it was Ronald Reagan, who was the first president I got to vote for. I think, you know, you just go back through history, and you look at men and the struggles that they faced and the faith that they had and those are the type of people that you want in government making tough decisions during tough times. You don't want a materialist, you don't want an atheist, you don't want a Muslim, you don't want, you want somebody who understands what truth is and understands the nature of man, the nature of government and the nature of God.*

Jason Rapert: *Yea*

Rep. Reschke: *If you don't understand those things, you're going to get things wrong and in Oregon that's a classic example, we have a lot of people who are godless, unfortunately, leading the way and it's the blind leading the blind.*

Jason Rapert: *Yea*

3. During my interview with Representative Reschke, he noted that the interview was on a Christian platform. Representative Reschke believed that the audience was

comprised of Christians and his comments set forth above were directed to Christians.

4. Representative Reschke advised me that he does not believe that only Christians are qualified as elected officials, and that he does not believe that Muslims and atheists or other non-Christians are disqualified from holding public office.
5. When asked about his comments in the Rapert Interview by a fellow elected official, Representative Reschke indicated that he did not believe that only Christians are qualified as elected officials and that he does not believe that Muslims and atheists are disqualified from holding public office. He explained to his colleague that his comments were intended to convey who he thought Christians should recruit for public office.
6. Representative Reschke stated that he has never made similar comments to the ones he made in the Rapert Interview and that his comments were clumsy.
7. I did not find any evidence that Representative Reschke made similar comments to those made in the Rapert Interview regarding Muslims and atheists.
8. Individuals have spoken to Representative Reschke about their concerns regarding his comments but no one told him they are uncomfortable in dealing with him.
9. As stated above, an individual advised a mandatory reporter that they felt uncomfortable working in the capitol due to Representative Reschke's comments. I confirmed with the mandatory reporter that they were so advised, but the individual who expressed reluctance to work in the Capitol due to Representative Reschke's comments, was not willing to speak to me directly. Therefore, I was not able to verify this information.

10. In an effort to assist the Conduct Committee in determining whether or not Representative Reschke's comments created a hostile work environment as defined by Rule 27, I interviewed 12 witnesses. Many of these witnesses were offended, upset, and/or uncomfortable by Representative Reschke's comments but only one identified an impact on their work at the Capitol. One individual stated that they were uncomfortable interacting with Representative Reschke at the Capitol. This individual noted that they did not want to encounter Representative Reschke at the Capitol because they interpreted his comments as stating that they did not belong at the Capitol.

V. CONCLUSION

The above constitute my findings.

Save The Nation with Jason Rapert
Conversation with Representative Reschke

Jason Rapert: Tell people about why you think it's important that Christians should be involved in government and voting and be a part of the authority in our country. What drew you as a Christian to do it and what would you tell those people that are listening today?

Rep. Reschke: What drew me to it was primarily looking at our history and the men and women who were part of that history in building this nation. Whether it's George Washington, whether it was Madison, whether it was Abraham Lincoln, whether it was Ronald Reagan, who was the first president I got to vote for. I think, you know, you just go back through history and you look at men and the struggles that they faced and the faith that they had and those are the type of people that you want in government making tough decisions during tough times. You don't want a materialist, you don't want an atheist, you don't want a Muslim, you don't want, you want somebody who understands what truth is and understands the nature of man, the nature of government and the nature of God.

Jason Rapert: Yea

Rep. Reschke: If you don't understand those things, you're going to get things wrong and in Oregon that's a classic example, we have a lot of people who are godless, unfortunately, leading the way and it's the blind leading the blind.

Jason Rapert: Yea