THE COMPLICATED WORLD OF EMPLOYEE SOCIAL MEDIA

September 12, 2024 | Alert

The prevalence of social media today makes it difficult for employers to draw a bright line between what employees do on their own time and workplace misconduct. Today, most employers are forced to consider if an employees' out of work conduct could violate other employee's rights and protections. Courts today are regularly addressing employment matters involving speech on social media. Recently, a decision by the 9th Circuit Court of Appeals involving an employee's workplace hostile work environment claim based upon outside-of-work social media posts gave important insight on this issue.

In *Okonowsky v. Merrick Garland*, the plaintiff who worked for a federal prison discovered that a corrections lieutenant operated an Instagram account followed by numerous 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, which were 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. '"

After 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.

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Unfortunately, the lieutenant continued mocking the prison psychology department in posts and suggesting sexual relations with and/or sexually harassing behavior toward female co-workers. The plaintiff informed the employer of the continued posts, but the employer failed to take any further action. Ultimately, the plaintiff filed suit alleging a sexually hostile work environment in violation of Title VII of the Civil Rights Act of 1964.

The District Court flatly rejected the suit, finding that the activity on Instagram "occurred entirely outside the workplace." Since the posts were never sent to the plaintiff or posted in the workplace, they could not form the basis for a valid workplace harassment claim. The District Court ruled that there was no triable issue as to whether the plaintiff's work environment was objectively hostile.

Upon appeal, the Court of Appeals initially noted that the "objective hostility of a working environment" requires courts to review "the totality of the circumstances surrounding the plaintiff's claim." The Court stated that social media 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."

The Court of Appeals rejected the rationale of the District Court 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." The Court concluded 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."

This case illustrates that employers may have an obligation to act on such misconduct in the form of outside-of-work social media posts. Generally, if sufficiently severe and pervasive, misconduct occurring on social media outside of work should be addressed. Also, employers should make sure that they have written policies in place banning such conduct on social media by employees, even if occurring outside of the workplace.

Beware of Election Season

Lastly, employers should also be aware of problems arising from political speech and activity in the workplace. Political discourse often is heated and passionate. Such conduct at work can hurt focus, erode employee morale and affect working relationships as employees discuss or even advocate their political opinions. How an employer deals with unregulated political discourse in the workplace can damage a company reputation both internally and externally. While employers do have broad discretion to regulate political speech in the workplace, attempting to strongly regulate political discourse in the workplace can implicate labor and employment law issues, including anti-discrimination laws and the National Labor Relations Act.

Enacting practical, non-partisan policies governing political discourse in the workplace is crucial to avoid pitfalls. The employment attorneys at Burke Warren are available to assist in structuring effective, non-discriminatory policies if issues concerning political speech in the workplace arise.