

what's

[i n s i d e]

Obscene Spam In The
Workplace...Is It The Employer's
Responsibility?.....1,3

Workers' Compensation And The
Zone Of Employment.....2

Self-Insured Corner3

Upcoming Seminars4, Back

Politics, The NLRB, And You.....5

Visit Us Online!Back

6000 Freedom Square Drive
Suite 540
Cleveland, Ohio 44131
Phone: [216] 447-1551
Fax: [216] 447-1554
www.rbslaw.com

OBSCENE SPAM IN THE WORKPLACE...IS IT THE EMPLOYER'S RESPONSIBILITY?

By Lynn Schonberg

Consider the following factual scenario: Joe Employee works for XYZ Company. On Monday morning Joe arrives at work, turns on his computer and signs into his office e-mail account. He clicks onto a message and is visually assaulted with pornographic obscenities of a sexual nature. Joe has never before visited pornographic Internet sites nor has he ever purchased goods or materials from his office e-mail account. Joe has also never requested that he receive such e-mail from any business anywhere at any time. Joe, who is devoutly religious, is so disgusted and shocked by the disturbing vision on his screen that he suffers severe emotional distress, cannot work and eventually loses his job. Does Joe have a cause of action against XYZ Company for his damages?

This factual scenario is occurring more frequently in many businesses today. The current law on sexual harassment makes a company liable for harassment by one employee against another employee. It also makes a company liable for harassment by a vendor, customer and/or subcontractor against an employee. The question raised by the scenario above, however, is whether the sexual harassment law makes a company liable for obscene spam sent from *outside* the company. [Ed. - Spam has been defined by one federal court as "an unsolicited, often commercial, message transmitted

through the Internet as a mass mailing to a large number of recipients." *Verizon Online Services v. Ralsky*. The same court traced the derivation of this word to a Monty Python routine from *The Flying Circus, Just The Words*.]

A good argument can be made that a company would indeed be held liable for its failure to control the offending spam, especially if it had received complaints about it from an employee. An employer must always keep in mind that it owns the computers as well as the software used by employees. If a company-owned computer were somehow attracting

continued on page 3

Attorneys

Alan G. Ross
Brian K. Brittain*
Evelyn P. Schonberg
Richard E. Walters
David T. Andrews
Jennifer A. Bennett
Jerry P. Cline
Christopher R. Debski
David S. Farkas
Marie A. Novak
Thomas R. Wyatt

Paralegals

Kimberly L. Altstadt
Ariel Flores
Megan E. Geist
Arlene M. Golias
Joyce L. Hale

*OSBA Board Certified Workers' Compensation

This publication is intended to inform clients and friends about labor and employment matters of current interest. The matters included were not given exhaustive treatments due to space limitations. This abridged information should not be construed as legal advice and is not a substitute for legal counsel. This publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship.

WORKERS' COMPENSATION AND THE ZONE OF EMPLOYMENT

By Jerry P. Cline

Your employee arrives for work twenty minutes early. According to company policy, the employee must wait for his shift to begin before clocking in, so he decides to walk back to his car and run a quick personal errand. For whatever reason, your employee slips and falls in the parking lot, injuring himself. May he participate in the workers' compensation fund even though he was not working at the time the injury occurred? According to a recent decision, the answer is yes. In *Remer v. Conrad*, the Sixth district court expanded the "zone of employment" to include "work-related" injuries that occur *before* and *after* the employee's work hours. The critical issue, according to Judge Lanzinger, is the *location* of the employee's injury.

To fully understand what "zone of employment" means, it is necessary to briefly summarize another concept, called the "coming and going" rule. Generally speaking, an employee injured while commuting to and from a fixed site of employment does not sustain a workers' compensation injury. However, once the employee reaches this fixed and limited place of employment, the zone of employment exception is activated, and the employee is protected under the Workers' Compensation Act. Defining the zone of employment is sometimes difficult, and many cases often turn on whether or not the employee was injured within this zone. Courts have generally held that "zone of employment" means the area where work activity takes place. The Ohio Supreme Court has defined the

zone of employment, using typical legalese, as "the place of employment and the area thereabout, including the means of ingress thereto and egress therefrom, under control of the employer." This may include a parking lot or a walkway, even if the employer does not actually own the property. The key again is whether the area in question is under the employer's *control*.

The employee's injury must also have been received in the course of the injured employee's employment. As employers know, the purpose of the Workers' Compensation Act is to protect the employee against the risks inherent to the performance of his job, not to make the employer an absolute guarantor of the employee's safety. The Ohio Supreme Court has held that, in order to establish a workers' compensation claim, there must be a causal connection between an employee's injury and his employment, either through the activities, conditions or environment of employment. To determine if there is sufficient causal connection to support a claim, a 'totality of the circumstances' test is used to analyze the facts and circumstances surrounding the accident, including (1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee's presence at the scene of the accident.

In applying these legal principles in *Remer*, the employer first argued that the employee's private excursion was of "no

benefit" to the employer. This argument was soundly rejected by the court because an injured worker need not be performing job duties at the time of the injury to be within the course of employment. Rather (the court reasoned), it is only the worker's location that must be considered when deciding if the injury is compensable.

The court also found the timing of the injury to be unimportant. The employer argued that the employee's claim should be denied because she had not yet begun her workday. Again, the court fell back on the location of the injury, concluding that because the injury happened in an area controlled by the employer, the injury occurred within the zone of employment. Even if the injured worker "intended" to leave the work area, the location of the injury was paramount in determining whether the injured employee was entitled to participate in the workers' compensation fund.

A word of caution: with the fast approach of winter, weather-related slip and fall injuries are virtually assured. Employers would do well to stock up on road salt and snow shovels. It would also be prudent to instruct your employees in the use of proper footwear during inclement weather. Remember, the parking lot you control is within the zone of employment, even if your employee is not on the clock.

Jerry Cline is an associate in the Workers' Compensation division of Ross, Brittain & Schonberg. Jerry and our other attorneys are prepared to assist you in all facets of the often-complex Workers' Compensation arena.

***Obscene Spam In The Workplace...Is It The Employer's Responsibility?
continued from page 1***

obscene or offensive e-mails, it would be the obligation of the owner of the hardware and software to control the e-mail. Otherwise, the employer may very well be in violation of its own harassment policy, which typically prohibits sexually offensive conduct and language in the workplace.

Assuming that an employer could be liable for obscene spam, the next issue to address is, what can an employer do to control spam? Most employers are aware that if an employee brings pornographic pictures into the workplace, the employer can instruct the employee to either immediately cease such activity or face termination. It is not as easy to filter spam however. Many companies operate their e-mail and Internet through a server, which makes it extremely difficult to filter out spam. Certain identifiable e-mail addresses can be blocked if the Internet and e-mail are operating from service providers, such as AOL or Microsoft. Spam, however, is rather stubborn, and cannot be so easily deterred.

As one can see, the issue of obscene spam in the workplace is very complex. Because of the potential liability to employers in this area, we recommend that the following steps be taken:

- Create a policy that states, or amend your existing policy on Internet and e-mail usage to include a strongly worded condemnation for obscene, pornographic and/or offensive e-mails in the workplace, including the receipt of spam. Recognize that while unwanted spam is difficult to control, the company will make every effort to put guards in place to prevent any employee from being the recipient of unwanted offensive e-mail. The policy should also contain the following prohibitions: no visiting pornographic web sites on company computers; no

downloading or circulating offensive materials; no viewing of pornographic sites while working. All employees must be instructed to report the receipt of any obscene spam.

- Purchase software that identifies the origin of unwanted materials. Much of this type of software is inexpensive and can be found at office supply stores.
- Investigate spam filtering technology to determine whether your own workplace can adopt some form of filter. If not, document your efforts and explain your company's decision not to obtain the filter.
- Continue to monitor the network to identify offensive spam (be sure that your Internet and e-mail policies place employees on notice that the company randomly monitors the network and e-mails).

To answer the question posed by the factual scenario in the beginning of this article, it is our opinion that while Joe, like any employee, can file a lawsuit against his employer for almost any reason, the likelihood of success is very dim. Joe would have to prove that XYZ knew or had reason to know about the spam on his computer, and failed to take corrective action. If Joe sues after only one episode of unwanted pornography, he would have a very difficult time proving that XYZ failed to correct the situation, especially if XYZ has the proper policies in place. Finally, Joe would have to prove that his reaction was "reasonable," especially if the spam would not be as offensive to other reasonable persons.

Many employers are concerned about their exposure to the types of lawsuits detailed above. Contact Lynn Schonberg or David Andrews for help regarding this or any other employment concern your company may be faced with.

self-insured [corner]

The Workers' Compensation Resource Network is an association for self-insured employers in Ohio. The purpose of the association is to provide a unique forum, opportunity and resource for the educational benefit of self-insured employers.

The Resource Network dialogues ideas, resources and information with member peers by identifying and addressing issues with which self-insured employers are faced. This includes engaging in dialogue focused on outcomes that enhance self-insured administration. Some topics thus far covered include the development and maintenance of a transitional work program, ergonomics, the importance of written job descriptions, the economic impact of business failures on self-insured employers, and medically managing claims for self-insured employers.

If you are a self-insured company, consider becoming a member of the Workers' Compensation Resource Network. Members pay no additional cost for two representatives from your company to attend regularly scheduled seminars and meetings.

Call Megan Geist at (216) 447-1551 x165 for additional information and membership details.

EMPLOYMENT LAW BREAKFAST BRIEFING

HR and Legal Alerts and Updates for Employers

Another year, another series of legislative enactments and court decisions that you need to know.
We will review all the latest developments that affect the way you run your business.

Date: December 11, 2003 • **Time:** 8:30 – 10:00 a.m.

Location: 6000 Freedom Square Drive • Ground Floor Amphitheatre, Independence, Ohio
Call (216) 447-1551 to register

(No cost to RBS clients and HRDU Members)

HUMAN RESOURCES

How to Create an Accountable, Responsible Workforce

This session addresses strategies to help employees learn and maintain accountable and responsible work habits to improve effectiveness.

Date: October 16, 2003

Planning, Directing, Controlling and Evaluating Your Human Resources

This basic human resource management seminar covers the core functions of making the best use of employee resources.

Date: November 13, 2003

Time for both events: 8:00-9:30 a.m.

Location for both events: 6000 Freedom Square Drive • Ground Floor Amphitheatre, Independence, Ohio

For more information or to register, please call Jane Plank at (330) 414-2220, or e-mail her at HRDU@aol.com

SUPERVISOR TRAINING

The Supervisor Training Institute, a division of HR Department Unlimited, offers comprehensive training comprised of the following six modules:

Introduction to Supervision; Legal Issues in Supervision; Communication Skills; Recruitment, Retention and Training; Conflict Resolution and Problem Solving Skills; and Performance Management

The next installment of classes will be held October 14, 21 and 28, 2003. Please contact Jane Plank for more information at (330) 414-2220, or e-mail her at HRDU@aol.com

ABC, NORTHERN OHIO CHAPTER SEMINARS

Drug Free Workplace Program Training Schedule

Dates:

October 23, 2003: Employee Training – 8:00 to 10:00 a.m.

October 23, 2003: Supervisor Training – 10:00 a.m. to 2:00 p.m.

Cost: Free to Participants of ABC's DFWP Program; \$60.00 per attendee/Non-Participants
All training participants must register one week in advance with Jennifer at (440) 717-0389.

All training will be held at the NOC-ABC Training Center.
9255 Market Place West, Broadview Hts., Ohio 44147

POLITICS, THE NLRB, AND YOU

By David S Farkas

“Legal research? What do you have to do that for? You’ve been practicing for years, shouldn’t you know this by now?”

There is no such thing as a legal practitioner who has not been faced with such a question over the course of his career. Indeed, the question makes sense. A bricklayer does not request payment for time expended in learning how to lay bricks, because it is assumed he has already learned the skills necessary to bill himself as a professional in the trade. Why then should an attorney be any different?

As a preliminary point, it must be emphasized that legal questions frequently involve novel or complex fact patterns, and the outcome of a case can and often does turn upon a solitary, innocuous-looking fact. Thus, a good attorney will never assume that the law of one case will apply to another, however similar they may appear superficially.

However, an excellent article has recently appeared in one of the premier legal journals for labor lawyers that really addresses the question squarely. The article can be found in the Summer 2003 issue of *The Labor Lawyer* (under an editorial board that includes Professor Marley Weiss, under whom I studied in law school), where Mr. W.V. Bernie Siebert, a management attorney in Denver, Colorado, discusses a recent decision of the Board that he argues convincingly was based purely on political grounds.

The case, entitled *MV Transportation*, involved a company that assumed, or “succeeded” the operations of its predecessor, and continued the old company’s operation in a substantially similar manner. The successor employer met with the Union that represented the employees of the old employer, but filed a petition to decertify the Union after only a few bargaining sessions. The Regional Director refused to process the petition, holding that a 1999 decision of the Clinton Board called *St. Elizabeth Manor* required a successor employer to bargain with the incumbent union for a “reasonable period of time” before either withdrawing or filing for decertification. The Board however, in a 3-1 decision, overruled the Regional Director, noting that the decision of *St. Elizabeth* was an unwarranted, “abrupt departure” from Board precedent, and reinstated the old rule, holding that a successor employer need not bargain with the incumbent union if it doubts the Union continues to represent the majority of the employees.

In a sharply worded and well-argued essay, Siefert questions if the quick change in law represents “principled philosophical debate or merely partisan discourse?” Siefert answers his own question by charging that *MV Transportation* “may well demonstrate that politics can, and often do, predominate over reasoned legal analysis, notwithstanding the claim of lofty philosophical differences.” In fact, the author states unequivocally “change in Board policy coinciding with each

change in the White House has largely become accepted as a fact of life.”

The above example is merely one out of dozens of cases where decisions of the Board have been influenced by their political affiliation. While some observers might argue that *all* legal decisions are affected by politics, this is especially true regarding the NLRB. After all, the very statute empowering the Board, the National Labor Relations Act (NLRA), mandates that the sitting President select part of its members.

The upshot of this discussion is that the current state of labor law at any given time can never be defined with accuracy. A creature of motion, the NLRA is always in a state of flux, shifting and changing, chameleon-like, to meet the notions of the sitting Board. To a certain extent, the shifts in policy trickle down to decisions of Regional Directors as well. As such, legal research is required not only for complex matters, but even for relatively simple questions where the position of the Board may have changed. Think about it – would you show up to your child’s wedding in the same suit your mother or father wore to your wedding? Let’s hope not – and let’s make sure to keep up to date on the NLRB trends as well.

Ross, Brittain & Schonberg has experienced labor attorneys who keep abreast of the constantly changing developments in the NLRB and the courts. Contact Alan Ross or David Farkas for more information on this issue or any other labor concern facing your company.

u p c o m i n g

[s e m i n a r s]

WORKERS' COMPENSATION RESOURCE NETWORK

VISIT US ONLINE!

Ross, Brittain & Schonberg Co., LPA wishes to remind our readership of our brand new and up-to-date website, www.rbslaw.com. The site includes biographical and contact information on each attorney, plus details on the firm's areas of practice. In addition, new and legal articles of interest are posted on a regular basis. Registration forms for our popular seminars can also be obtained on-site as well. You can also sign up to receive this newsletter in a convenient electronic format. Pay us a visit today!

Workers' Compensation Resource Network, our self-insured group, will have its Fall Quarterly meeting on Friday, October 17th from Noon to 4:00 p.m. at the Embassy Suites in Independence, Ohio. All self-insured employers are welcome to attend. The cost of \$35 per person includes lunch, all materials and speakers. There will be door prizes in the form of Scholarships to Workers' Comp University training events. The program will be varied with presentations by The Self-Insured Dept. of the BWC, Comprehensive Risk Management and Case Manager Network. Please contact Rick Walters at (216) 447-1551 for more information.

ROSS,
BRITTAIN
&
SCHONBERG
CO., L.P.A.

6000 Freedom Square Drive
Suite 540
Cleveland, Ohio 44131