Alert

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COZEN O'CONNOR

#NoFilter: Outside-of-Work Social Media Posts Can Create a Hostile Work Environment

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Prior to the advent of social media, employers were generally comfortable drawing a bright line between what employees did on their own time and workplace misconduct. Those bygone times, however, have been replaced by a modern era wherein employers are forced to apply employment laws created before the personal computer to their workforce located in an increasingly virtual world. Courts are addressing employment matters involving speech on social media at a progressively increasing rate. In this edition of #NoFilter, we will discuss a recent 9th Circuit Court of Appeals decision[1] involving outside-of-work social media posts to an employee's workplace hostile work environment claim.

Factual Background

In *Okonowsky v. Merrick Garland*, a staff psychologist (the Plaintiff) working for a federal prison discovered that a corrections Lieutenant operated an Instagram account followed by more than one hundred other prison employees. The page contained sexually offensive content about the work at the prison, and the Plaintiff was a personal target of some of the posts. For example, on one occasion the Instagram page joked about the male prison officers performing sexual acts on the Plaintiff, which was liked by some staff members. The Plaintiff complained, but the conduct continued and shortly after her complaint, new posts appeared "threatening the Plaintiff, sexually debasing her, and denigrating a well-known woman in public leadership, with the captions, 'when you get [ ]hurt by memes' and 'Tomorrow's forecast: hot enough to melt a snowflake.'"

The Plaintiff continued to complain. The employer investigated and issued a report finding impermissibly harassing conduct violating its standards for supervisors and law enforcement officers. The report further recommended corrective action, including separating the Lieutenant and the Plaintiff, issuing a letter to the Lieutenant ordering him to cease posting in violation of the employer's Anti-Harassment Policy and Standards of Employee Conduct, and advising the Plaintiff to inform leadership if the posts continued.

For at least three weeks after receiving the letter, the Lieutenant continued to make near-daily posts on his Instagram page, including posts mocking the prison psychology department and posts suggesting sexual relations with and/or sexually harassing behavior toward female co-workers. The Plaintiff informed the employer of the continued posts, but "[t]he record does not reflect that the Plaintiff received any reply." Seven months later, the Plaintiff transferred to another facility in Texas and filed suit alleging a sexually hostile work environment in violation of Title VII of the Civil Rights Act of 1964.

Trial Court

The District Court found that the Instagram posts "occurred entirely outside of the workplace" because "the posts were made on a staff member's personal Instagram page and none of the five posts was ever sent to the Plaintiff, displayed in the workplace, shown to the Plaintiff in the workplace, or discussed with the Plaintiff in the workplace without her consent." As a result, the District Court found that the posts "did not amount to severe or frequent harassment in the physical workplace, the District Court concluded that there was no triable issue as to whether the Plaintiff's work environment was objectively hostile."

Ninth Circuit Decision

To begin, the Court of Appeals noted the "objective hostility of a working environment" is evaluated by "look[ing] to the totality of the circumstances surrounding the Plaintiff's claim." Specifically

relating to social media posts, the Court noted they are “permanently and infinitely viewable and re-viewable by any person with access to the page or site on which the posts appear…. employees who followed the page were free to, and did, view, like, comment, share, screenshot, print, and otherwise engage with or perceive his abusive posts from anywhere. … including from the workplace.” As a result, “even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee's working environment.”

The Ninth Circuit specifically rejected the notion that “only conduct that occurs inside the physical workplace can be actionable, especially in light of the ubiquity of social media and the ready use of it to harass and bully both inside and outside of the physical workplace.” As a result, the Appellate Court found that “a Title VII sexually hostile work environment claim includes evidence of sexually harassing conduct, even if it does not expressly target the Plaintiff, as well as evidence of non-sexual conduct directed at the Plaintiff that a jury could find retaliatory or intimidating.”

Practical Advice for Employers

This case illustrates how social media has become an extension of our lives, our culture and our workplaces. As a result, employers may have an obligation to take corrective action depending on the severe and pervasive nature of the conduct, including outside-of-work social media posts. As a general rule for evaluating these situations, if comments made between employees at the water cooler would be found to violate an employer’s harassment and discrimination policies, then the exact same comments made on social media between the employees should reach the same result. Employers considering discipline for misconduct occurring on social media outside of work should ask themselves a few basic question prior to taking action:

Do I have a copy of the tweet or post?

Social media is user-controlled content and can be easily deleted when an employee learns they are under investigation. Preserving this evidence prior to taking action is critical to any complete investigation.

Does the post relate to working conditions or wages?

The National Labor Relations Act prohibits employers from taking action against employees acting together to improve their wages, hours, and/or conditions of employment.

Would the post be considered harassment if said face to face?

Applying an employer’s harassment and discrimination policy to offensive conduct requires evaluating the content and context of the speech. Consistently evaluating offensive conduct and taking action to correct it, irrespective of the venue where the conduct occurred, will help ensure uniform application of the employer’s policies and help defendant against subsequent litigation.

Are we being consistent?

Consistent application of an employer’s policies is the best way to both prevent and defend against employment discrimination lawsuits. Ensuring an employer has equally applied its policies in like situations will be an important fact at all stages of litigation.

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[1] *Okonowsky v. Merrick Garland,* 23-55404, --- F.4th ---, 2024 WL 3530231, at *3 (9th Cir. July 25, 2024)