

DISCRIMINATION AT HOME: HOW REMOTE WORKING HAS CHANGED THE WORKPLACE

Jesse Weinstein from Phillips and Associates talks to us this month about how discrimination can still take place when employees are working remotely. Below, he explores how working from home has changed the workplace and why employers should still be proactive at preventing discrimination when employees are working remotely.

How has working from home changed the workplace?

Many potential and current clients have told me that they are working harder than they worked before the pandemic. Given that the pandemic has undoubtedly had a substantial economic impact on employers across the country, we have seen a surplus of layoffs and furloughs, along with new work from home scenarios. With this trend, there appears to be an emerging culture in the workplace where supervisors are more closely monitoring employees' time, work product, and contributions. Consequently, the prospect of termination or furlough has many employees working harder, longer, and with more intensity to avoid the "chopping block".

How has working from home impacted workplace discrimination?

Unfortunately, there has been no shortage of workplace discrimination, despite much of the country working from home.

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In fact, what we are seeing are more employers pretextually using COVID "economic impact" explanations to terminate employees for, what are really underlying, discriminatory reasons. This discriminatory conduct has appeared against many different protected classes, including discrimination based on pregnancy, disability, race, religion, gender, age, sexual orientation and sexual harassment. Additionally, remote working has underscored the efficiency of the "digital age" in the workplace. Through various technological platforms, we have seen that responses, assignment submissions, and other work related activities can happen very quickly. However, that speed and efficiency has also reared its head in the discrimination and harassment context. For example, harassers have become emboldened to send discriminatory text messages and emails, knowing that they do not have to face anyone in person. Along those same lines, we are seeing alarming rates of retaliation occurring

within a short period of time after employees engage in protected activity such as complaining or reporting unlawful harassment.

I have also spoken to many mothers who have been impacted by the pandemic in an employment context. With schools closed, and most learning being conducted remotely, it has primarily been these mothers who have taken the brunt of childcare and remote learning responsibilities while also working their full-time jobs. I have repeatedly found that employers have discriminated against working mothers for their "familial status" as primary caregivers in their households by failing to promote them, disparately treating them as compared to their male colleagues, and/or peppering them with gender related comments such as, "women are so emotional" and "maybe you should be a stay at home mom instead of working here". A frequent example of this disparate treatment is promoting males over females who are equally qualified solely because they are not mothers. Notably, this unlawful treatment had generally occurred remotely. Therefore, in the same way employers have evolved with the changing times to survive, so have harassers in the workplace.

What are some of the misconceptions people may have in terms of discrimination not occurring as much as it would in the office?

The biggest misconception is that it is practically impossible for any employer to create a hostile work environment remotely. However, this is

false. Working from home has not discharged any employer's legal obligations to maintain a workplace free of a hostile work environment. For example, the United States Equal Employment Opportunity Commission ("EEOC") holds employers legally accountable for their employees' discriminatory behaviour when that behaviour creates a hostile work environment. Employers are also liable when they knew of the harassment but failed to immediately address it and/or prevent future harassment. Some local statutes provide even broader protections than the EEOC. For instance, whereas the EEOC requires "severe and pervasive" behaviour to establish a claim of a hostile work environment, under the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"), the harassment no longer has to be severe or pervasive but rather, the burden is on the employer to show that the conduct at issue was no more than a petty slight or trivial inconvenience.

Despite these laws, in this new "work from home" world through Zoom, FaceTime, Skype, and text messaging, employers have still easily engaged in inappropriately harassing behaviour. Racial slurs, sexual propositions, and repeated comments about one's pregnancy, age, or disability are no less offensive, or incendiary, merely because they are not done in person. As such, I have seen an influx of discrimination cases with an abundance of corroboration because of the "digital footprint" harassers have left behind.

Employers also appear to be veering away from their obligations to provide

reasonable accommodations to employees. The laws protecting employees who request reasonable accommodations remain the same as they were prior to the pandemic. Employers are generally liable for disability discrimination under the NYSHRL and NYCHRL if an employee can show that: (1) he/she was a disabled person within the meaning of the statute; (2) the employer had notice of their disability; (3) with reasonable accommodation they could perform the essential functions of the position sought; and (4) the employer failed to make such accommodations. When employees request such accommodations, employers must engage in a good faith interactive process and/or cooperative dialogue. Thus, it is insufficient for an

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employer to flatly say "no" to an employee's request for an accommodation without any further dialogue.

Despite these legal mandates, disability discrimination has rapidly increased during the pandemic. In the past year, many requests for reasonable accommodations have coincided with COVID-19 concerns, and have come from people with high-risk pregnancies, immune disorders, or preexisting respiratory conditions. We are seeing a growing number of employers rejecting employees' requests for accommodations without any discussion or dialogue. Worse, many of these employees being demoted, suspended, or terminated shortly after making such requests. Given that the laws remain unchanged, and that



the ease with which employers may still engage in discriminatory behaviour persists, employers should be wary of maintaining a false sense of security in remote work settings.

What are some of the precautions employers should still be taking due to remote working?

There are numerous factors that employers should consider with respect to remote working. First, employers should be mindful of the ease with which their employees can leave a “digital footprint”. Similarly, employers should be aware that text messages can be saved as screenshots, phone calls and Zoom chats can be recorded, and emails cannot be unsent. However, in the “age of the pandemic” where businesses are relying exclusively on technology to survive, employers must consider that the volume of this digital evidence is bound to increase. This means that employers will find more evidence that may corroborate claims of discrimination against them as cases increase.

Second, employers must be mindful of the legitimate medical implications COVID-19 may have on their employees. While it may not be economically beneficial to employers to have employees who need an accommodation, an employer is still liable for failing to provide a reasonable accommodation to its employees who may need an accommodation. Thus, employers cannot just broadly cite “economic” reasons for failing to provide a reasonable accommodation and expect that they will not be confronted with potential legal action.

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Finally, employers must confront claims of discrimination within their organisations promptly and without retaliation. Too often in the last year, I have represented employees who were suspended, placed on “Performance Improvement Plans” (PIPs) or terminated shortly after complaining about discrimination in the workplace and/or requesting a reasonable accommodation.

Just because employees are working from home more than ever, they are still protected from harassment and discrimination, remote or otherwise. Employees should be aware of their rights, which really have not changed, and employers must take heed of those rights, regardless of whether workers are in the office or working from home.

Jesse Weinstein is a Litigation Associate at Phillips & Associates. He is a sharp negotiator with a meticulous investigative approach to each one of his cases. As a result, he has secured millions of dollars in settlements for his clients through presuit negotiations, mediation, and litigation. Additionally, Jesse was recently selected by Super Lawyers as a “2020 Rising Stars Honoree” in the New York City region for his contributions in the field of employment discrimination.

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