Updates

In a recent decision, the U.S. Court of Appeals for the Ninth Circuit soundly rejected the notion that employers may escape liability for unlawful harassment by arguing that the alleged harassment is limited to social media activity occurring outside the workplace.

In *Okonowsky v. Garland*, the Ninth Circuit reversed a district court's order of summary judgment dismissing an employee's Title VII hostile work environment claim arising from the employee's coworker's social media posts.

Online Conduct Outside the Physical Workplace

In *Okonowsky* a federal prison employee (Okonowsky) complained to her employer that her coworker's personal Instagram account featured derogatory and sexually explicit comments about her. The account was followed by more than 100 prison employees who interacted with the posts by liking or commenting on them.

The district court granted summary judgment in favor of Okonowsky's employer, finding, among other things, that the harassment occurred "entirely outside the workplace." The district court noted that the Instagram posts were not sent, displayed, or shown in the workplace.

The Ninth Circuit rejected the district court's reasoning, noting, among other things, that the Instagram posts and related online comments "could be seen at any time from any place—including from the workplace." The Ninth Circuit also clarified that the standard for analyzing hostile work environment claims not only involves looking at where the harassing conduct occurred, but also whether it had an "unreasonable *effect* on the working environment." The court took special note of the "ubiquity of social media and the ready use of it to harass and bully both inside and outside of the physical workplace."

Ineffective Remedial Action by the Employer

The Ninth Circuit also rejected the district court's finding that the employer was not liable for the alleged harassment, regardless of where it occurred, because the employer took reasonable remedial action. After Okonowsky reported the conduct, her employer took several measures, including opening an investigation, reassigning Okonowsky to a different part of the facility, and eventually issuing a cease-and-desist letter to the employee who posted the comments about which Okonowsky complained. However, the Ninth Circuit found that a reasonable juror could conclude that the employer "slow-walked" an investigation that was fraught with delays and inaction from several supervisors. Notably, the online harassment allegedly continued for three months following the plaintiff's initial complaint, and the employer's safety manager and human resources manager allegedly told Okonowsky the posts were "funny" and continued following the Instagram account after Okonowsky complained about the posts.

Takeaways for Employers

The mere "ubiquity of social media" makes it a prominent tool for coworker harassment. Moreover, as remote and hybrid work becomes more common, the idea that an employer's responsibility for maintaining a harassment-free workplace extends only as far as the confines of the *physical* workplace is an antiquated notion, at best.

To reduce the risk of liability for online harassment claims, employers should address the issue of online coworker harassment in their anti-harassment policies and social media policies. If complaints of online harassment do arise, employers should promptly and thoroughly investigate those complaints, just as they would investigate complaints of harassment occurring within the physical workplace. Employers with questions about handling and investigating online harassment complaints should consult experienced counsel.

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