

Yes, You Can Be Liable for Your Employee's Online Posts!

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You might think what happens outside the workplace stays outside the workplace, but as the Ninth Circuit recently ruled, you can be sued by one employee for what another employee posts online.

On July 25, 2024, the Ninth Circuit Court of Appeals in *Okonowsky v. Merrick Garland* held that under Title VII of the Civil Rights Act of 1964, an employer may be liable for a hostile work environment if an employee creates and shares harassing social media content. Lindsay Okonowsky was a psychologist in a federal prison. She discovered that an employee with whom she worked with ran an Instagram account in which the employee posted sexually offensive conduct about work, and that she was a target in these posts. The Instagram account was followed by more than one hundred prison employees. When Okonowsky complained to prison leadership, management told her the page was “funny” and it was not “a problem.” After complaining, the employee targeted Okonowsky more frequently. Two months after Okonowsky made her initial complaint, the prison requested that the employee stop violating the prison's Anti-Harassment Policy. However, the employee failed to do so. The employee continued posting sexually hostile content for another month with no repercussion or action by the prison. Due to the employee's continuous conduct and the prison's failure to remedy, Okonowsky resigned from her position. In its decision, the Ninth Circuit held that a reasonable trier of fact could find that the prison violated Title VII, as social media could allow an individual to use it to harass others both within and outside the physical workspace.

In light of this decision, employers should understand that they may be just as liable for their employees' off-duty conduct as they are for conduct within the physical workspace. Accordingly, complaints regarding employee harassment on social media should be investigated as promptly and thoroughly as complaints regarding harassment within the office. To cover both these situations, employers should have comprehensive anti-harassment and social media policies that prohibit on and off-duty conduct that harasses, threatens, or discriminates against coworkers. When receiving complaints involving

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social media, employers must be careful about deciding whether to investigate and/or discipline an employee for their social media activity. For certain activity can be “protected concerted” activity under the National Labor Relations Act. Accordingly, employers should train management and leadership on how to address and investigate claims involving social media so supervisors know how to respond appropriately, and they know what evidence, such as social media accounts and their content, should be considered in the investigation.