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## **Managing Employment Claims in the Age of Social Media**

### **I. The Evolution of Sexual Harassment in the Workplace**

#### **Understanding the Impact of Social Media and the Internet**

Social media provides the opportunity for people to connect both inside and outside of the workplace. For example, co-workers can “follow” each other on various social media platforms such as Instagram, Facebook, Snapchat, and Tumblr. They can “chat” with each other on all of these forums, send direct messages, and even send private photos and videos to one another. Additionally, employers are more frequently providing Internet-based platforms for employees to use in order to perform their work. For instance, Slack is a commonly used program through which employees can directly message one another, view calendars, plan meetings, and share documents and other resources. The program essentially helps employees quickly communicate with one another, from any device that accesses the Internet (i.e., their cell phones, iPads, or computers). Many companies also utilize some form of instant messaging in their workspaces so that employees can be engaged in a constant flow of communication as opposed to sending emails back and forth.

While all of these platforms sound like innovative and useful ways to communicate and foster a productive work environment, they also provide employees with more opportunities to discretely speak with co-workers in forums that may not be monitored frequently or are not accessed by employers. With respect to the personal platforms (i.e., Instagram, Snapchat, Facebook, etc.), there is no way for an employer to monitor the messaging part of those apps where communication can occur between co-workers, as these apps are independent from the workplace. One way an employer can control the use of these types of platforms during the work day is to block access to these apps from the company’s WiFi network. On the other hand, the platforms that are provided and/or required by the employers may be monitored, but the constant flow of communication may make it difficult for an employer to follow every interaction between its employees.

According to a 2017 Pew Research Center study, about four-in-ten Americans have personally experienced online harassment (although the study does not focus specifically on online harassment in the *workplace*). See “Online Harassment 2017”, <https://www.pewinternet.org/2017/07/11/online-harassment-2017/>. The study explains that “social media platforms are an especially fertile ground for online harassment” and “online

harassment is highly contextual and varies from person to person.” Therefore, online sexual harassment is situational and difficult to clearly define.

There is no shortage of news coverage on sexual harassment in the workplace – in the midst of the #MeToo movement, sexual harassment litigation is as prevalent as ever, as employees bring claims against their employers because they have been sexually harassed within the workplace. Most of the news coverage or cases on the topic discuss sexual harassment that occurs within the four walls of the office – that is, physical, in-person sexual harassment. Perhaps one of the most well-known cases is the Harvey Weinstein scandal, in which numerous employees came forward with accusations of sexual harassment or assault against the film executive. See New York Times, “Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades,” [https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?\\_r=0](https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?_r=0). Many of these allegations involved conduct in the workplace, whether it was at film auditions, on movie sets, or at hotels that acted as Weinstein’s headquarters near various film festivals. *Id.*

The Weinstein scandal was not the only one of its kind, as #MeToo sparked the outpouring of stories and accusations of physical sexual harassment and assault against executives and employers across many industries. However, with the ever-increasing and expanding use of social media platforms both in and out of the workplace, employers should expect these sexual harassment claims to take on a new form – that is, virtual sexual harassment that occurs online, outside of the physical workspace.

The issue of virtual sexual harassment poses several questions that employers and claims professionals should consider. Employers purchase Employment Practices Liability (“EPL”) policies that provide coverage for sexual harassment that took place against an employee by another, but does this definition of sexual harassment include virtual sexual harassment? If so, does virtual sexual harassment only occur in the context of employment if it happens over an employer-provided platform? How, if at all, should insurance companies change their policies to adapt to and provide coverage for this type of harassment? This panel will address these questions and provide guidance for claims professionals handling EPL policies.

### **Defining Sexual Harassment in the Virtual World May Be More Complicated Than You Think**

With so many types of online interactions at our fingertips, it becomes difficult to define sexual harassment that takes place on these virtual platforms. For example, do frequent, unsolicited messages constitute harassment? Do the messages need to be sexually explicit in nature? It can be difficult to draw the line between what is harassment and what is not.

In fact, courts have had difficulty creating clear, bright line rules for what is traditional, in-person sexual harassment. The courts ask whether conduct was severe and pervasive, which means that each case presents a fact-dependent inquiry. Throwing social media interactions into this mix will likely present even more complications. The ways in which courts handle these virtual sexual harassment claims has a direct impact on EPL policies, as employers will begin to seek coverage for such claims under their policies should they be found liable for conduct that occurred online and not physically within their workspaces.

## II. The State of the Law With Respect to Virtual Sexual Harassment

There have been a number of court cases that consider online sexual harassment in an employment context; unfortunately, they do not yet provide a clear answer to the questions presented so far as to whether employers will be held liable for sexual harassment that occurs over the Internet.

In *Wei Fu v. ISO Innovative Analytics*, 2014 U.S. Dist. LEXIS 44488 (Dist. Conn. March 31, 2014), Fu alleged that during his employment with Defendant-employer ISO, he was subjected to sexual harassment. Fu claimed that a male co-worker, Halon, knew that Fu was gay and began contacting him via email to discuss treating Fu to dinner. Halon later requested Fu's personal email address, which Fu provided. Fu claimed that Halon began emailing Fu's personal email address and made reference to online chatting and sexual chat boards. Fu also referenced physical, in-person conduct or comments that were inappropriate and sexual in nature. The court ultimately held that Fu's allegations, including the email exchanges, did not rise to the level of pervasiveness required to prove a sexual harassment, hostile work environment claim. While this case did not discuss insurance coverage for Fu's claim, it presents the type of scenario that EPL insurers should be aware of – the contact between Fu and Halon took place, at least in part, over personal email servers. The contact started in the workplace, but eventually moved into their personal spheres. The court made no mention of whether or not the email communications would constitute workplace sexual harassment because they took place on a personal server; rather, the court focused its inquiry on the severity of the alleged harassment. However, given that the forum of the communications did not appear to be an issue to the Connecticut court, perhaps this indicates that online sexual harassment would still be considered harassment in the workplace, i.e., contributing to a hostile work environment, even if it took place over co-workers' personal email servers.

Conversely, in *Russell v. New York Univ.*, 2017 U.S. Dist. LEXIS 111209 (S.D.N.Y. July 17, 2017), an NYU employee filed suit against NYU, alleging discrimination. The employee alleged that she was harassed based on her gender and religion when she received mailings and emails of a sexually explicit nature and when another employee posted an online comment that allegedly "outed her." The court considered how the unsolicited emails at issue were sent using personal computers from locations outside of NYU, and not while connected to any NYU network, and other online conduct happened on websites over which NYU had no control. The court found that NYU's response to the complained-of conduct was reasonable, that NYU took the possible steps to correct the harassment, and that NYU should not be held liable for the alleged harassment because it was ultimately not in its control. This case ultimately instructs that an employer will *not* be held liable for virtual sexual harassment that occurs outside the employer's network, on platforms over which the employer has no control.

In *Chinery v. Am. Airlines*, 2018 U.S. Dist. LEXIS 144782 (E.D. Pa. Aug. 27, 2018), Chinery, a flight attendant, filed suit against American Airlines, alleging that she was sexually harassed by four male flight attendants. Chinery claimed that the men harassed her by posting various comments on Facebook groups, and that American Airlines failed to address her concerns regarding online harassment. Chinery initially filed a complaint with the EEOC, and the EEOC investigator recommended dismissal of her claim because he concluded that American Airlines was not responsible for comments made on private Facebook boards, and because the harassment did

not take place in the work setting, her allegations did not rise to the level of creating a severe or pervasive work environment. Chinery subsequently filed a lawsuit against American Airlines. The court did not ultimately answer the question of whether alleged harassment over Facebook occurred in the work environment, because the court first concluded that the alleged instances of harassment were not so objectively severe or pervasive to give rise to a cause of action; thus, it did not need to consider whether the Facebook harassment would have constituted workplace harassment. However, the EEOC investigator's response indicates that the forum over which the harassment against an employee takes place may impact a court's analysis as to whether it constitutes workplace harassment, and ultimately whether an employer will be held liable.

The cases that consider online sexual harassment between employees does not provide a clear answer as to whether the forum over which the harassment takes place is dispositive of whether an employer will be held liable, or whether the harassment needs to relate to or take place within the actual workplace. However, as the use of social media platforms and online communication in the workplace becomes increasingly popular, we can expect to see a rise in lawsuits considering these questions. The cases discussed in this section tend to indicate that the forum over which the alleged harassment takes place will be an important consideration for courts in determining whether the employer is liable.

### **III. Whether EPL Policies Should Cover Virtual Sexual Harassment**

#### **The Platform Used by the Harasser May Affect Coverage**

EPL policies provide coverage for wrongful acts arising out of the employment relationship. Sexual harassment is often included in the definition of a wrongful act, but in order for conduct to be considered a wrongful act under an EPL policy, it has to relate to the employment. This begs the question of whether harassment that occurs between two co-workers on the personal social networks discussed above outside of the workplace, as opposed to employer-provided platforms, would constitute a wrongful act. Courts have yet to address this scenario, but may ultimately find that the forum for the harassment is not dispositive and an employer could be held liable for communications that occurs on personal networks outside of its control. The panel will discuss what other defenses would be applicable to the employer in light of these risks.

#### **Do Policies Need to Adapt to Cover a Broader Range of Harassment?**

Because a typical EPL policy may not include virtual sexual harassment in its definition of a wrongful act, policies may need to adapt with the changing landscape of interactions between employees. For instance, insurers could offer an endorsement to add coverage for cyber-harassment to existing policy-holders. As they write new policies, insurers can include online sexual harassment in the definition of a wrongful act. Additionally, insurers can address the issue of online sexual harassment that takes place on private social networks, apart from any work-related platforms, by adding an exclusion to their policies to bar coverage for this type of online sexual harassment. There are a number of options to be considered, and they will largely depend on the type of business the insured runs and the methods/platforms of communication its employees are required to use.

#### **IV. Considerations for Claims Professionals**

Claims professionals should consider the types of Internet platforms used by a particular company who is seeking to purchase an EPL policy. If a company requires its employees to use various social media platforms or web-based technology on a regular basis, that company is much more likely to need expansive coverage including virtual sexual harassment in the definition of an EPV. Conversely, if the company does not use any such platforms and the employees only communicate or work in traditional means, such as email, it may not be necessary to expand their scope of coverage to include virtual harassment. Insurance companies should consider the specific needs of the company during the underwriting process in order to ensure that the policy is applicable and responsive to that company's actual day-to-day activities and its areas of potential exposure.