Reminder: Employers May be Held Liable for Employee's Posts on Social Media

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Introduction

In the case of *Okonowsky v. Garland*, the court reminds employers that they may be held liable for a Title VII hostile work environment claim based on content posted on an employee's personal social media account.[1] Accordingly, an employer should be prepared to address and not ignore complaints regarding an employee's off-duty conduct to the extent that conduct might impact the workplace.

In *Okonowsky*, a staff psychologist at the Lompoc federal prison, Lindsay Okonowsky, reported to prison leadership and management an Instagram account run by a corrections Lieutenant that had sexually offensive content of which Okonowsky was a personal target.

The Lieutenant, Steven Hellman, worked in the Special Housing Unit ("SHU"), which was the same unit where Okonowsky worked. Hellman was responsible for, among other things, the safety of inmates and staff, like Okonowsky. Okonowsky relied on Hellman to oversee the corrections officers who worked in the SHU with her. On occasion, Okonowsky and Hellman's jobs required them to collaborate. Hellman was also a member of the Bureau's Special Investigative Services, which was responsible for investigating suspected violations by staff and inmates of law and prison policy.

In January 2020, around the time Okonowsky and Hellman had some disagreements over managing styles, Hellman created an Instagram page which Okonowsky became aware of approximately a month later. The Instagram page boasted more than 100 posts which the court described as "sexist, racist, anti-Semitic, homophobic and transphobic."[2] The posts referred to Lompoc staff and inmates and had more than 200 followers. Of the 200 followers, more than 100 of them were Lompoc employees. Those employees included the Human Resources Manager, the Union President, and a member of the prison's Special Investigative Services.

The posts specifically referred to interactions with the SHU staff, including the SHU psychologist. Other posts resembled Okonowsky's likeness, which included derogatory images and images depicting sexual violence and physical harassment towards women in some instances and specifically the SHU psychologist in others. The court explained that "[m]ost of the posts are too graphic and disturbing to republish [in the opinion]" but narrated one that "particularly disturbed" Okonowsky.[3] The specific post suggested that the all-male prison officers would "gang bang Okonowsky at her home" during a gathering Okonowsky was intending on hosting prior to discovering the Instagram page.[4]

The Instagram posts were openly liked and thus, endorsed by upper-level management and staff. Okonowsky reported the Instagram page initially to her supervisor as well as messaged the prison's Acting Safety Manager on Instagram, who was also following the page, liking and commenting on the posts. In response, the Acting Safety Manager said the posts were funny and that she needed to get a sense of humor or toughen up. On the other hand, Okonowsky's supervisor suggested that she transfer to a different facility within Lompoc. Okonowsky agreed and was transferred. However, Hellman and Okonowsky still crossed paths at the new facility, despite Hellman typically working at a different facility. Okonowsky inquired into the specifics of why Hellman was at the same facility, but never received a response.

Okonowsky continued to raise complaints and concerns about the Instagram posts, however, more often than not, she was met with superiors' inaction. For example, Okonowsky met with the prison's Acting Warden who referred her complaint to the Special Investigative Agent, who happened to be Hellman's supervisor. When Okonowsky became aware of a post that made it clear someone had alerted Hellman of her complaints, she sent the Warden a copy of the post and asked for a phone call. The post used sexually obscene hashtags which made Okonowsky feel unsafe at work. The Warden never responded to Okonowsky, while the Special Investigative Agent stated that he reviewed the Instagram page and didn't see a problem with it. Hellman continued to post sexually suggestive memes specifically targeting Okonowsky. Okonowsky's productivity suffered while upper management and Human Resources saw the posts as funny.

Okonowsky continued to raise complaints and would often send the Instagram posts to the Warden. The Warden would not respond. Nearly three weeks had passed and the Special Investigative Agent had yet to transfer the matter

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[1] *Okonowsky, v. Garland*, 109 F.4th 1166 (9th Cir. 2024).

[2] 109 F.4th at 1172.

[3] 109 F.4th at 173.

[4] 109 F.4th at 173.

to the Office of Internal Affairs and when Okonowsky inquired into the status of the investigation, she was told the Agent had "other things going on."[5] Okonowsky even sent a memo with examples of the Instagram posts, her belief that the prison was not properly investigating Hellman's conduct and pointed to the lack of response from the Warden and the Agent. Again, Hellman continued to post "profanity-ridden" and "sexually vulgar" images about "'the one staff member [that] relentlessly tell[s] on staff.'"[6]

Nearly two months after Okonowsky's initial complaint, a new warden was appointed and a Threat Assessment Team was convened. The Team encouraged Okonowsky not to look at Hellman's page anymore but still instructed her to inform the prison's leadership if the posts continued. Ultimately, the Team concluded that Hellman's conduct constituted harassment that likely violated the BOP's standards of conduct. Hellman was sent a cease-and-desist letter that indicated the possibility of removal if Hellman failed to comply.

Despite the letter, Hellman continued to post for nearly three weeks. Posts depicting sexual relations with and/or sexually harassing behavior toward female coworkers did not elicit any response from the prison nor did Okonowsky's continued efforts to communicate with the prison about Hellman's ongoing posts. Approximately one month later, Hellman took down his Instagram page for unknown reasons. Due to the harassment Okonowsky experienced, she transferred to a BOP facility in a different state.

Okonowsky sued asserting discrimination on the basis of sex pursuant to Title VII of the Civil Rights Act of 1964. A motion for summary judgment was granted and Okonowsky appealed. The appellate court held that it was error for the district court to limit its consideration of the evidence to just five posts made on the Instagram page because those posts "targeted Okonowsky specifically and … did so because of her sex."[7] The district court noted that the five posts "'occurred entirely outside of the workplace' because the posts were made on a staff member's personal Instagram page" and none of the posts were ever directly sent to Okonowsky, displayed … shown … or discussed … in the workplace without her consent."[8] Thus, the district court concluded the five posts did not amount to severe or frequent harassment in the physical workplace. The Ninth Circuit reversed holding that the objective standard for finding hostility in a workplace must be decided with the totality of the circumstances in mind. Here, although the posts were made on an employee's personal Instagram account and were made outside of the workplace, they still affected the workplace.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" based on their sex.[9]

As is well known in cases involving hostile work environment claims, Okonowsky had the burden of proving that she was (1) subjected to verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome and (3) the conduct was sufficiently severe or pervasive as to alter the conditions of employment thus creating an abusive working environment.[10] The Court focused on the third factor because there was no dispute that she met the other two factors. The Court stated that "in analyzing the objective hostility of a working environment, we must look to the totality of the circumstances surrounding the plaintiff's claim."[11] This includes conduct that takes place outside of the physical workplace.[12]

Thus, a social media page, although it can exist outside of the workplace, would still need to be considered. In criticizing the district court's characterization that a social media page like Hellman's page, "'occur[s] in only a discrete location," the Court stated that "social media posts are permanently and infinitely viewable and re-viewable by any person with access to the page … ." It did not matter where Hellman was or what he was doing, the posts were always available for Lompoc employees to view and interact with. In sum, the Court concluded that "offsite and third-party conduct can have the effect of altering working environment in an objectively severe or pervasive manner."[13] In fact, the Court found that a reasonable factfinder could infer that Lompoc employees engaged with the posts while at work. However, whether Hellman posted from work or whether his co-workers interacted with the posts while at work was not the crucial issue. The court focused on whether Hellman and his co-worker's discriminatory conduct had an unreasonable effect on Okonowsky's work environment.

EEOC Guidance

The decision here is similar to recent guidance the EEOC released regarding social media use. For example,

[5] 109 F.4th at 1175.

[6] 109 F.4th at 1176.

[7] 109 F.4th at 1177.

[8] 109 F.4th at 1177.

[9] 42 U.S.C. 2000e-2(a)(1).

[10] *Fried v. Wynn Las Vegas, LLC* 18 F.4th 643, 647(9th Cir. 2021).

[11] *Okonowsky* 109 F.4th 1166, at 1179.

[12] 109 F.4th at 1180.

[13] 109 F.4th at 1180.

the EEOC's guidance states, "[c]onduct 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."[14] The EEOC also makes note of several examples of conduct that occurs on social media outside of the workplace which then contributes to a hostile work environment. Specifically, if the employee learns about the post directly or other coworkers discuss it at work, then the social media post can contribute to a hostile work environment.

Conclusion

While employers should already be prepared to investigate and take appropriate action when a report of workplace misconduct is submitted, employers should also keep in mind that just because conduct occurs outside of work or after hours does not mean that it should not also be addressed. Indeed, if this outside conduct might impact working conditions, employers should apply their policies, investigate the incident, and take appropriate action. Given the delicate nature of such complaints, employers should work with their counsel to develop policies and procedures to address such complaints.

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