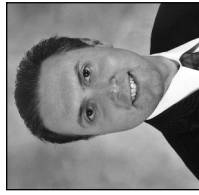




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You've Got Spam

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Employment Notes



You've Got Spam

The emergence of e-mail and the Internet as integral tools of the American workplace has brought about some unexpected consequences for both employers and employees. To employees, the message from courts across the country has been that you have no reasonable expectation of privacy in the e-mail/Internet contents of your work computer if your employer has established a computer use policy to such effect. For employers, the message is equally clear that e-mail/Internet misuse by employees can contribute to the creation of a hostile work environment resulting in potential civil liability for the employer. In short, the business advantages that have resulted from the expansion of the Internet and the acceleration of access to information it provides can be undermined by an employee's misuse and employer's carelessness and lack of supervision.

One area of peril for both employee and employer is the use of the work computer to surf the Internet for pornography. This misuse of the Internet by the employee and failure to prohibit access to offensive sites by the employer creates potential liability for both. Equally troubling, and likely more difficult to prevent, is the fast-growing pornographic solicitations in unwanted e-mail advertisements, commonly referred to as porn-spam. Porn-spam represents one of the fastest growing forms of unwanted e-mail advertising and for employers the rise of porn-spam means a greater potential for workplace sexual harassment claims. In the seminal case of *Harris v. Forklift Systems* in 1993, the U.S. Supreme Court held that liability existed in an environment that is reasonably perceived and is perceived as hostile. This "hostile workplace" standard has been applied to find liability in cases where employers tolerate the posting of risqué photographs and permit the telling of lewd jokes in the workplace.

Previously, employers had been primarily concerned with hostile environment threats from within. With porn-spam, employers must now protect employees from threats originating outside the company. One can contemplate a circumstance where an employer may fail to screen out such information and an employee may feel that the failure of the employer to do so has created a hostile environment because the worker is forced to view lewd e-mails on a continuous basis. Also foreseeable is a circumstance where an employee shows his computer screen with an unsolicited pornographic e-mail on it to a colleague or prints out porn-spam on a colleague's printer. The hostile workplace standard would likely be applied to such instances.

It should also be noted that sexual harassment has not been the only context for hostile workplace claims, and is not the only type of case where e-mail can set liability in motion. In *Curtis v. DiMaio*, a 1999 federal case decided in the Eastern District of New York, former employees of Citibank brought an action alleging that they "were forced to work in a racially hostile environment" because one of the defendants sent (and one defendant encouraged sending) e-mail messages allegedly offensive to African-Americans. While the court noted that case law made clear that the sending of a single offensive e-mail does not create a hostile workplace environment, multiple e-mails may create such liability for the employer. While employers may think that unsolicited e-mails are out of their control, employers may have an obligation to be proactive in being aware of and obtaining the capability to filter offensive spam e-mails.

In the Tenth Circuit an employer may face potential hostile workplace liability claims if it fails to block unsolicited porn-spam, while an employee may face the prospect of losing his job or worse for misuse

of his work computer. Courts have given great deference to an employer's right to monitor an employee's work computer. The 2002 decision in *U.S. v. Angevine* from the U.S. Court of Appeals emphasizes the importance of a strong computer use policy. In *U.S. v. Angevine*, a professor at Oklahoma State University was prosecuted for possessing child pornography. While the professor had downloaded the images on his work computer, he claimed that he had a legitimate expectation of privacy against the government's search and seizure of the items on his computer. Although this case turned on established principles of constitutional law, the effect of the computer use policy that Oklahoma State University had in place is an important lesson to all employers. Oklahoma State promulgated a detailed computer use policy explaining appropriate computer use, warning employees about the consequences of misusing computers and describing how the University monitors the computer network. Furthermore, the University spelled out the consequences of using the system contrary to federal and state law, both in terms of immediate termination and potential criminal penalties. A federal district court held that the computer use policies and procedures at Oklahoma State University prevented the professor from having a legitimate expectation of privacy in the data on the seized University computer. The district court also denied the professor's motion to suppress the images found on the computer. The Tenth Circuit upheld the lower court's ruling.

The information age has brought amazing gains in productivity and efficiency, but with these gains have come unexpected pitfalls that both the employer and employee must be aware of and take the necessary steps to avoid.