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E-UPDATE

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RECENT DEVELOPMENTS

NLRB Rolls Back Trump Board Representation Case Policies

The National Labor Relations Board (the Board) issued a final rule on July 26, 2024, rolling back several Trump-era amendments to representation case rules. The rule, dubbed the "Fair Choice-Employee Voice Final Rule" makes three significant changes: (1) it restores the NLRB's previous "blocking charge" policy; (2) it reinstates a six-month minimum voluntary recognition bar during which time a voluntarily recognized union's status as majority representative cannot be challenged; and (3) returns to the Board's pre-2020 approach to voluntary recognition in the construction industry.

The final rule comes two years after the Board issued its Notice of Proposed Rulemaking (NPRM). The 2022 NPRM sought to roll back policy changes issued by the Trump Board in 2020. The final rule will take effect on September 30, 2024.

Restoration of Blocking Charge Policy. The rule reinstates the prior policy allowing a regional director to delay the processing of an election petition at the request of a party that has filed an unfair labor practice charge and an adequate offer of proof in support of the charge allegations. In virtually every case, the "blocking charge" is filed by a union after a decertification petition has been filed.

Under the 2020 rule, regional directors would hold an election even if a blocking charge had been filed. The results of the election, however, would not be certified until after the blocking charge had been fully investigated. The Board stated that the 2020 rule required "regional directors to conduct, and employees to vote in, an election in a coercive atmosphere that interferes with employee free choice."

Many employers should now expect unions to quickly file charges soon after a decertification petition is filed. Such charges will now block an election from being held during the pendency of the investigation which, in some cases, could be many months (or more than one year).

Return of the Voluntary Recognition Bar. Now, when an employer voluntarily recognizes a union as its employees' bargaining representative based on the union's showing that it is supported by a majority of employees, there will be no election challenging the union's status for a "reasonable period of time" not less than six months. This rule eliminates the 2020 rule providing for a 45-day window after voluntary recognition for employees to file a petition seeking an NLRB-administered election.

The signing of union authorization cards is not always the most reliable indicator of overall employee support for a union. Under the previous rule, employees could put the union's support to

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the test in an NLRB election – although such elections were very rare. Now, a voluntarily recognized union will be protected for at least six months, and, if a collective bargaining agreement is negotiated during that period, up to an additional three years on top of the voluntary recognition bar.

Return to *Staunton Fuel* Standard in Construction Industry. Last, the final rule returns to the Board's pre-2020 approach to voluntary recognition in the construction industry. This policy includes restoring a six-month bar to an election petition challenging a construction employer's voluntary recognition of a union. In addition, the final rule returns to the Board's *Staunton Fuel* standard that permitted voluntary recognition in the construction industry through no more than language in a collective bargaining agreement bestowing voluntary recognition on the union pursuant to Section 9(a) of the NLRA – the section of the law that provides for the formation of bargaining relationships.

Dueling Federal Court Decisions on the FTC's Non-Compete Ban – Now What?

As many employers know, the Federal Trade Commission has issued a final rule that imposes a near-total ban on non-compete provisions in employment agreements, applicable to for-profit employers (the FTC generally does not have jurisdiction over non-profit employers) with certain limited exceptions (as discussed in our April 24, 2024 E-lert). The rule was immediately challenged in several different courts and, in early July, a Texas federal judge issued a preliminary injunction that blocked the rule as to the plaintiffs in that case - the U.S. Chamber of Commerce, several other trade associations, and a private company, Ryan LLC – as discussed in our July 5, 2025 E-lert. The Texas judge indicated that she thought the FTC lacked the necessary authority to issue the rule and that the rule is likely arbitrary and capricious. But now, a Pennsylvania federal judge has come to the opposite conclusion.

The Pennsylvania Court's Decision. In *ATS Tree Services v. FTC*, like the plaintiffs in the Texas case, the plaintiff company argued that the FTC lacked substantive authority to issue the rule, and that Congress unconstitutionally delegated legislative power to the FTC, and also argued that the FTC exceeded its authority. The company requested the Pennsylvania federal judge to issue a preliminary injunction to prevent the rule from being applied to it. However, the Pennsylvania federal judge rejected the request, finding that the company was unlikely to succeed on the merits of its claim or that it would suffer irreparable harm absent an injunction.

Reading the Tea Leaves? With the Texas court's limited injunction and the Pennsylvania court's refusal to issue an injunction, the FTC's rule is currently scheduled to take effect for most employers on September 4, 2024. The Texas court has stated that it intends to issue a ruling on the merits of the case before it by August 30, prior to the effective date, and many legal commentators expect the Texas court to enjoin the rule – but the extent of any injunction is unclear. It is possible, although unlikely, that the Texas court could uphold the rule. If not, the Texas court could issue a nationwide injunction, an injunction that applies only in its jurisdiction of Texas, or only as to the plaintiffs in the case before it (with some question as to whether it might apply to the U.S. Chamber's and other trade associations' members or only the entities themselves).

And just to muddy the waters further, another lawsuit has been filed in a Florida federal court, with a request for injunction. No ruling has yet issued in that case.

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What Next? In the meantime, covered employers should prepare for the possible implementation of the rule: evaluate current agreements that contain non-compete provisions to determine if they are subject to the ban and, if so, how to modify them to comply with the ban; consider (legal and enforceable) confidentiality, non-disclosure, and non-solicitation provisions that can protect company interests in lieu of non-compete agreements; and plan on whether/how to provide the required notice of non-enforcement to current and former employees with existing non-compete agreements (in consultation with counsel).

The 90-Day Filing Period for Discrimination Lawsuits Might Be Longer Than, Well, 90 Days…

In a cautionary tale for employers, the U.S. Court of Appeals for the Third Circuit recently held that neither the posting of the dismissal of an employee's charge and notice of her right to sue in the Equal Employment Opportunity Commission's electronic portal, nor the EEOC's email to her attorney, was sufficient to trigger the start of the 90-day filing period for a Title VII lawsuit.

The Charge Filing Prerequisite for a Discrimination Lawsuit. Before filing a discrimination lawsuit in federal court, an employee is required first to file a charge of discrimination with the EEOC. Unless the parties opt for EEOC mediation, the agency will typically conduct an investigation into the charge. If the EEOC cannot identify a violation of the antidiscrimination laws, it issues a dismissal of the charge and a Notice of Right to Sue (NRTS). The employee then has 90 days from their receipt of the notice in which to file their lawsuit (emphasis to be explained below). Any lawsuit filed outside this period will be deemed untimely and dismissed – so employers tend to count those days carefully.

Issues with the EEOC's Electronic Portal. Historically, the EEOC mailed all of its communications, including the initial notice of the charge, as well as a dismissal and NRTS. With any mailed communication, courts presume receipt three days after the date of mailing, although that presumption may be rebutted with other evidence (including a plaintiff's sworn testimony that they did not receive the mailing).

As many employers know, however, the EEOC has mostly moved away from using actual paper notices and other communications related to an employee's charge of discrimination. Instead, it has mainly relied on its electronic portal to transmit and receive information and documents from both the employer and the employee, as well as counsel for those parties, if any. This includes a dismissal and NRTS, although the EEOC typically follows up electronic notice with an actual mailed letter.

The use of this portal has run into glitches, however. For example, the EEOC's initial emails to employers to notify them of charges and provide a link to the portal have often landed in spam filters or been directed to incorrect company officials who may ignore an email that they do not understand, with the result that the employer does not receive timely notice of the charge. Months may pass before the EEOC sends a physical letter with the charge. And now, it appears that employers cannot rely on issuance of a NRTS through the portal to start the 90-day filing period. Even more problematically, it appears that emailed notice to the employee's attorney does not necessarily trigger the start of the period either.

The Court's Ruling. In *Hayes v. New Jersey Dept. of Human Services*, the EEOC concluded its investigation, and it emailed the employee's attorney that its "review of the available evidence does

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not establish a violation of Title VII" and that the EEOC "will issue you a Dismissal and Notice of Rights that will enable you to file suit in U.S. District Court within 90 days of your receipt of that Notice." The EEOC then issued its dismissal and NRTS through its portal. The Third Circuit, however, found that "neither action provided notice sufficient to start the clock." It determined that the email to the attorney "was not equivalent" to the NRTS because it did not state that the 90-day clock had started – only that the NRTS was forthcoming. And while the NRTS was uploaded to the portal, there was no direct communication to the employee or her attorney that the upload had occurred. Therefore, the upload did not start the clock either.

Given the lack of electronic notice, the Third Circuit then turned to the mailed notice, which is subject to the 3-day presumption of receipt. But here, both the employee and her attorney provided sworn statements that neither of them received the mailed notice, and they were not aware of the dismissal and NRTS until the attorney contacted the EEOC and obtained it – over five months later!

Lessons for Employers. So there are several lessons here for employers. First, regularly check spam filters for important correspondence, including from the EEOC. Second, and particularly for larger employers who deal with charges from time to time, it is helpful to ensure that the EEOC has the correct contact information for the company official designated to receive charges (which can be done the first time an employer uses the EEOC portal, as that information should be applied for future charges). And finally, a wise employer, upon receipt of the NRTS, may wish specifically to confirm that the EEOC investigator has actually emailed the employee (and counsel, if any) that the dismissal and NRTS have been uploaded to the portal.

TAKE NOTE

OSHA Issues Onerous Proposed Rule to Prevent Heat Injury and Illness. The Occupational Safety and Health Administration has issued a proposed rule intended to protect workers from heat-related illnesses and injuries. The rule imposes extensive requirements on employers. Among other things, the rule will require employers to develop an injury and illness plan to control workplace heat hazards, provide training, and implement procedures to respond to workers experiencing a heat-related illness or emergency.

The required plan must include an evaluation of heat risks. If there is an increased risk, employers must implement requirements for water hydration, rest breaks, and indoor heat control. Employers must also protect new or returning workers who are unaccustomed to working in high heat.

Once the proposed rule is published in the Federal Register, the public may submit comments. OSHA will then consider the comments and may make changes to the proposed rule before issuing a final rule. Notably, the proposed rule has already met with controversy, with the business community expressing concerns about the rushed rulemaking process, extensive requirements, and one-size-fits-all approach regardless of employer size or industry. A U.S. House of Representatives committee has also raised concerns about the rule. In light of the recent Supreme Court ruling undermining agency regulatory authority (as discussed in our June 28, 2024 E-lert), the future of this proposed rule is quite uncertain.

Employee's Unreasonable Objection to DEI Training Is Not Protected by Title VII. The U.S. Court of Appeals for the Seventh Circuit rejected an employee's claim that he was unlawfully

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terminated in retaliation for his refusal to complete mandatory unconscious bias training – good news for employers' diversity, equity and inclusion efforts.

In *Vavra v. Honeywell Int'l, Inc.*, the President of a Company unit sent a September email entitled "Continue to Fight for Social Justice," reacting to a grand jury's decision not to indict officers involved in a Black woman's death and stating "Racial bias is real…. Each of us has unconscious bias within us." He also noted that the unit would be taking various actions "to make a difference." Subsequently, the unit rolled out mandatory, online unconscious bias training. The employee never accessed the training, despite a multitude of automated and personal reminders. In response, the employee sent an email, claiming that the President's email turned him and his White colleagues into villains, denying that he had unconscious bias, and calling the training "a joke." The reminders to take the training continued. The employee's supervisor told the employee that he had taken the training, including a video involving unconscious bias towards a white male, and the supervisor did not perceive it as racist. The employee continued to refuse to take the training, despite additional requests and warnings that termination would be the consequence, and he was finally terminated.

The Seventh Circuit threw out the employee's lawsuit. While the federal anti-discrimination laws, including Title VII, protect employees from retaliation for opposing unlawful discrimination, the Seventh Circuit noted that the employee "must have an objectively reasonable belief that the action [he] opposed violated the law." Moreover, "an employee must have some knowledge of the conduct he is opposing for his belief to be objectively reasonable." In this case, because the employee never accessed the training or otherwise determined what it included, his "purely speculative" assumption that it violated Title VII, particularly in light of his supervisor's "concrete" information to the contrary, "could not have been objectively reasonable."

This case is good news for employers in the Seventh Circuit (Illinois, Indiana, and Wisconsin) that employees cannot simply refuse DEI training without any reasonable basis for their objection. And the employer here provided an excellent blueprint for handling such a refusal: multiple reminders (both automated and live) to complete the training; extending the deadline for well over a month; and multiple meetings with the employee to ask about his specific concerns, to explain what the training actually included, and to warn of the consequences of continued refusal. But employers should keep in mind that the Seventh Circuit's position may not necessarily be shared by all of its sister Circuits – particularly those like the Fifth and Eleventh that are more conservative.

Employee May Be Fired for Refusing to Cooperate in Employer's Investigation. The employer had a legitimate reason to terminate an employee based on his refusal to cooperate in the investigation into his possible wrongdoing, according to the U.S. Court of Appeals for the Ninth Circuit. Moreover, the fact that his termination occurred 56 days after his internal discrimination complaints meant that there was not sufficient temporal proximity to support the claim of unlawful retaliation.

In *Kama v. Mayorkas*, the TSA conducted an investigation into the employee's co-worker for the receipt of illegal compensation for serving as a personal representative assisting other employees during internal investigations. A witness indicated the employee's possible involvement, but the TSA did not investigate the employee at that time.

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Several years later, the employee began a series of EEO discrimination complaints. Approximately five months after his first complaint, TSA commenced an investigation into the employee's possible misconduct related to the earlier investigation. The employee refused to respond to questions or provide documents related to whether he illegally received compensation. He was notified that his employment could be terminated for his failure to cooperate, and then subsequently terminated. He sued, alleging that the TSA commenced its investigation and terminated him in retaliation for his EEO complaints, pointing to the temporal proximity of his complaints to the termination as evidence that the TSA's stated reason was pretext for illegal retaliation under Title VII.

The Ninth Circuit rejected the employee's claims. It noted that whether temporal proximity supported a claim of retaliation or pretext is a fact-specific analysis that depends on the degree of proximity and what other evidence supports an inference of pretext. It further observed that where "an adverse action follows on the heels of both a protected activity and an independent reason for adverse action— [temporal proximity] might not be enough standing alone to establish pretext."

In this case, the TSA articulated a legitimate, non-retaliatory reason for the employee's termination – his refusal to cooperate with the investigation into his suspected criminal activity. The Ninth Circuit found that the period of time between his final EEO complaint and his termination, 56 days, was not sufficiently close to establish pretext. It also noted the same temporal proximity between the employee's non-cooperation and his termination – meaning that the same period of time "cuts both ways." Because an "equally likely cause" of his termination arose during that period of time, temporal proximity could not establish illegal retaliation or pretext. In addition, the five-month gap between his first EEO complaint and the beginning of the investigation was not sufficient temporal proximity to establish that the investigation was in illegal retaliation for his complaint.

This case provides some good news for employers. First, an employee's refusal to participate in an investigation into possible misconduct can be a legitimate reason for termination. (We note that unionized employers must ensure that they comply with the rules governing their investigations of union members that can result in disciplinary action, including termination). In addition, courts will not presume an illegal motivation on the part of an employer based purely on temporal proximity of the adverse action to the employee's protected conduct (of discrimination complaints) where there has been an extended time between the two, or where there is other evidence that supports the employer.

NLRB General Counsel Doubles Down on Injunctive Relief. Following last month's Supreme Court decision holding that a stringent test applies to lawsuits filed by the National Labor Relations Board (the "Board") that seek injunctions to halt serious labor violations (as discussed in our June 14, 2024 E-lert), the Board's General Counsel has issued a memorandum that reaffirms her commitment to the use of injunctive relief.

Under Section 10(j) of the National Labor Relations Act, the Board may seek injunctive relief against both employers and unions to stop unfair labor practices. However, there was a split among the U.S. Circuit Courts of Appeals as to the standard that applies to preliminary injunctions, with the Board and several Circuits employing a lower standard. The Supreme Court, however, held that a more difficult standard applied.

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In her memorandum, the General Counsel asserts that the Supreme Court's decision will not significantly impact the Board's injunctive efforts, noting that it has successfully obtained such relief in jurisdictions utilizing the stricter test. This is in line with a previous memorandum in which she advocated for the aggressive use of injunctions against employers in organizing campaigns, as discussed in our February 28, 2022 E-Update, as well as a 2021 memorandum in which she emphasized the importance of injunctive relief.

Therefore, employers (both union and non-union) should be aware that the current Board will continue to pursue injunctions against those it deems to have engaged in unfair labor practices – and certainly it is far more willing to find such conduct than prior Boards.

NLRB Abandons Its Joint Employer Rule – Now What? On July 19, 2024, the National Labor Relations Board voluntarily dismissed its appeal of a federal court decision that vacated (i.e. blocked) its final rule for determining whether two entities are joint employers. (Under federal labor law, a joint employer is required to bargain with a union selected by its jointly-employed workers and may be held liable for the unfair labor practices committed by the other employer.)

The final rule would have resulted in more findings that two entities are joint employers. It was immediately challenged in court, and earlier this year, a federal district court in Texas prevented the rule from taking effect, as we discussed in our March 11, 2024 E-lert. In its dismissal motion, the Board asserted that it "would like the opportunity to further consider the issues identified in the district court's opinion" and "to consider options for addressing the outstanding joint employer matters before it."

The Board's action means that, for now, the current Trump Board rule, making joint employer findings less likely, continues to apply. We remind employers, however, that there are many other statutes that apply different standards to a joint-employer analysis. These include the Department of Labor's rescission of the Trump DOL's final joint-employer rule under the Fair Labor Standards Act (and consequent lack of clarity as to its approach), which we discussed in our July 2021 E-Update, and the Equal Employment Opportunity Commission's interpretation of joint employment under anti-discrimination laws, as well as many courts' interpretations under these laws, which can differ from agency interpretations.

As we have previously warned, companies engaging in contractual relationships with other businesses must remain keenly aware that the potential impact of the joint employer doctrine may differ depending on the context and jurisdiction at issue. Employers must choose whether to take actions to minimize the likelihood that they will be deemed a joint employer or accept the reality of a joint employment relationship and the resulting obligation to verify compliance with applicable laws.

A Reminder that Computer Boot-Up/Down Time May Be Compensable. We previously discussed an opinion from the U.S. Court of Appeals for the Ninth Circuit, holding that time call-center employees spent booting up their computers is compensable work time, but sending the case back to the trial court to determine if the time was so minimal that it need not be paid. The trial court said yes, but now the Ninth Circuit has decided that is a question for a jury to consider.

Under the Portal-to-Portal Act, which is an amendment to the Fair Labor Standards Act, activities that are preliminary or postliminary to an employee's principal activities are not compensable.

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Principal activities include all those that are an "integral and indispensable" to the performance of the productive work that the employee is retained to perform (and not necessarily all the activities required by the employer). In the original ruling in *Cadena v. Customer Connexx LLC*, the Ninth Circuit found that "All of the employees' principal duties require the use of a functional computer, so turning on or waking up their computers at the beginning of their shifts is integral and indispensable to their principal activities." Accordingly, such time was compensable.

There are two exceptions to the compensability of such time – if it is too minimal (i.e. *de minimis*) or if the employer did not know and did not have reason to know that the employees were working the extra time. Last time, the Ninth Circuit initially found that these issues had not been addressed by the federal trial court, and sent the case back for further consideration. The trial court rejected the employees' argument that the *de minimis* doctrine was no longer good law, and then applied that doctrine to find that the employees were not entitled to payment for the boot-up/down time.

The employees again appealed to the Ninth Circuit. Although the Ninth Circuit agreed with the trial court that the *de minimis* doctrine was alive and well, and applicable to overtime claims, it found that there were sufficient factual disputes over whether the time was truly *de minimis* such that a jury would need to make the decision.

Given this latest ruling from the Ninth Circuit, in addition to the Tenth Circuit's prior ruling finding such minimal amounts of time to be compensable (as discussed in our October 2021 E-Update), risk-averse employers may wish to ensure that non-exempt employees engaged in computer-based work be paid for the time spent booting up and down the computer, in connection with their primary work tasks.

NEWS AND EVENTS

Victory – Darryl McCallum won summary judgment for a hospital system. The federal district court threw out the plaintiff's claims of disability discrimination and retaliation under the Americans with Disabilities Act, finding that the employer had presented ample evidence of legitimate reasons for the employment actions taken, including the plaintiff's termination.

Victory – J. Michael McGuire, Chad Horton and Stephen Shawe assisted a casino in winning a union election. The members of the voting unit of security ambassadors rejected union representation by an overwhelming majority vote of 61-29.

Victory – Darryl McCallum successfully defended a county public school system against discrimination and retaliation claims. The federal district court granted summary judgment to the employer, finding that the employer had taken the employment actions at issue for reasons other than the plaintiff's race or national origin, and not because of plaintiff's internal complaints.

Honor – Fiona Ong has once again been recognized by Lexology as its "Legal Influencer" for Employment & Immigration - US, most recently for Q2 2024. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology's quarterly "Lexology Content Marketing Awards" recognizes one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the 21th consecutive quarter and 22nd time overall that Fiona has received this honor.

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Victory - Parker Thoeni and Evan Conder won a motion to dismiss defamation claims brought by two former employees of a company. The federal court found that the company's internal communications about possible fraud by the employees were lawful.

TOP TIP: Hey Employers - Workplace Harassment Can Occur Through Personal Social Media Postings!

Some employers turn a blind eye to what happens outside the workplace – after all, that is the employee's own time. And we cannot/should not control what employees do outside the workplace, right? Including personal social media activity, right? Unfortunately for those employers, that kind of thinking can land them in trouble, and a recent case from the U.S. Court of Appeals for the Ninth Circuit highlights that point.

Background of the Case. In *Okonowsky v. Garland*, a staff psychologist in a federal prison found out that a corrections lieutenant had posted sexually offensive content on his Instagram account, and that she was a target. Prison leadership initially dismissed her repeated complaints, telling her that the page was "funny" and that she needed to toughen up or get a sense of humor. Two months later, after he increasingly targeted her, the lieutenant was finally told to stop violating the prison's anti-harassment policy. But his postings continued for another month without action from the prison, eventually driving the psychologist to leave. She then sued the Bureau of Prisons for sexual harassment in violation of Title VII.

Sexual Harassment Under Title VII. There are three factors in determining whether there was a sexually hostile work environment under Title VII: whether the plaintiff was subject to verbal or physical conduct of a sexual nature; whether the conduct was unwelcome; and whether the conduct was sufficient severe or pervasive to alter the conditions of employment and create an abusive working environment. This last factor requires a showing that the work environment was both objectively (to a reasonable person) and subjectively (to the plaintiff) hostile. Courts look to the totality of the circumstances in analyzing objective hostility, which includes the frequency and severity of the conduct, whether it was physically threatening or humiliating, and whether it unreasonably interfered with the employee's work performance.

The Lower Court's Decision. The federal district court threw out the case. In reviewing the postings, the court looked only at five posts that it determined to have targeted the psychologist because of her sex, and it found that the posts occurred entirely outside the workplace – they were made on the lieutenant's personal Instagram page and they were not sent to the psychologist or shown to her in the workplace. The federal district court also found that the Bureau took reasonable and prompt corrective steps to end the harassment – "a methodical, albeit relatively lengthy investigation," reassigning the lieutenant to another part of the prison, convening a Threat Assessment Team to evaluate the situation, and issuing the cease-and-desist letter.

The Ninth Circuit's Decision. On appeal, however, the Ninth Circuit reversed the federal district court's decision. It pointedly noted that "it makes little sense to describe a social media page that includes overt comments about a specific workplace … as 'occurring' in only a discrete location" (meaning outside the workplace). Such posts are "permanently and infinitely viewable and re-viewable" and others, including co-workers, can view and engage with these posts from anywhere,

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including from the workplace. Moreover, the Ninth Circuit noted that "wholly" offsite conduct can have the effect of altering the working environment, and the employer's response to that effect "can be particularly relevant to both the hostile work environment and employer liability elements of a Title VII claim." More specifically, the Ninth Circuit flatly stated, "We … reject the notion that only conduct that occurs inside the physical workplace can be actionable, especially 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."

Against that analytic background, the Ninth Circuit found that there was evidence the Bureau failed to take reasonably prompt and effective steps to address conduct that plainly violated Bureau policies, and the Bureau's lack of action signaled to the psychologist that it had no intention of protecting her from the lieutenant's harassment. The Ninth Circuit further found that the district court improperly limited its consideration of the lieutenant's posts to those that sexually targeted the psychologist. Under Ninth Circuit precedent, the totality of circumstances in a sexual harassment claim may include sexually harassing conduct that does not expressly target the plaintiff as well as non-sexual conduct targeted to the plaintiff that a jury could find retaliatory or intimidating.

Lessons for Employers. Employers must recognize that conduct occurring outside the workplace – including social media activity – can create a hostile work environment. It is critically important that if an employer becomes aware of "outside" conduct that can impact working relationships, it take prompt and effective action to address it.

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