

## **Hostile Workplace Claims: The New Battleground**

E-mail and internet access have become tools of the workplace, just like pens and paper. Any of these tools, if misused, can cause a hostile workplace and have the potential to create employer liability. The solution is to adopt and implement effective policies to prohibit misuse of these systems, to monitor compliance with the policies, and to address any complaints.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against any individual because of such individual's race, color, religion, sex, or national origin. Other federal laws prohibit discrimination based on age and disability. State laws normally parallel federal law and prohibit the same types of discrimination.

Beginning in 1986, the courts recognized that a hostile work environment could be a form of discrimination. However, this does not mean that Title VII acts as a general civility code, prohibiting raised voices or rough and tumble words. Instead, a hostile work environment occurs when the workplace is so permeated with "discriminatory intimidation, ridicule, and insult" as to alter the terms and conditions of the victim's employment. An occasional insult or isolated incident is rarely enough to create a hostile work environment. The conduct must be sufficiently severe or pervasive that a reasonable person would find it hostile or abusive. This rule applies whether the person is female or male.

In the past, courts have found that the presence of racial slurs or sexual images can create a hostile workplace. Since the advent of widespread e-mail and internet access, employees have made claims against employers for creating or tolerating a hostile work environment based on words or images transmitted electronically.

Employees have claimed a hostile work environment when pornographic images are displayed on another employee's terminal and can be readily seen because of the lack of a door to a cubicle or a strategically placed window. Other cases deal with the transmission of pornographic pictures or racially derogatory cartoons as attachments to e-mails. Courts readily recognize that such images can create lead to liability for a hostile work environment, if the other elements of the claim could be shown.

The potential liability is extensive and wide ranging. In one case, employees of a community college, subjected to three derogatory e-mail messages concerning issues of race, race relations, ethnicity and immigration, complained that their employer failed to take effective action to stop the e-mails, even after the employees complained. Thereafter, the employees sued their employer for failing to take effective action and the court hearing the case certified a class action against the employer. Thus, the employer was potentially liable to each and every employee who became a member of the class. Each successful class member could then claim back pay, front pay, emotional distress damages, litigation costs and attorney fees.

The borders of potential liability are constantly being stretched. In one case, a court held that an employer could potentially be liable for an employee's abuse of his child, because several employees knew of and complained about the employee's viewing of pornographic materials, including child pornography, on his office computer. Despite repeated complaints, the employer did little to halt the behavior. In fact, the employer told the complaining employees to stop, because the employee viewing these materials had a constitutional right to do so. The employer was wrong, because the employee had no privacy rights, and the mother of the employee's stepchild sued the employer for negligence. The court held that the employer's failure to act - to discipline the behavior or report it to authorities - could have contributed, in part, to the injuries suffered by the child and the employer could potentially be liable for the injuries suffered by the child.

The consistent message from the developing case law is that the employer must adopt policies which lay out the acceptable uses of an e-mail and/or electronic information systems and then monitor compliance with the policies. One common issue is an employee's use of e-mail or the internet for personal business. Policies usually prohibit personal use, but the restriction is normally not enforced until the employer seeks to discipline or discharge an employee, frequently for a reason other than abuse of the e-mail system. If the employer adopts a flat prohibition against such use, then the prohibition must be

enforced. It may be more realistic to recognize that personal uses may occur, but that any such uses must be in accordance with the other policies of the employer, such as those prohibiting sexual harassment in the workplace. Once a reasonable policy is in place, it must be enforced through monitoring and, if necessary, discipline for violations of the policy.

Contrary to common belief, employers can and should monitor employees' use of computers and computer systems. Such monitoring generally does not violate the law. Typically, the employer owns the computers and the system and has the right to monitor the use of that system, including e-mails. Commercially available software permits employers to identify the sites visited on the internet and the time spent there. Further, system administrators generally have the capability to view network logs maintained by date and can identify questionable e-mails through the use of certain words.

Finally, as long as employees are notified about the policy limiting use and monitoring, they cannot claim a right to privacy if their use of company e-mail or systems violates company policy. The policies should also contain provisions requiring that misuse of these systems must be reported to the proper entity within the company. Allegations of hostile work place created through the use of e-mails or computers should then be handled within the sexual harassment policies of the company.

While there is no magic bullet which will prevent the filing of a lawsuit, an employer can minimize liability by following these steps.

*Diane Vaksdal Smith,*

*Shareholder, Burg Simpson Eldredge Hersh & Jardine, P.C., Denver, CO.*

*Please contact Diane Smith at [dsmith@burgsimpson.com](mailto:dsmith@burgsimpson.com) or (303) 792-5595 if you need advice or representation concerning employment issues.*