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Expert Analysis

Defending Against Hostile Work Environment Claims in the Digital Age

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The line between work and non-work has blurred considerably since the advent of the Internet, personal computers and handheld electronic devices. While employees once worked primarily in the office during business hours, "technologies [now] allow us to slip some work into almost any time slot, regardless of when it is, where we may be located at the time, or what activities are competing with a demand for work."[1] This fundamental shift in the way we work is changing the nature of hostile work environment claims; plaintiffs are now seeking to impose liability on their employers for discriminatory electronic communications made over personal mediums and outside of typical working hours.

A case exemplifying this issue is currently pending in the Bronx County Supreme Court.[2] There, a female police officer has asserted a hostile work environment claim against the City of New York based on, among other things, explicit text messages and photos that a male lieutenant sent to her personal cell phone while she was off-duty. There have not yet been any decisions in this case addressing whether liability may be imputed to the city for these off-duty messages. However, other courts that have analyzed the issue have focused on one primary inquiry: Do the offsite messages and/or their consequences have a sufficient nexus to the workplace? If the answer is yes, and the other elements of the claim are satisfied, liability may be imputed to the employer.

Understanding hostile work environment claims generally, and those cases that have considered off-duty electronic communications, is critical for employers and practitioners to protect and defend against these kinds of lawsuits.

Overview of Claims

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of race, color, religion, sex or national origin.[3] New York State and New York City have also enacted laws prohibiting discrimination in the workplace.[4] An employee can bring a claim under these statutes by alleging, among other things, that he or she was subjected to a hostile work environment. Because claims under Title VII and the State Human Rights Law are evaluated under the same standard, while claims under the City Human Rights Law are not,[5] this overview applies to the former but not the latter.

The proponent of a hostile work environment claim must show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[6] A work environment will be considered hostile if a reasonable person, given the totality of the circumstances, would have found it to be so and the plaintiff subjectively so perceived it.[7]

The proponent must also show that a "specific basis exists for imputing the conduct that created the hostile environment to the employer."[8] Where the harasser is a supervisor, an employer will be held liable unless he can establish as an affirmative defense that: "(1) the employer took reasonable care to prevent and correct any harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided."[9] Where the

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harasser is the victim's non-supervisory co-worker, the employer will only be held liable if it is negligent, that is, if it "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."[10]

granted the motion and the intermediate appellate court affirmed, the New Jersey Supreme Court reversed and remanded for trial.

The Supreme Court held that "Continental's liability [would] depend on whether the [forum] was such an integral part of the workplace that harassment on the [forum] should be regarded as a continuation or extension of the pattern of harassment that existed in the Continental workplace."[12] The court instructed the trial court to determine whether "a triable issue of fact is presented concerning whether the crew members forum should be considered sufficiently integrated with the workplace to require a response by an employer [to harassment taking place on the forum]."[13] It also cautioned the trial court that, while "employers do not have a duty to monitor private communications of their employees, employers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace…."[14]

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Electronic Communications

Blakey v. Continental Airlines was the first case to closely analyze how off-duty electronic communications fit within the rubric of hostile work environment claims.[11] Tammy Blakey, a female pilot, commenced an action against Continental Airlines in New Jersey Superior Court alleging that she had been subjected to a hostile work environment because male pilots posted harassing gender-based messages about her on an Internet message board. She also experienced other harassment while in the workplace.

The message board was known as the Continental crew members forum, and was essentially a virtual community for Continental employees. The forum was part of a larger package of software, which also contained programs that Continental required its employees to use to learn their flight assignments. However, employees were not required to use the forum and, in fact, it could only be accessed from their personal computers.

Continental moved for summary judgment on the basis that conduct outside the workplace could not support a hostile work environment claim, and the allegedly harassing messages were posted by male pilots and viewed by Blakey from outside of Continental's facilities. Though the trial court

Following the trend, a California appellate court held, in *Espinoza v. County of Orange*, that blog postings on a personal forum were actionable when accompanied by on-site harassment. There, a corrections officer created a blog from a personal computer after business hours.[15] He and other employees of the Orange County Probation Department began posting obscene and insulting comments on the blog regarding Ralph Espinoza, another employee, who was disabled. Espinoza was also subjected to abusive commentary regarding his disability while at work.

Espinoza ultimately learned of the blog and viewed it from home on a number of occasions. Although he reported the blog and other harassment to his employer, the blog remained active for eight additional weeks and the department never directed its employees to stop their on-site misconduct.

Espinoza sued the Corrections Department under a California statute that prohibited workplace harassment based on a person's disability.[16] After trial, the jury returned a verdict against the department. The department moved to set the verdict aside, arguing that the court erred in admitting evidence of the blog postings because that conduct was "non-workplace activity" that the employer did not dictate or authorize.

The appellate court denied the motion. It reasoned that the California statute, like Title VII and the New York State Human Rights Law, provided for employer liability for harassment committed by non-supervisory employees if the employer knew or should have known of the harassment and failed to take remedial measures. The fact that some of the harassment took place outside the workplace did not change the calculus. The blog posts were relevant in analyzing the totality of the circumstances and, when considered together with the on-site abusive treatment, supported the conclusion that Espinoza's work environment was hostile.

It seems that only one New York court has given this issue brief consideration. In *Summa v. Hofstra University*, Lauren Summa was a football manager who asserted a hostile work environment claim against Hofstra University on the basis of certain comments made to her by members of the football team in addition to sexual remarks that the players posted about her on

Facebook.[17] There was no evidence that the postings were made by team members, or viewed by plaintiff, while in the workplace.

The court noted that "[w]hen sexual [sic] harassing acts occur outside the workplace, the plaintiff must identify sufficient facts from which to infer a connection between the misconduct and the employment."[18] The court posited that the posts did not "seem to affect [Summa's] employment environment," but considered them as part of the totality of the circumstances before concluding that Summa had failed to state a claim.

On appeal, the U.S. Court of Appeals for the Second Circuit did not address whether the Facebook posts could contribute to a hostile work environment. Instead, the court concluded that liability could not be imputed to the university because it had responded appropriately to Summa's complaints by speaking "to the three players involved in making the offending postings and instruct[ing them] to remove the posts."[19]

Preparing for the Future

The takeaway from these cases is that discriminatory electronic communications may be actionable if they are accompanied by on-site harassment and/or reasonably cause the victim to feel intimidated while in the workplace. The potential impact of this principle is significant, because electronic communications may very well be the conduct that nudges otherwise non-actionable on-site offenses over the "severe and pervasive" line. They may also provide smoking gun evidence for the plaintiff; while liability for face-to face interactions often hinges upon whether the victim's version of the story is credible, there is no escaping what was said when there is a written record of it.

Employers should take a two-prong approach to protect themselves from liability in these types of cases. First, employers should implement written policies that forbid discriminatory harassment and ridicule over any medium and at any time.[20] These policies should make it clear that a violation thereof is grounds for discipline, and could result in termination. The employer should also clearly specify to whom within the organization complaints should be directed, taking care to identify more than one such person so that victims have multiple avenues for complaint. And, as is true of all types of workplace discrimination, periodic sensitivity training is always helpful.

Second, while an employer should not monitor private communications, it must diligently investigate and appropriately respond when complaints of harassment via electronic communications are brought to its attention. Interviewing the victim and the alleged harasser, as well as anyone else who may have been privy to the communications, is an essential starting point. Requesting copies of the communications from the victim is equally important.

The employer should also be sure to consider whether the communications are a part of a pattern of on-site harassment. If the investigation reveals that the victim's complaints are founded, the employer should take disciplinary action that is commensurate with the conduct in question.

Even if an employer believes that complained-of electronic communications do not rise to the level of a hostile work environment, it should take caution by: (1) requesting that the offending party cease from unwanted communication with the victim; (2) limiting on-site interaction between the alleged harasser and the victim; (3) warning the alleged harasser that future policy violations may result in discipline; and (4) following up with the victim to ensure that the measures undertaken have improved his or her work environment.

Conclusion

Courts and practitioners will soon see more hostile work environment cases that concern off-duty electronic communications. Employers should heed the trend and prepare themselves by creating policies and procedures that account for the realities of the modern workplace. As the adage goes, the best offense is a good defense.

1. Wallace, Patricia. "The Internet in the Workplace." New York: Cambridge University, 2004.
2. *Vasquez v. City of New York*, Bronx County Index No. 306825/2012.
3. 42 U.S.C. 2000e-3(a).
4. N.Y. Exec. Law §290, and N.Y. City Admin. Code §§8-101.
5. *Summa v. Hofstra Univ.*, 708 F.3d 115, 123-24 (2d Cir. 2013).
6. *Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 436 (2d Cir. 1999), abrogated on other grounds by *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006).
7. Id.; *Brennan v. Metro. Opera Ass'n*, 192 F.3d 310, 318 (2d Cir. 1999).
8. *Richardson*, 180 F.3d at 436.
9. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013) (internal citations omitted).
10. *Distasio v. Perkin Elmer*, 157 F.3d 55, 64 (2d Cir. 1998) (internal citations omitted).
11. *Blakey v. Continental Airlines*, 164 N.J. 38 (2000).
12. *Blakey*, 164 N.J. at 59.
13. Id. at 61.
14. Id. at 62.
15. *Espinoza v. County of Orange*, 2012 WL 420149 (Cal. App. Ct. 2012).
16. The New York State Human Rights Law also prohibits disability discrimination in the workplace. On the federal level, the Americans with Disabilities Act of 1990 (ADA), rather than Title VII, prohibits disability-based discrimination. Although the Second Circuit has not decided whether the ADA contemplates a hostile work environment claim, district courts in the jurisdiction have assumed that such a claim is cognizable. *Lewis v. Blackman Plumbing Supply*, 2014 U.S. Dist. LEXIS 137492 at *43-*44 (S.D.N.Y. 2014).
17. *Summa v. Hofstra University*, 2011 U.S. Dist. LEXIS 37975 (E.D.N.Y. 2011), affirmed in part and vacated in part by, 708 F.3d 115 (2d Cir. 2013).
18. Id. at *44.
19. *Summa*, 708 F.3d at 124.
20. Of course, to the extent the employer requests that an employee refrain from engaging in conversations over the Internet, it should take care to ensure that its actions do not run afoul of the National Labor Relations Act's protection for concerted activity, which applies to both unionized and non-unionized employers. See 29 U.S.C. §157.