9th Circ Ruling Flags Work Harassment Risks Of Social Media

By **Jennifer Lada and Phillip Schreiber** (August 15, 2024)

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The U.S. Court of Appeals for the Ninth Circuit ruled on July 25 in Okonowsky v. Merrick Garland that under Title VII of the Civil Rights Act, employers can be held liable for claims of a hostile work environment if an employee shares harassing content online that negatively affects the workplace.

This decision is one of the latest to address the blurred boundaries between professional and personal spaces, a challenge increasingly brought to the forefront by social media.

This challenge has been intensified by the seismic shift the workplace has experienced since 2020. Remote work has become the norm for many, and videoconference meetings have replaced in-person meetings as a staple of daily business operations. Though employees have largely adapted to this new landscape, it has introduced new challenges for employers.

In particular, as remote work blurs the lines between professional and personal spaces, employers must proactively address issues of communication, inclusivity and employee well-being in the remote work environment. Employers also must ensure that employees remain free from unlawful hostile workplaces even in a remote work environment, whether it be through work-related interactions in video conferences, the metaverse or other virtual environments, or social media.

Okonowsky v. Garland marks a further evolution of a company's obligations to ensure its workplace is free from unlawful harassment.

Case Summary

In Okonowsky, the Ninth Circuit overturned the U.S. District Court for the Central District of California's decision on summary judgment in favor of the government in a sexual harassment case brought under Title VII.

The case was brought by Lindsay Okonowsky, a staff psychologist working at a federal prison, where she claims that her employer, the Federal Bureau of Prisons, failed to address a sexually hostile work environment created by her co-worker.

Okonowsky claims that a co-worker posted derogatory content on social media. Despite Okonowsky reporting this to her employer, the co-worker continued to post even after being directed to stop in accordance with the prison's antiharassment policy. Okonowsky eventually resigned due to the lack of action and filed the lawsuit.

The trial court granted summary judgment to the prison, ruling that the social media posts were "entirely outside of the workplace" because they were made on a personal account and not shared or discussed with Okonowsky in the workplace. The court found that since the posts did not constitute severe or frequent harassment within the physical workplace, there was no triable issue regarding whether Okonowsky's work environment was objectively

hostile.

The Ninth Circuit disagreed with the trial court and found that online social media contact can constitute workplace harassment. The court noted that it 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.

The court further warned that "social media posts are permanently and infinitely viewable and re-viewable by any person with access to the page or site on which the posts appear" and that "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 sent the case back to the trial court.

EEOC Social Media Guidance

The Ninth Circuit's decision is consistent with guidance released in April from the U.S. Equal Employment Opportunity Commission on workplace harassment and the use of social media accounts by employees.[1]

The guidance reads in part: "Although employers generally are not responsible for conduct that occurs in a non-work-related context, they may be liable when the conduct has consequences in the workplace and therefore contributes to a hostile work environment." The EEOC also noted that "conduct that can affect the terms and conditions of employment, even if it does not occur in a work-related context, includes electronic communications using private phones, computers, or social media accounts, if it impacts the workplace."

Although Okonowsky dealt with a sexually hostile work environment arising from a co-worker's sharing of his personal social media posts, the same liability exposure concerns arise if an employee shares personal social media posts tied to the workplace animus based on race, religion, national origin or other protected classes.

The EEOC explained in its guidance that the employee targeted by the harassing conduct must either directly see the post or hear about it from co-workers discussing it at work, presumably leading the targeted employee to become aware of these discussions.

The source of the offending post, whether from a supervisor or co-worker, likely will play a crucial role in assessing the employer's potential liability. If the supervisor made the post, the employer likely will be strictly liable for any resulting unlawful hostile work environment. Conversely, if a co-worker made the post, the employer's responsibility will likely be assessed under a negligence standard, requiring the employer to take appropriate and timely action to stop the conduct once notified.

The EEOC clarified in its guidance that private social media posts by an employee where "there is no connection between the posts and the firm or any of its employees" do not contribute to a hostile work environment, even if a co-worker is offended by the posts. The EEOC noted that these posts do not have an impact on the work environment itself.

Further, personal social media posts by an employee, standing alone, cannot form the basis of an unlawful hostile work environment if they do not reference a co-worker or the employer. However, such personal posts may still show evidence of bias against a protected class and can support a discrimination or harassment claim.

Complicating the issue are state and federal laws protecting employees' use of social media.

State Law and Social Media Policies

Okonowsky and the EEOC's guidance might be viewed as suggesting that employers should actively monitor employees' private social media posts. But that interpretation goes too far. There are countervailing considerations that limit how far employers should go in monitoring employees.

Many states have enacted laws and regulation that restrict employers from accessing employees' social media accounts.

For example, on March 12, New York passed a law placing a strict prohibition on an employer's ability to access the social media accounts of employees and job applicants, with only a few exceptions permitted. The Illinois Employee Right to Privacy in the Workplace Act, which went into effect in 2013, similarly limits the rights of employers to force employees to provide access to their personal social media accounts.

These regulations and similar laws applicable in other states highlight the tension between employee privacy and employer obligations to create a safe work environment.

The National Labor Relations Act and Section 7 Rights

Similarly, a company's policies and practices that signal to employees that their personal social media accounts will be actively monitored on a regular basis likely run afoul of National Labor Relations Act regulations.

Section 7 of the NLRA protects nonsupervisory employees' rights to engage in protected and concerted activities. This may include employee discussions about wages, working conditions and other employment-related issues — whether they are discussed in person or on social media. Employer policies and practices that interfere with an employee's Section 7 rights, or may act to deter an employee from exercising those rights, are unlawful.

The National Labor Relations Board has issued numerous decisions finding an employer's social media policy to be unlawful.[2] An employer attempting to ensure personal social media use does not create an unlawful hostile work environment should also ensure its good intentions do not run afoul of the NLRA.

Key Takeaways for Employers

The decision in Okonowsky is an opportunity for companies to review and update their policies and procedures to ensure compliance with the rapidly evolving remote and technology-driven work environment.

Employers also should consider updating their antiharassment and social media policies to expressly address personal social media posts tied to the workplace. In particular, these policies should clarify that personal social media posts shared with co-workers containing content that violates the employer's antidiscrimination or antiharassment policies are prohibited.

Employers also should develop protocols to investigate employee hostile work environment claims — whether based on sex, race, origin, religion or any other protected classification —

generated out of another employee's personal social media posts.

Supervisors and managers should be trained to be aware of social media posts running afoul of the employer's policies and of how to address employee complaints about personal social media posts.

Nevertheless, in updating their policies and practices, employers should be mindful of state laws limiting their right to monitor personal social media posts by employees and should take care that their revised policies and practices do not inhibit an employee's rights under the NLRA.

For example, employers generally should not force employees to provide access to their personal social media accounts as part of an investigation. Rather, employers should give the employee the option to provide such access. If the employee refuses, the employer would conduct its investigation based on the information provided by others and draw its findings and conclusions based on whatever evidence is available, including statements by other workers about the content of the post as they recollect.

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[1] https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace.

[2] See, e.g., G4S Secure Solutions (USA) Inc., 364 NLRB No. 92 (Aug. 26, 2016); Dish Network Corp., 359 NLRB No. 108 (Apr. 30, 2013); Karl Knauz Motors Inc., 358 NLRB No. 164 (Sept. 28, 2012).