

SHOULD YOU BE CONCERNED ABOUT CYBERBULLYING AMONGST EMPLOYEES?

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Author: Bobbi K. Dominick

This spring, a female firefighter in Fairfax County, Virginia committed suicide. This would be a tragic case in any event, but it provides a cautionary tale for employers. Allegations surfaced that the intense cyberbullying was perpetrated by fellow employees. Online community forum members who claimed to be Fire Department employees posted comments criticizing the firefighter's body, sex life and then later her death.

The electronic world has taken over our culture, and many studies show that we spend more time on our phones or electronic devices than we spend at work or sleeping. Even if an employer has addressed bullying in the workplace, (which, as subsequent blog posts will make clear, is a precursor and incubator for more serious harassment behavior) employers may have missed their obligation to become aware of, regulate and stop cyberbullying.

Employers should regulate use of the Internet and mobile devices at work, but may think that online activity that happens in the worker's personal life is not a concern. Unfortunately, not all personal use of online devices is truly personal, as it may leak into the workplace when it involves employees. When the cyberbullying affects the workplace, it is as much the employer's issue as inappropriate behavior between employees off premises. The employer cannot rely on an "off premises" exception to regulating workplace behavior because there is no "off premises" exception when the behavior affects the workplace.

One recent example is a female supervisor harassed a male subordinate by sending sexually explicit text messages and asked the employee to send back explicit pictures of himself. Those off premises exchanges, along with other workplace behavior, were enough for the court to find that the plaintiff was subjected to a hostile work environment. In another case, an EMT claimed that threatening Facebook messages sent to her constituted retaliation. The court said it raised an inference of a violation of Title VII.

Harassment, anti-discrimination, and technology policies should clearly prohibit cyberbullying and online harassment. While no federal law specifically prohibits cyberbullying, Title VII prohibits an employer from allowing a hostile work environment, where the hostility is based on a protected class. This law would apply to conduct that happens online between employees. In the case of the firefighter, comments about the employee's body and sex life could rise to the level of Title VII harassment if conducted within the workplace. It should be no different if the same behavior occurs between co-workers online.

Employers are almost caught between two federal laws when acting to prevent cyberbullying or cyber harassment. Title VII requires that employers take action to prevent cyberbullying when it is based upon a protected class. The National Labor Relations Board (NLRB) has ruled that many employer policies seeking to prevent workplace cyberbullying could violate Section 7 of the NLRA, which protects an employee's right to engage in concerted activity. This restriction applies to all employers, regardless of whether they are unionized.

Employee speech is protected by the NLRA when it addresses working conditions because workers have the right to engage in concerted activities for mutual aid or protection. For example, while posting someone's photo online is a common form of cyber abuse, the Board has concluded that it is unlawful for an employer to bar employees from taking pictures of co-workers. Policies that govern employee use of the Internet are mandatory, but the policies should prohibit abusive behavior without interfering with the employee's Section 7 rights to organize and complain about workplace issues.

INSIGHTS FOR EMPLOYERS

1. Make sure you have a social media policy
2. Make sure that online behavior is covered in your anti-harassment policies and training
3. Make sure your social media and harassment policies contain a Section 7 exception
4. Immediately investigate and take corrective action when you receive a complaint, even if it is about off premises online behavior

Please contact a Gjording Fouser lawyer at 208.336.9777 if you would like any additional information about this topic or any other employment issues facing your company.