Westlaw Journal
EMPLOYMENT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 30, ISSUE 18 / MARCH 29, 2016

EXPERT ANALYSIS

Workplace Cyberbullying Poses Danger For Employers

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Mention the word "cyberbullying" and most of us think of adolescents or young adults using social media to insult or embarrass their peers. Indeed, the high-profile cases attracting media attention typically involve troubled teens bullied by their classmates, often with tragic results.

Adults are not immune from the dangers of cyberbullying, however. As cyberbullies graduate into the workforce, and employees more often use social media, email, and text messages to communicate, it is becoming an increasing problem for employers.

Cyberbullying is similar to traditional workplace bullying and harassment, but uses electronic devices and communications. It can include sending threatening and abusive emails, text messages and tweets, public shaming via "mass emails," sharing embarrassing or offensive pictures or videos of the victim, and spreading gossip on social networking sites.

Often, it begins with a bully posting a derogatory message about the victim on Facebook or Twitter and co-workers responding with their own inappropriate comments.

From the bully's perspective, cyberbullying offers several advantages over traditional workplace bullying. The speed and scale of the Internet gives would-be bullies a wider audience, near-instant gratification, and in some cases, total anonymity.

Cyberbullying is obviously harmful for the unfortunate victims, but it raises potential problems for employers too.

OLD PROBLEM, NEW SETTING

The biggest threat cyberbullying poses for employers is a lawsuit by the victim for job discrimination and hostile work environment. Although these things are not new, technology has created new avenues and opportunities for them to occur. Therefore, employers cannot be concerned only with what their employees say and do within the four corners of the office.

Generally, federal law — including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act and the Age Discrimination in Employment Act — protects employees from discrimination because of their race, color, sex, religion, national origin, age and disability.

An employer can find itself liable for a claim of hostile work environment when an employee is subject to unwelcome harassment based on his membership in a protected group and the harassment is sufficiently severe or pervasive to alter the terms and conditions of employment.

Ignoring cyberbullying that creates a hostile work environment can be an expensive mistake for employers.

In *Espinoza v. County of Orange*, No. G043067, 2012 WL 420149 (Cal. Ct. App., 4th Dist. Feb. 9, 2012), for example, a California state court held an employer liable for employees' online harassment of a disabled co-worker.

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The plaintiff, who was born without fingers on his right hand, reported misconduct by several of his co-workers. In response, the co-workers created a blog about the plaintiff from a personal computer while off duty. The blog posts referred to the plaintiff as "the one-handed bandit" and his deformed hand as "the claw." One post offered a cash prize for pictures of the disfigured hand, which the plaintiff mostly kept in his pocket.

The harassment soon carried over into the workplace as employees began accessing and posting to the blog through their work computers. The plaintiff also complained of other harassing behavior by co-workers, including having his car keyed and the word "claw" written throughout his workplace. The plaintiff reported the harassment to his supervisors several times, but it was not resolved.

The court subsequently found his employer liable for having knowledge of the harassment and failing to take remedial measures. In doing so, it rejected the employer's argument that it was not liable for harassment that occurred on the blog and outside the workplace. The fact that some harassment occurred in the workplace made the online harassment an extension of the harassment at work. Following trial, a jury awarded the plaintiff $820,000.

Job discrimination lawsuits are not the only risk to employers. Cyberbullying can also lead to common law claims for defamation, intentional infliction of emotional distress and invasion of privacy.

In *Gavrilovic v. Worldwide Language Resources Inc.*, 441 F. Supp. 2d 163 (D. Me. 2006), for example, a linguist sued her military contractor employer for defamation and Title VII violations based on a supervisor's email that referred to the plaintiff as a sexual plaything (a "f--- toy") at her military base.

Following a bench trial, the Maine federal court held that the email was false and defamatory and that the supervisor's fault in sending the email could be attributed to the employer.[1]

AN EXPANDING VIEW OF THE WORKPLACE

Employers may incorrectly assume they are not liable for cyberbullying that occurs after hours or outside the workplace. But such behavior should be a concern because it often permeates into the workplace over time. Further, there is no bright-line rule that prevents a court from considering activity outside the workplace as evidence in a discrimination or harassment lawsuit.

In fact, courts frequently rely on such evidence when it can be connected to workplace behavior. For example, in *Isenhour v. Outsourcing of Millersburg Inc.*, No. 14-cv-1170, 2015 WL 6447512 (M.D. Pa. Oct. 26, 2015), a man sued his employer for sexual harassment and hostile work environment based on sexually explicit text messages he received from his supervisor. The texts, sent outside work hours, requested sexual favors from the plaintiff and asked him to send pictures of his genitals.

The court refused to dismiss the plaintiff's case, holding that a reasonable jury could conclude the conduct, including the off-duty texts, was sufficiently threatening and humiliating to support the plaintiff's claims.

Additionally, the traditional definition of the workplace has expanded with advances in technology. Employers can therefore be liable for facilitating cyberbullying through company-sponsored forums such as blogs, websites or social media accounts.

In *Blakey v. Continental Airlines Inc.*, 164 N.J. 38 (N.J. 2000), a female pilot brought a hostile-work-environment suit against the airline after derogatory remarks about her were posted on the airline's online bulletin board, which was hosted by a third-party Internet provider.

The New Jersey Supreme Court held that, standing alone, the fact that the online bulletin board was located outside the workplace did not relieve the employer of the duty of correcting offsite harassment. It noted that although employers do not have a duty to monitor the private communications of employees, they do have a duty to stop harassment when it takes place in "settings that are related to the workplace."

In sum, employers cannot escape liability for cyberbullying simply because it happens off duty or away from work. When the activity has a connection to the workplace, employers can be held responsible.

UNIQUE CHALLENGES

Workplace cyberbullying creates unique problems for employers. Unlike traditional workplace bullying or harassment, cyberbullying allows the bully to remain anonymous by creating a social media or email account under a fake name and then using the account to send harassing messages to the victim. The perceived benefit of anonymity can often bring out the worst in a person's behavior.

Employers can be held liable for cyberbullying even when the harasser remains anonymous.

In *Maldonado-Catala v. Municipality of Naranjito*, No. 13-cv-1561, 2015 WL 6454074 (D.P.R. Oct. 26, 2015), the plaintiff complained to her employer's director of human resources about harassing comments from two supervisors. One of the offending supervisors was forced to resign as the result of the employer's investigation.

Shortly thereafter, the plaintiff received several threatening messages from a Facebook user using a pseudonym. The plaintiff filed a report with the police, who traced the Facebook messages to a computer in her employer's office.

The court allowed the plaintiff to rely on the Facebook messages as evidence of a hostile work environment, despite the fact that the plaintiff never learned the identity of the sender.

A second characteristic of cyberbullying that makes it particularly dangerous for employers is the trail of evidence left by the parties involved. Potential plaintiffs can easily save harassing emails and texts for use in litigation or obtain the messages from the employer's servers through discovery. Further, posts to blogs and social media accounts can remain online forever.

Many courts have permitted discovery of social media material when the information is relevant to a party's claim or defense and producing the information will not impose an undue burden or expense on the party involved.[2]

In one recent case, *Nucci v. Target Corp.*, 162 So. 3d 146 (Fla. 4th Dist. Ct. App. 2015), a Florida court ordered a party to produce two years' worth of photographs from her Facebook account, holding that production was not onerous because the photos were "powerfully relevant" to the issues in the case and easily accessible in electronic form.

In doing so, the court noted that photographs posted on a social networking site are neither privileged from discovery in a civil action nor protected by any right of privacy, regardless of any privacy settings that the user may have established on his social media account.

STEPS TOWARD PREVENTION

There are several steps that employers can take to minimize the risks of liability associated with workplace cyberbullying:

- Establish a clear written policy prohibiting workplace cyberbullying. The policy can be a stand-alone policy or one that is incorporated into a broader workplace harassment policy. Ensure the policy includes procedures employees can use to report cyberbullying without fear of retaliation.

- Develop and enforce an "acceptable use of technology" policy. The policy should outline appropriate uses of employer-provided computers, cellphones, email and social media accounts, and it should forbid employees from using such things for bullying or harassment. Employers, however, should use caution in drafting such polices to avoid running afoul of the National Labor Relations Act. Section 7 of the NLRA protects the rights of employees to discuss their wages, hours and other terms and conditions of employment with their co-workers. Overly broad policies that tend to "chill" the exercise of these protective rights

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by employees may violate the NLRA.[3] Section 7 applies to union and non-union employers alike.

- Despite the fact that most employers have policies prohibiting harassment and outlining acceptable uses of technology, many employees are not aware of them. No matter how well-drafted the policy, it will not do any good collecting dust on the shelf. It is essential that employers clearly communicate their policies to employees and train management and staff to address workplace cyberbullying.

- Lastly, it is important for employers to learn to recognize the signs of bullying, such as high turnover or an employee becoming increasingly withdrawn from the group. When bullying or harassment is discovered, employers should immediately investigate the conduct before it escalates — and take immediate corrective action when necessary. Interview the employees involved, and document every step of the investigation. This documentation will be critical in the event that the affected employee files a lawsuit or administrative charge of discrimination.

CONCLUSION

Bullying and harassment are not new problems for employers. But the use of technology to engage in bullying and harassment creates new challenges that employers must be prepared to address.

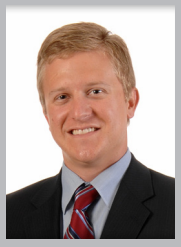
The risk of a lawsuit is not the only reason that employers should take steps to prevent cyberbullying. It can have serious negative consequences on the employer's business by hurting employee morale, decreasing productivity and increasing employee stress, turnover and absenteeism. Recruiting, hiring and training new employees costs valuable time and resources. Following the steps outlined in this analysis will help employers manage both the litigation threats and the business risks caused by workplace cyberbullying.

NOTES

[1] In addition to civil liability under anti-discrimination statues and the common law, cyberbullies can face criminal penalties under federal anti-stalking laws. For example, 18 U.S.C.A. § 875 makes it illegal to transmit a communication containing a threat to injure another person, while 47 U.S.C.A. § 223 prohibits the use of telecommunications to harass, threaten or abuse another person.

[2] *See, e.g., EEOC v. Original Honeybaked Ham Co. of Georgia,* No. 11-cv-2560, 2012 WL 5430974, *2-3 (D. Colo. Nov. 7, 2012); *Glazer v. Fireman's Fund Ins. Co.*, No. 11-cv-4374, 2012 WL 1197167 (S.D.N.Y. Apr. 5, 2012).

[3] *See, e.g., Triple Play Sports Bar,* 361 N.L.R.B. 31 (2014) (the employer violated the NLRA when it terminated employees as the result of a Facebook discussion criticizing the employer).



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