

Employee Benefit ■ Plan Review

Hostile Environment Claims in a Work-From-Home World

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A recent Forbes.com article¹ on harassment in the work-from-home world identified eight “red flag” signs of harassment. “Just like the working environment has changed to a home-based environment, so has workplace harassment,” the article observed, warning that “workplace harassment that follows an employee into their homes can have devastating impacts on their mental well-being, as well as on their family.”

As of now, case filings have not revealed whether the increase in remote working will accelerate the resurgence of hostile environment employment discrimination claims.² Yet it almost certainly will alter how employers investigate and defend them and, more importantly, how in the first instance companies modify policies and train³ to prevent wrongful conduct irrespective of location.

THE HOSTILE WORKPLACE

The U.S. Equal Employment Opportunity Commission (“EEOC”) advises⁴ that a hostile work environment occurs where severely or pervasively offensive conduct based on sex, race or another legally protected classification exists. This means the unwelcome conduct, if of lesser severity, must occur frequently. Alternatively, a single occurrence can constitute harassment if particularly severe. Either way, the conduct

must create a work environment that would be intimidating, hostile or offensive to reasonable people, such that it negatively affects work performance.

The remote working situation may raise an additional question: could the employee have just hung up the telephone, ended the videoconference or turned away?

However, context remains important.

Some commentators believe a remote setting increases the risk of a hostile work environment,⁵ citing an EEOC task force report⁶ observing that decentralized work may make employees feel less accountable. Others recognize that claims arising in the home workplace could occur less often or face inferences of legitimacy. As an example, an employee could repeatedly call a colleague in a harassing manner⁷ and say it was for work purposes. Still others recognize that harassment in a remote environment could happen more frequently on chat, text or video applications. The Forbes.com panel⁸ noted how standards

of offensiveness could change due to the proximity of family members to potentially offensive communications, potentially giving rise to new manifestations of misconduct.

The remote working situation may raise an additional question: could the employee have just hung up the telephone, ended the videoconference or turned away? In theory, a remote worker could end an electronic communication whenever it became unwelcome. In practice, the effectiveness of such an action likely would depend on who is doing the harassing – an employee might well find it more difficult to hang up on a supervisor than a co-worker.

THE EMERGING FORMS OF PROOF

These potential risks of work-at-home hostile environment claims also bring new uncertainty to investigating, proving, and defending harassment allegations.

At a minimum, digital data, calendars, phone logs, and any retained journal of video calls can establish the fact that a communication took place and perhaps when, with whom and for how long.

While the physical isolation that accompanies work-from-home employment should help reduce unwelcome touching cases, other claims relating to severely or pervasively hostile environments likely will rely on evidence similar but not identical to cases arising at factories and offices. In both situations, hostile environment evidence often rests on what was said or done, requiring that fact finders weigh conflicting

accounts to determine if unwelcome harassment occurred.

Therefore, as before, proving exactly what orally or visually happened at one-on-one meetings, in person or virtually, will remain difficult unless the interactions were recorded. Employees will still need to demonstrate that statements and conduct occurred, that they were harassing, and that they rose to a level of “severe or pervasive,” such that they materially affected their ability to work.

However, hostile environment claims in the work-at-home situation may provide new evidentiary opportunities by providing more persuasive proof than typically arises from in-person interactions in break rooms, offices, and common areas of a business. Because work-at-home communications likely occur electronically, such as through email, video conferencing platforms and instant messaging applications, evidence of what was shown or said may exist. At a minimum, digital data, calendars, phone logs, and any retained journal of video calls can establish the fact that a communication took place and perhaps when, with whom and for how long. Although employees will still need to prove the content of the communication and that it was harassing, these data provide a starting point and may help with credibility assessments – for example, where one employee denies the existence of a communication, but records prove it occurred.

THE SPECIAL CASE OF RECORDINGS

Finally, considering that work-at-home harassment claims typically will involve electronic interactions, a real possibility exists that they were recorded.

Undeniably the recipient of an unwelcomed message, photo or video encounter at home will have the means to take contemporaneous screenshots and make audio/

visual recordings. This, of course, implicates employer policies and state laws on unconsented recordings, and creates the risk that recorded conversations that provide essential evidence in a hostile work environment case were unlawfully obtained.

Consider modifying harassment and discrimination policies and training to make sure they apply to all work environments, whether in the office or remote.

Notably, at least 10 states require multiparty consent⁹ to record electronic communications and some make it a criminal offense¹⁰ to record a conversation without approval of all parties. Additionally, it is not always clear which law applies when participants are in different states. Moreover, some state statutes¹¹ prohibit using unlawfully recorded communications as evidence. Even in the absence of such a bar, courts retain wide discretion under the rules of evidence to determine if recorded conversations constitute admissible evidence irrespective of whether they were made with or without consent of all parties.

Lastly, Zoom, WebEx, Outlook, text messaging, and other applications may permit creation¹² and archiving of electronically stored information such as a transcript or full-meeting recording. Accordingly, investigation and defense budgets can anticipate expensive electronically stored information (“ESI”) search and retrieval costs. Similarly, legal hold orders should encompass information from these communication platforms.

**PRACTICAL STEPS
EMPLOYERS CAN TAKE TO
PREVENT HARASSMENT**

- Consider modifying harassment and discrimination policies and training to make sure they apply to all work environments, whether in the office or remote.
- Continue to investigate every claim of discrimination or harassment, and identify data that remote working platforms retained.
- Become familiar with state laws, and know what consents are necessary before recording an electronic communication or meeting. 🌐

NOTES

1. <https://www.forbes.com/sites/forbeshumanresourcescouncil/2020/10/05/>

eight-workplace-harassment-red-flags-in-a-work-from-home-environment/#2638f4be2cc8.

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11. https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN§ionNum=632.

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 Number 2, pages 9–11, with permission from Wolters Kluwer, New York, NY,
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