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Five lessons plus four in social media and workplace harassment

Analysis | August 14, 2024

The following may be a true story.

The events depicted allegedly took place in Lompoc, California, in 2020.

Out of deference to the judges involved, their names have not been used.

Out of respect for the victim, her story has been told as it was recorded in the court's records.

I confess. Most of that intro is a riff on the opening lines from the Coen brothers' 1996 classic *Fargo*.

What not to do when responding to a complaint of harassment

Dr. Lindsay Okonowsky was employed as a Staff Psychologist at the Lompoc Federal Correctional Facility.

Steven Hellman was a Lieutenant at the prison, with responsibility for overseeing the safety of prison staff.

Dr. Okonowsky and Mr. Hellman frequently disagreed about how to manage difficult inmates. (Apparently, Mr. Hellman didn't think the answer was counseling.)

Then Dr. Okonowsky discovered that Mr. Hellman was operating an Instagram account containing numerous overtly sexist, racist, antisemitic, homophobic, and transphobic posts.

The account also included crude and degrading posts targeted at Dr. Okonowsky, including a joke about one of Mr. Hellman's subordinates "gang banging her at her home."

According to the evidence submitted by Dr. Okonowsky:

- More than 100 prison employees "followed" and "liked" Mr. Hellman's Instagram posts, including the prison's Human Resources Manager and Union President. (**Lesson No. 1:** HR Managers should be shutting down such activities, not following them.)
- When Dr. Okonowsky complained about the posts, prison management told her they were "funny." (**Lesson No. 2:** When an employee complains about harassing conduct, be empathetic.)
- When management appointed someone to investigate Dr. Okonowsky's complaint, the investigator summoned her to his office over the staff-wide radio system and met with her while other staff members were nearby. (**Lesson No. 3:** Do not broadcast, "Will the person complaining about sexual harassment please come to my office?" In other words,

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ensure confidentiality for the alleged victim.)

- When Dr. Okonowsky first met with the investigator, who happened to be a "subordinate" of Mr. Hellman, the investigator said that it was "not a problem". (**Lesson No. 4:** Do not prejudge the complaint. Even if it lacks merit, an unbiased investigation is required.)
- Dr. Okonowsky's questions about the status of the investigation often went unanswered, and the investigator told her the page was "not a problem". (**Lesson No. 5:** When an employee complains of harassment, investigate it promptly. If you are too busy, find someone who isn't.)

Nearly two months after she first complained, the prison issued Mr. Hellman a cease-and-desist letter. (Hallelujah!)

But he did not cease. Nor did he desist. He continued with the offensive posts for another month before he finally took down his Instagram page.

According to Dr. Okonowsky, Mr. Hellman's conduct and the lack of a curative response drove her to leave the prison in search of a different job. I doubt any of you are surprised by that.

Four lessons in evaluating claims of harassment

Dr. Okonowsky filed a lawsuit asserting a single claim of sexual harassment in violation of Title VII.

After discovery was complete, a federal court entered summary judgment for the government and dismissed Dr. Okonowsky's claims.

The court limited its consideration of Dr. Okonowsky's evidence to five posts that the court concluded were targeted at her because of her sex.

Having limited its review to those five posts, the court then concluded that all five "occurred entirely outside of the workplace" because they were made on Mr. Hellman's personal Instagram page and none were sent to Dr. Okonowsky, displayed in the workplace, or discussed with her in the workplace without her consent.

Based on those findings, the court concluded that the five posts did not amount to severe or pervasive harassment in the physical workplace.

Dr. Okonowsky appealed, and the U.S. Court of Appeals for the Ninth Circuit reversed the dismissal.

The reversal provides valuable lessons for evaluating claims of harassment in a world where anyone can broadcast just about anything via social media platforms:

- **Lesson No. 1:** Harassment claims must be evaluated based on all the relevant circumstances, which can include conduct that does not expressly target the plaintiff. In other words, all of Mr. Hellman's sexist posts should have been considered, not just the ones targeted at Dr. Okonowsky.
- **Lesson No. 2:** The "relevant circumstances" can include evidence of non-sexual conduct directed at the plaintiff. That means Mr. Hellman's posts that were intimidating or retaliatory also should have been considered.
- **Lesson No. 3:** The "relevant circumstances" are not limited to conduct that occurs in the physical workplace. As the Ninth Circuit concluded, this is especially true "in light of the ubiquity of social media and the ready use of it to harass and bully both inside and outside of the physical workplace." As a result, it was no defense that Mr. Hellman posted while off duty and did not post in the workplace.
- **Lesson No. 4:** The relevant standard for assessing the circumstances is whether the harassing conduct has an unreasonable effect on the working environment. As the court explained, "even if discriminatory or intimidating conduct occurs offsite, it remains relevant to

the extent it affects the employee's working environment."

You're not your brother's keeper . . . except when you are.

What employees do during their "off" time is their business. But when that conduct creeps (or blasts) its way into the workplace and creates a hostile environment, employers cannot turn a blind eye to it or dismiss it as off-duty conduct beyond their control.