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REPORT

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Minimizing The Potential Litigation Risks of Today's Electronic Workplace

by Craig R. Thorstenson and Gary N. Savine

In recent years, a multitude of new computer technologies have proliferated in the office landscape, the most notable being electronic mail ("e-mail") and the Internet. These new tools of communication have effectively shrunk the workplace by allowing employees to share information with customers and colleagues at lightning speed, regardless of distance. At the same time, these technologies, along with advances in data storage technology, have substantially increased the risks associated with employment-related litigation. Due both to a general lack of formality and etiquette in electronic communications, and to a fundamental misunderstanding of the potential permanence of e-mail and other forms of data (*i.e.*, that "delete" does not necessarily mean "delete"), many employers are unwittingly creating and retaining an enormous amount of discoverable and potentially damaging electronic information. Consequently, an increasing number of employment-related disputes (especially harassment-type claims) are being filed and subsequently proven based upon vulgar or racist e-mail messages and/or other "electronic" evidence of discriminatory conduct. Many of these claims could have been avoided if the defendant-employers had implemented and enforced comprehensive technology use policies and adopted coherent electronic data retention practices.

This article will address the principal employment and labor-related legal risks associated with the use of computers in the workplace and offer suggestions as how to reduce these risks. In Section I, we will describe how current office computer technologies and employees' unregulated use of these technologies are generating potential bonanzas of discoverable and perhaps damaging evidence for plaintiffs in employment-related disputes. In Section II, we will suggest a two-pronged approach for employers to better manage the creation and retention of computer data so as to minimize this risk, taking into account the additional legal risks of placing restrictions on and/or monitoring employees' electronic communications.

INSIDE

I. How Employees With Computers Create Risk In Employment Litigation

Recent studies conclude that an estimated 90 percent of large companies, 64 percent of mid-size companies and 42 percent of small companies currently use e-mail systems.[1] Over forty million workers currently correspond via e-mail, and that number is expected to increase by 20 percent per year over the next several years.[2]

The increasing popularity of workplace e-mail is easy to understand, considering its ability to increase efficiency and disseminate information instantaneously throughout a large workforce. Indeed, it may be similarities between an e-mail system and a telephone (*i.e.*, the ability to facilitate immediate communication) which has prompted many individuals to adopt an overly casual (and oftentimes careless) attitude toward their electronic correspondence. As employees have become more comfortable with e-mail, many have adopted a more informal, conversational and sloppy style in their composition of e-mail messages than in their other writings.[3] Spelling and typographical errors and abbreviations are common, and the tone is more

conversational than written. Perhaps because this form of communication is not face-to-face, people feel more comfortable making comments or passing along information that they might not otherwise make or provide in person.

In addition, a growing familiarity with the workings of computers and fearlessness toward new computer technologies has prompted many workers to use their office computers to commit inappropriate acts. In a recent survey of over 700 workers, 45 percent reported that they had engaged in unethical actions relating to new office technologies.[4] Twenty-seven percent reported committing a "highly unethical or illegal act."[5] Reported offenses included visiting pornographic web sites, accessing private computer files without permission, and sabotaging systems or data of coworkers or employers.[6]

Not surprisingly, due to this growing reckless use of computers and increasing carelessness in electronic correspondence, e-mail files and other types of electronic evidence increasingly are surfacing in employment litigation. Most frequently, these cases involve claims of harassment based upon racist or sexist remarks and/or jokes circulated in e-mail messages.[7] For instance, in one recent sexual harassment case, a female plaintiff discredited her employer's claim that she was terminated for economic reasons by producing a sexist e-mail authored by the company's president.[8] In this message, the president directed the company's personnel office to "get rid of that [redacted] tight assed bitch," referring to the plaintiff.[9] This single e-mail communication sabotaged the company's position and prompted its settlement of the case for $250,000.[10]

In another case, a female plaintiff sued Microsoft Corporation, claiming that she was terminated because of her sex.[11] In support of her claim, the plaintiff offered a series of sexually derogatory and lewd e-mail messages which allegedly had been sent by the person who made the termination decision, including an e-mail referring to another woman in the office as "spandex queen;" an e-mail forwarding a message containing a Reuter's news story on Finland's proposal to institute a sex holiday; and an e-mail forwarding a parody of a play entitled "A Girl's Guide to Condoms."[12] The trial court held that the e-mail messages were admissible because they "could lead a reasonable jury to conclude that . . . [Microsoft] failed to promote [the plaintiff] as a result of gender discrimination."[13]

Some employees have even tampered with their employers' e-mail systems to manufacture bogus electronic evidence to support their employment claims. For instance, a California jury recently found a former Oracle Corporation employee, Adelyn Lee, guilty of falsifying an e-mail message from her boss in order to secure a $100,000.00 settlement in a sexual harassment case.[14] Lee had claimed that the former Oracle Vice President fired her after she refused to have sex with the CEO on their last date.[15] The day after she was fired, a break-in occurred at Oracle's offices and an e-mail under the vice president's name was sent to the CEO saying "I have terminated Adelyn per your request."[16] The jury concluded that Lee had created the message to support her harassment claim and consequently convicted her of two counts of perjury, one count of manufacturing evidence with intent to produce such evidence, and one count of offering false evidence.[17]

The Equal Employment Opportunity Commission ("EEOC") now routinely makes broad requests for personnel-related data on employers' computer systems during the course of its investigations of certain complex discrimination charges.[18] For example, in a case involving twenty-four charges of age discrimination against Lockheed Martin Corporation, the EEOC issued a sweeping subpoena requesting that the Company identify all computer files maintained over a six-year period "which contain data on personnel activities."[19]

Similarly, private litigants now regularly make expansive discovery requests for computer-related data. For instance, in one case (albeit not an employment case, but nonetheless indicative of the trend in discovery in all types of cases), a defendant-therapist who was being sued for malpractice subpoenaed the plaintiff's home computer.[20] The Court enforced the subpoena and ordered the plaintiff to turn over her computer, because the computer's hard drive contained a letter from the plaintiff to an expert witness and several chapters of a book that the plaintiff was writing.[21]

Likewise, in a class-action antitrust case, plaintiffs sought in discovery 30 million pages of e-mail data stored on defendant CIBA-Geigy Corporation's ("CIBA") computer back-up tapes.[22] CIBA objected to the request because it would require the company to incur an estimated cost of $50,000 to $70,000 to search, retrieve, compile and format the e-mail data into a usable form.[23] The court granted the plaintiffs' motion to compel CIBA's production of this data.[24] The court also refused to shift the cost of CIBA's production to plaintiffs, reasoning that plaintiffs should not be forced to bear a burden which solely was the product of the company's ill-advised choice of a computer record-keeping system.[25]

As these cases reveal, the careless and unrestricted use of office computer technologies can expose an employer to substantial risk in employment litigation and greatly increase the cost of discovery. Too many employers, however, erroneously assume that they

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can eliminate this risk and cost simply by using the "delete" function to clear their e-mails and data files from their screen (and instructing their employees to do the same).[26] This view, however, fundamentally misperceives the way computers store memory and consequently may compound employers' risk in employment litigation. What few realize is that pressing the "delete" key typically does not erase data. To the contrary, most deleted files remain indefinitely in a computer terminal's hard disk drive.[27] Indeed, as long as space remains on the hard disk, a deleted file can be totally or partially recovered. The file is not deleted until new data is written on the disk in the space previously occupied by the file. Given the ever-increasing capacity of hard disk memory, data files can remain on a computer without ever being overwritten. As long as the file has not been overwritten, an "undelete" or "sector editor" program can read and recover it. Even if the file is overwritten, portions of the deleted file may still be recovered, depending upon the extent of the overwriting.[28] A computer's hard drive may even contain file names of completely overwritten files, and a history of files saved and deleted.

A terminal user's personal hard drive is not the only place where an old deleted e-mail message or data file may be located. As a security measure, most computer networks are configured to create periodic back-ups of all data contained at all terminals in the system.[29] These periodic back-ups are intended primarily to protect information that the corporation might otherwise lose in the event of a computer failure. Additionally, historical back-ups may be generated to preserve information that a company has an interest in maintaining (for example, a company is obligated to retain certain corporate records for a specified period of time, as required by certain state or federal government regulations).[30]

Finally, a number of inadvertent back-ups may exist of a given e-mail or data file. Some programs, including e-mail programs, automatically create back-up files and save them on the system. Indeed, back-up copies of e-mail messages typically are created by every computer of every recipient of an e-mail, as well as by every computer through which the e-mail traveled en route to those recipients. In addition, employees may have made copies of data files or e-mails on floppy disks and/or laptop computers. These files may exist long after files on network harddrives are overwritten or purged.

II. Reducing the Risk

To reduce the litigation risks created by today's electronic communication technologies, employers must take two important steps. First, employers must implement and enforce comprehensive technology use policies to encourage employees to exercise better judgment in their e-mail communications and to reduce the careless creation of potentially damaging electronic data. Second, employers must develop record retention programs to routinely purge unnecessary computer records from system memory and ensure that only documents which should exist are available on their computer networks. Both steps entail legal risk, however, and thus employers should consult with legal counsel before adopting such policies and practices. What follows is a discussion of these risks and some suggestions of how to minimize the risks by implementing an effective technology use policy and comprehensive record retention practices.

A. Step 1 - Develop a Comprehensive Technology Use Policy

A comprehensive technology use policy should fully communicate to employees what uses are permissible and impermissible, and clearly set forth the penalties that may be incurred for impermissible use. It should also establish mechanisms to monitor system activity to enforce the policy and prevent employees from continuing to engage in any improper system use.

Before employers decide upon any use restrictions, they should assess how such restrictions may affect workplace morale. Employers should recognize that to the extent employees already have grown accustomed to unrestricted and unmonitored e-mail and Internet use (by virtue of their prior use of these technologies at work and/or at home), any prospective limits on use of the systems likely will be viewed with suspicion and contempt. Employers should gauge the potential for this reaction and calculate how it is likely to affect workplace productivity.

In addition, when defining the scope of permissible and impermissible uses, employers should consider the extent to which overly broad use restrictions may prevent employees from engaging in statutorily-protected activities. Specifically, employers with unionized workplaces (or workplaces facing union organizing efforts) should be aware that employees might use their computer terminals to engage in union-related activities. As an example, Borders Bookstore employees in Chicago, Illinois and Des Moines, Iowa recently utilized the Internet to facilitate successful union organizing efforts.[31] They established a union web site which included regular bulletin board postings and information about the organizing effort, and offered activists located at different stores the opportunity to keep in touch via e-mail.[32]

Unionized employers should also recognize that their employees may use the Internet to download general information from union-sponsored web sites. In this regard, several unions (including the AFL-CIO, Teamsters and United Auto Workers, among others) have their own web pages where employees can learn how to organize their workplaces and/or locate other labor-related resources.[33] In addition, seven unions representing more than two million U.S. workers (including the UFCW, HERE, the Laborers, and BCTWGM) will soon launch "United Labor Online," an Internet service similar to America Online.[34] This system will have chat rooms where union activists can carry on conversations with each other, and union officials can conduct "town hall meetings" with their members.[35]

In light of these potential union-related activities, employers must assess how their technology use

policies may affect such activity. A broad use restriction, for instance, such as a blanket prohibition of all "non-business-related" e-mail and Internet use, might prevent union-related Internet activity, and thus constitute an unlawful restriction of employees' rights to engage in protected concerted activity. Indeed, the General Counsel of the National Labor Relations Board ("NLRB") recently took the position that e-mail messages circulated between employees regarding subjects such as salaries, layoffs, NLRB procedures and unionization constitute protected activity under Section 7, of the National Labor Relations Act and thus any prohibition of such e-mail communication is unlawful.[36] While the NLRB has not yet ruled on this issue, and even if the NLRB agrees with its General Counsel it remains to be seen if the public sector labor boards will follow suit, employers may want to limit the scope of their technology use policies to permit the use of office e-mail and Internet access for such protected activities.

Employers also should recognize that monitoring employees' e-mail and Internet habits may be viewed by employees as overly invasive, and thus could encourage employees to file violation of privacy rights claims. For instance, employees who are subject to monitoring may attempt to bring claims under the Electronic Communications Privacy Act ("ECPA"), which protects employee e-mails from interception and disclosure to third parties.[37] An employee subject to unlawful monitoring under the ECPA may seek equitable relief in the form of an injunction, monetary damages (including punitive damages) and reasonable attorney's fees.[38] The ECPA, however, shields an employer from liability when an employee consents (either expressly or impliedly) prior to the monitoring.[39]

In addition, public employees whose e-mail is monitored may be able to assert Fourth Amendment claims against their employers.[40] To succeed on such a claim, an employee must prove that he or she had a reasonable expectation of privacy.[41] The few cases that have addressed such privacy claims in the context of e-mail monitoring suggest that an employer's giving of advance notice of monitoring likely will defeat arguments that employees had a reasonable expectation of privacy in their employer's e-mail system.[42]

Finally, employees who are fired for sending inappropriate e-mail messages may attempt to sue their employers for wrongful discharge, based upon the theory that the e-mail monitoring which preceded and precipitated their termination violated some public policy against intrusion upon privacy.[43] The scant body of case law on this issue, however, suggests (similar to the Fourth Amendment cases) that employers can defeat such claims by giving employees advance notice of monitoring.[44]

In light of these legal risks, an employer should take (at minimum) the following steps to create a comprehensive technology use policy.

1. Describe in Detail Permissible and Impermissible Uses

An employer's policy should be in writing and disseminated to all employees, and should specifically define how employees may use the employer's computer system. Because prohibiting all personal use of e-mail and/or the Internet probably is unrealistic (and, as mentioned above, may pose legal risks), an employer may want to consider explicitly stating in its policy that limited personal use is permissible so long as it does not interfere with employees' productivity or involve illegal activity. Regardless, the policy should contain language prohibiting the use of e-mail and/or the Internet to harass or annoy third parties or to receive or disseminate obscene material, in order to prevent the employer's system from being used to create a hostile work environment for others. In this regard, an employer may want to integrate its technology use policy with its sexual harassment and/or general anti-harassment policies.

2. Train Employees on Proper Systems Usage

Employees should be taught that proper e-mail etiquette is critical given the potential permanence of their electronic correspondence. Specifically, employees should be instructed not to communicate anything in an e-mail message that they would not want to commit to writing. Employees should also be instructed to review their messages for tone and word choice before they hit the "send" key, and avoid sending e-mail messages when angry or tired. Finally, employees should be warned to refrain from responding to every original recipient of an e-mail when only one person needs to receive a response, in order to avoid sending messages to unintended recipients and/or creating additional (unnecessary) copies of correspondence.

3. Obtain Employee Consent to Monitoring

As mentioned above, obtaining prior consent to monitoring may lower employees' expectations of privacy and thus shield an employer from liability for invasion of privacy-type claims.[45] Thus, if an employer intends to monitor e-mail use, it should take steps to obtain its employees' advance consent to monitoring. An employer may obtain actual consent to monitoring by having employees sign written release forms. Alternatively, an employer may be able to establish consent to monitoring by posting a notice of its technology use policy and monitoring practices on its computer network. This notice could appear as a pop-up screen that forces users to click "I agree" before obtaining access to the employer's system. Regardless of its form, however, the notice should specifically remind employees that they do not have a personal privacy right or property right in any matter created, received or sent via the employer's e-mail system. It should also reserve to the employer the right to monitor e-mail activity, and warn employees that e-mail messages are automatically saved in the

computer's back-up memory even if the messages have been deleted from an employee's electronic mailbox. Finally, the notice should reiterate that violations of the technology use policy may lead to disciplinary action, up to and including termination.[46]

B. Step 2 - Develop a Coherent Record Retention Program

In addition to establishing a sound technology use policy, employers should adopt record retention practices to regularly purge their computer systems of unnecessary back-up copies of e-mail and other electronic data.[47] Before adopting such practices, however, an employer should first determine what files exist and where the records are kept. Because of federal and state record retention requirements for certain types of documents, an employer should consult with counsel to develop a schedule for the regular purging of each category of documents. After the employer has developed the record retention system, it should strictly follow the established guidelines to purge its back-up files on a regular basis consistent with the schedule. Finally, if litigation commences or is ever anticipated, all scheduled system purges which could affect data that might relate to the issues being litigated should cease, in order to avoid court sanctions for destruction of evidence.[48]

III. Conclusion

The increased use of e-mail and the Internet in the workplace requires that employers and employees alike be trained on their use of such office technologies. Employees need to understand that rules of proper writing style and grammar, as well as basic principals of etiquette, apply to electronic correspondence with equal (if not greater) force as they do to traditional written correspondence. Employees must also understand that simply pressing the"delete"key does not erase their computer correspondence, nor does it prevent later access to and/or disclosure of such communications.

In addition, employers need to implement mechanisms to ensure that these electronic communication technologies are not abused. Specifically, employers need to issue written policies which specifically define what uses are permissible and/or impermissible, and clearly set forth the discipline which may be imposed for violations of the policy. Employers also should monitor e-mail use to ensure that employees abide by these policies and use good judgment in their e-correspondence. Finally, employers should establish document retention programs to regularly purge computer back-up systems of unnecessary data. By taking these steps, employers should be able to reduce the amount of potentially damaging data created and maintained in their computer systems and consequently reduce their litigation risks. ♦

Notes

[1]Kevin P. Kopp, *Electronic Communications in the Workplace: E-Mail Monitoring and the Right of Privacy*, 8 SETON HALL CONST. L.J. 861, 862 n. 4 (1998) (*citing* Mark S. Dichter and Michael S. Burkhardt, *Electronic Interaction in the Workplace: Monitoring, Retrieving and Storing Employee Communications in the Internet Age*, Seminar Before the American Employment Law Council, Fourth Annual Conference (October 2-5, 1996) (referring to a recent poll conducted by the Gallup Organization)).

[2] *Id. at* 862 n. 5.

[3]*See generally, Most Companies Need to Train Employees on E-Mail Use to Raise Work, Lower Risk*, DAILY LAB. REP. (BNA), April 16, 1999, at B-1,2; Parry Aftab, *E-Mail and Discovery Considerations*, 14 No. 2 LEGAL TECH. NEWSL. 1, 4 (1996).

[4]*Employees More At Ease With Technology But Prone To Unethical Acts, Survey Says*, DAILY LAB. REP. (BNA), April 30, 1998, at A-11 (referring to an April 29, 1998 survey released by the American Society of Chartered Life Underwriters & Chartered Financial Consultants and the Ethics Officer Association, entitled *Technology and Ethics in the Workplace*).

[5]*Id.*

[6]*Id.*

[7]*See, e.g., Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1166-67 (7th Cir. 1998) (religious discrimination claim based in part on hundreds of harassing e-mail messages sent by plaintiff's supervisor which criticized plaintiff for rejecting Islam); Knox *v. State of Indiana*, 93 F.3d 1327, 1329-30 (7th Cir. 1996) (sexual harassment claim based in part on repeated e-mail messages in which supervisor propositioned plaintiff for sex); *Curtis v. Citibank, N.A.*, No. 97-1064 (S.D.N.Y. February 14, 1997) (class action racial harassment claim based on two e-mails circulated between white supervisors, one of which contained an "ebonics" vocabulary test with stereotyped diction), *reported* in DAILY LAB. REP. (BNA), Feb. 26, 1997, at A-1; *Owens v. Morgan Stanley & Co.*, No. 96-9747 (S.D.N.Y. December 24, 1997) (racial harassment claim based on racist e-mail sent by white employee using the identification password of a black employee), *reported* in DAILY LAB. REP. (BNA), Jan. 15, 1997, at A-7; *Harley v. McCoach*, 928 F. Supp. 533, 540-41 (E.D. Pa. 1996) (racial harassment claim based in part on supervisor's e-mail in which he referred to plaintiff as "Brown Sugar"); *Strauss v. Microsoft Corp.*, No. 91-5928, 1995 WL 326492 (S.D.N.Y. June 1, 1995) (sex discrimination claim based on sexually derogatory e-mails); *Blakey v. Continental Airlines, Inc.*, No. A-5462-97T3 (N.J. Super. Ct. App. Div. June 9, 1999) (sexual harassment claim based in part on sexist messages posted on pilots' Internet bulletin board), *reported* in DAILY LAB. REP. (BNA), June 14, 1989, at A-11.

[8]*See* Marianne Lavalle, *Digital Information Boom Worries Corporate Counsel - Questions Arise About Data Overload, Online Privacy, The Retrieval of Deleted E-Mail and Technological Monopoly*, NAT'L L.J., May 30, 1994, at B-1.

[9]*Id.*

[10]*Id.*

[11]*Strauss v. Microsoft Corp.*, No. 91-5928, 1995 WL 326492, at *1 (S.D.N.Y. June 1, 1995).

[12]*Id.* at *4.

[13]*Id.* Electronic evidence has also come into play in several other employment cases. *See, e.g., Kempcke v. Monsanto Co.*, 132 F.3d 442, 444 (8th Cir. 1998) (age discrimination claim based in part on document found on supervisor's computer hard drive which set forth reorganization plan aimed at "finding opportunities for promising young employees"); *Greenslade v. Chicago Sun-Times, Inc.*, 112 F.3d 853, 864-66 (7th Cir. 1997) (reverse discrimination claim defeated by evidence of harassing e-mails which plaintiff sent to coworker); *Meloff v. New York Life Ins. Co.*, 51 F.3d 372; 373 (2d Cir. 1995) (sex discrimination and defamation claims based on supervisor's e-mail accusing plaintiff of fraud); *Cerwinski v. Insurance Serv. Office*, No. 95-1766, 1996 WL 562988, at *4, (S.D.N.Y. October 3, 1996) (sex discrimination claim based on termination defeated by evidence of harassing e-mails which plaintiff sent to coworker); *Aviles v. McKenzie*, No. 91-2013, 1992 WL 715248 (N.D. Cal. March 17, 1992) (retaliation claim based on employee's e-mail to supervisors in which he reported "unsafe and illegal" practices).

[14]*People v. Lee*, No. C38925 (Calif. Super. Ct. January 30, 1997), *reported in* DAILY LAB. REP. (BNA), Feb. 5, 1997, at A-4.

[15]*Id.*

[16]*Id.*

[17]*Id.*

[18]*See Equal Employment Opportunity Commission v. Lockheed Martin Corp.*, No. 95-2995, 1996 WL 48528, at *2 (D. Md. January 26, 1996) (referring to EEOC's "routine procedure" of issuing broad requests for electronic personnel files before formulating specific requests for personnel information).

[19]*Id.*

[20]*Halbrooks v. Moore*, No. 05-95-00800, 1997 WL 198748, at *6 (Tex. Ct. App. April 24, 1997).

[21]*Id.*

[22]*In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-C-897, 1995 WL 360526, at *1 (N.D. Ill. June 15, 1995).

[23]*Id.*
[24]*Id* at *3.
[25]*Id.* at * 2.
[26]For purposes of clarity, "delete" refers to the process of marking the space on a hard disk drive or computer memory device that currently is occupied by a file as "erasable" and available for use. In contrast, "purge" refers to the process of erasing data.
[27]For a more detailed discussion of how deleted data may be recovered from a computer's hard drive, *see* Joel B. Rothman, *Is it Really Gone? Data Recovery and Computer Discovery*, 15 No. 10 LEGAL TECH. NEWSL. 1, 7-8 (1998).
[28]In this regard, Windows 95 contains a "recycle bin" function which is displayed as a wastebasket icon and maintains a list of all deleted files. Unless completely overwritten, a deleted file can be revived simply by locating it in this list and clicking on its file name. Novell Netware and the Apple Macintosh contain similar tools.
[29]Periodic backups may be made either on-site or off-site, depending upon the size and sophistication of the computer network. These backups are recorded on a variety of media, including tape, optical disk, removable hard disks and other removable disks, like jazz or zip. For a discussion of common computer data backup practices, *see* Patrick R. Grady, *Discovery of Computer Stored Documents and Computer Based Litigation Support Systems: Why Give Up More Than Necessary?*, 14 J. MARSHALL J. COMPUTER & INFO. L. 523, 529, n. 29 (1996); Rothman, *supra* note 27 at 8.
[30]For a general discussion of federal regulations which impose corporate record retention requirements, *see* Grady, *supra* note 29, at 532-33.
[31]*Union Supporters at Borders Bookstores Rely on Internet to Communicate Message*, DAILY LAB. REP. (BNA), Nov. 10, 1997, at CC-1.
[32]*Id.*
[33]The AFL-CIO's web address is http:www.aflcio.org. The Teamsters web address is http:www.teamster.org. The UAW's web address is http:www.uaw.org.
[34]*Company Sets Up Advisory Board to Help Launch United Labor Online Later This Year*, DAILY LAB. REP. (BNA), Feb. 17, 1999, at A-2.
[35]*Id.*
[36]*See* Report of the General Counsel (Sept. 1, 1998), available at www.nlrb.gov (authorizing complaint attacking employer's blanket prohibition on use of email for non-business purposes).
[37]18 U.S.C. §§ 2510-21 (1994 & Supp. III 1997. Several states have also adopted their own wiretapping /electronic surveillance statutes which may impose additional prohibitions against monitoring of employee e-mail.
[38]18 U.S.C. §§ 2520-21 (1994).
[39]The ECPA specifically allows for the "interception" of electronic communications when "one of the parties to the communication has given prior consent." 18 U.S.C. §§ 2511(2)(c), (d) (1994).
[40]*See* Patrice S. Arend and Kathleen M. Holper, *Monitoring E-Mail in the Workplace: Employee Privacy and Employer Liability*, 87 ILL. B J. 314, 317 n.34 (*citing* Laurie Thomas Lee, *Watch Your E-Mail! Employee E-Mail Monitoring and Privacy Law in the Age of the "Electronic Sweatshop,"* 28 J. MARSHALL L. REV. 139, 146 (1994)).
[41]*See Id.* (*citing Smith v. Maryland*, 442 U.S. 735 (1979)).
[42]*See, e.g., Bohach v. City of Reno*, 932 F. Supp. 1232, 1234-35 (D. Nev. 1996) (no objectively reasonable expectation of privacy in police department's "alphapage system," which is similar to an e-mail system, in part because the police chief had issued an order notifying all users that their messages would be "logged on to the network" and that certain types of messages that violated the department's anti-discrimination policy were banned from the system).
[43]The Illinois Constitution specifically guarantees a right to privacy. ILL. CONST. art. I, § 6. Such public policy/wrongful discharge claims in Illinois likely would be premised on this Constitutional provision.
[44]*See, e.g., Bourke v. Nissan Motor Corp.*, No. YC-003979 (Cal. Ct. App. June 1993) (employees terminated for excessive personal e-mail messages could not maintain claim for wrongful discharge where they had signed agreement restricting e-mail use to company business and had been notified that their e-mail would be monitored), as reported in Peter Brown, *Developing Corporate Internet, Intranet and E-Mail Policies*, 520 PLI/Pat 347, 357 (1998). *See also* Kevin J. Baum, *E-Mail in the Workplace and the Right to Privacy*, 42 VILL. L. REV. 1011, 1035 (1997) ("A well-disseminated e-mail policy could be an effective method to avoid invasion of privacy claims or complaints by employees").
[45]*See supra* notes 37-44 and accompanying text.
[46]*For* suggested sample e-mail user instructions, *see Focus On ... Electronic Monitoring*, Individual Employment Rights (BNA), No. 1, p. 4 (June 1, 1999); *see also* Arend & Holper, *supra* note 40 at 319 (discussing recommended e-mail user instructions).
[47]For a general discussion of how to establish a record retention program, *see* Grady, *supra* note 29, at 537-43.
[48]Several courts have imposed sanctions against defendants for discovery abuses where the defendants permitted the routine destruction of electronic records while litigation (or the prospect of litigation) was pending. *See, e.g., Cheyenne Software, Inc., Sec. Litig.*, No. CV-94-2771, 1997 WL 714891, at *2 (E.D.N.Y. August 18, 1997) (sanctioning defendant for destroying information stored in the computer hard drives of various employees by erasing data when the employees left the company); *National Assoc. of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556-60 (N.D. Cal. 1987) (sanctioning federal agency for failing to protect computer database from routine deletions once possibility of litigation became known); *William T. Thompson Co. v. General Nutrition Corp., Inc.*, 593 F.Supp. 1443, 1445-57 (C.D. Cal. 1984) (ordering default judgment against employer for destruction of 2,000 data backup tapes, despite employer's routine document destruction schedule that directed erasure and reuse of such tapes. ♦

RECENT DEVELOPMENTS

by the student Editorial Board

Recent Developments is a regular feature of T*he Illinois Public Employee Relations* Report. It highlights recent legal developments of interest to the public employment relations community. This issue focues on developments under the two collective bargaining statutes, the equal employment opportunity laws and the Fair Labor Standards Act.

IELRA Developments

Bargaining Units

In *Northern Illinois University and University Professionals of Illinois, Local 4100, IFT-AFT,* No. 97-UC-0003-C (IELRB 1999), the IELRB, in a unit clarification case, held that the new position of "Director of Anatomy of Labs" should not be included in a bargaining unit consisting of "temporary" faculty. The Board concluded that the position did not share a sufficient community of interest with the temporary faculty to be included in the temporary faculty bargaining unit.

The IELRB followed its decision in *Beach Park Community Consolidated School District 3*, 10 PERI 1089 (IELRB 1994), where it held that the unit clarification procedure is an appropriate means for determining the bargaining unit placement of a newly created position. Under the unit clarification procedure, employees are classified into a unit where they share a community of interest with bargaining unit members.

In *Thornton Township High School District No. 205*, 2 PERI 1103 (IELRB 1994), the Board stated that the purpose of assigning an employee to the most similar unit is to create a maximum coherence of interest within

the different units that come to the bargaining table which would make the negotiation process less difficult and more efficient for all concerned. However, *Thornton* did not require the Board to select the most appropriate unit if more than one unit would be appropriate. Rather, it required the Board to reject placement of an employee in a bargaining unit if the community of interest between the unit and the employee would be artificial and arbitrary.

Consequently, the Board considered whether the position of "Director of Anatomy Labs" shared a community interest with the temporary faculty bargaining unit. To determine if there was a community of interest, the Board consulted section 7(a) of the Act which provides:

> In determining the appropriateness of a unit, the Board shall decide in each case, in order to ensure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining, based upon but not limited to such factors as historical pattern of recognition, community of interest, including employee skills and functions, degree of functional integration, interchangeability and contact among employees, common supervision, wages, hours and other working conditions of the employees involved, and the desires of the employees.

While the UPI stressed the importance of job functions in determining a community of interest, the Board examined all factors listed under section 7(a). Some duties of the Director of Anatomy Labs were similar to those of temporary faculty. Teaching classes and supervising the laboratory were temporary faculty type responsibilities. However, the Director was also responsible for developing programs and counseling students which was more like supportive staff functions. Therefore, the Director of Anatomy Labs was responsible for duties similar to both classifications.

With respect to the other factors, the Board found that the Director of Anatomy Labs had a greater similarity to supportive staff. Similarities between the Director position and supportive staff include salary, supervision, expectations of continued employment, contact with other employees and representation. Because of these similarities with the supportive professional staff, the Board held that it would not be appropriate to place the position of Director of Anatomy Labs in the bargaining unit with temporary faculty.

The facts of this case also indicated other differences between temporary faculty and supportive professional staff. Position openings were created based on different needs and fashioned in different manners. Temporary appointees spent the majority of their time teaching while regular professional staff were responsible for advisory and administrative duties. The salaries of the two positions were significantly different. Temporary faculty interacted with their supervisor, other temporary faculty and with students while supportive professional staff interacted with tenure-track faculty. The benefits offered to supportive professional staff were superior to those offered to temporary employees. Supportive professional staff were evaluated through a peer review system while temporary faculty were critiqued by their department chair or designee based on collective bargaining standards. Lastly, professional staff were represented by the University Council. Temporary faculty were not included in the definition of faculty who are entitled to such representation.

The Director of Anatomy Labs shared distinct similarities with the professional supportive staff and exhibits significant differences with the temporary faculty. Therefore, the Board held that it would be arbitrary to separate the Director of Anatomy Labs from the supportive professional staff and place the Director in the temporary faculty unit.

IPLRA Developments

Supervisors

In *City of Springfield and Illinois Fraternal Order of Police Labor Council*, No. S-RC-9850 (ISLRB 1999), the State Board held that statutory supervisors who were part of a historical unit on the date the Illinois Public Labor Relations Act became effective, but who subsequently become unrepresented, are covered by the Act's historical protections. In this case, the Board held that because union representation for the Springfield police lieutenants terminated in 1992, without protest from the lieutenants, the lieutenants had no historical bargaining rights and were not employees within the meaning of the act.

The parties in this case agreed that at all relevant times the lieutenants were supervisors. As supervisory employees, the lieutenants only had representation rights if they fell within Sections 3(s) and 9 of the IPLRA which allows collective bargaining for statutory supervisors who were in bargaining units recognized by their employers on the effective date of the amendments to the act.

As of January 1, 1986, the effective date of the amendments extending IPLRA coverage to municipal police officers, the Police Benevolent Patrolmen's Association ("PBPA") was the exclusive bargaining representative of a unit that included all police officers, detectives, sergeants and lieutenants employed by the City. On March 1, 1992, a new collective bargaining agreement became effective in which the City and the PBPA agreed to exclude the lieutenants from the historical unit. Since March 1, 1992, the lieutenants were not covered by any collective bargaining agreement and were not represented by the PBPA.

The State Board noted that the fundamental policies of the Act is "to preserve historical patterns of bargaining, to foster stability in labor relations, and the portent the right of public employees to designate collective bargaining representative of their own choosing for the purpose of negotiating

wages, hours, and other terms and conditions of employment." Also, the Board noted that in cases which supervisors attempt to claim historical protections, the supervisors have some sort of on going bargaining relationship with an exclusive representative bargaining at some time prior to the relevant effective date which is continuous until the date the petition is filed. The Board deemed the seven year gap between the end of the bargaining relationship and the date the representation petition was filed crucial and opined that the policies of the Act would not be furthered if the lieutenants were allowed to reclaim the rights which were voluntarily relinquished seven years ago. In order to promote stability, the Board refused to resurrect the seven year old voluntarily relinquished bargaining rights.

EEO Developments

In *Kolstad v. American Dental Association*, 119 S.Ct. 2110 (1999), the United States Supreme Court interpreted the standards for punitive damages in Title VII cases as authorized by the Civil Rights Act of 1991 (CRA).

Carole Kolstad must challenging her nonselection for the portion of Director of Legislation and Legislation Policy and Director of the Council on Government Affairs and Federal Dental Services for the American Dental Association (ADA). At trial, Kolstad proved that the selection process was a sham and that a male, the other candidate, was selected for the position before the selection process had begun. However, the District Court denied Kolstad's request for a jury instruction regarding punitive damages. In a split decision, the Court of Appeals for the District of Columbia Circuit reversed the District Court's, but upon rehearing en banc, the Court of Appeals affirmed the decision of the District Court. The Court decided that a defendant must be shown to have engaged in some egregious conduct before the court may give a jury instruction on punitive damages.

The CRA of 1991 provides for awards of punitive damages in cases where the defendant has engaged in intentional discrimination "with malice or with reckless indifference to [the employee's] federally protected rights." After reviewing the CRA of 1991, the Supreme Court found the term "malice or reckless indifference" pertains to the employer's knowledge that the employer may be acting in violation of federal law. The Court then held, in the context of Title VII, to be liable for punitive damages the employer must discriminate in the face of a perceived risk that its actions will violate federal law. Finally, the Court held that when a employer has undertaken good faith efforts for Title VII compliance, the employer has not acted in reckless disregard of federally protected rights. An employer may not be liable for punitive damages when a managerial agent has made decisions contrary to the employer's good faith efforts to comply with Title VII.

Disability Discrimination

In three separate opinions, issued the same day, the Supreme Court held that the determination of whether an individual is disabled within the meaning of the Americans with Disabilities Act must consider the effects of any measures that tend to correct the individual=s impairment. In *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), the Court held that United did not violate the ADA when it rejected for employment as global airline pilots, two individuals whose uncorrected vision was 20/22 in one eye and 20/400 in another eye. With corrective lenses, each had vision of 20/20.

The Court held that in determining whether the plaintiffs had an impairment that substantially limited a major life activity, a court must take into account their use of corrective lenses. The Court offered three reasons for its holding. First, the ADA defines a disability as "a physicial or mental impairment that substantially limits one or more of the major life activities . . ." The Court observed that the use of the present tense in he statutory definition reflects an intent to evaluate an individual's claim to have a disability in the individual's present state, i.e., taking into account any corrective measures, such as eyeglasses or contact lenses.

Second, the Court reasoned, failure to take into account the impact of corrective measures would be inconsistent with the ADA's focus on the specific conditions of individuals. Rather, it would lead to speculation about classes of conditions generally.

Third, the Court observed that in its findings, the ADA estimated the number of disabled individuals in the United States at 43,000,000. The Court reasoned that this figure reflects an understanding that only those whose impairments are uncorrected are considered to be disabled. Citing estimates that 100,000,000 Americans require corrective lenses and that 50,000,000 have hypertension, the Court concluded that if the statute was intended to cover persons with corrected impairments the findings would have provided a much higher estimate of the number of disabled Americans.

The Court also rejected the plaintiffs' claim that United regarded them as disabled. The Court stated that an employer has regarded an individual as disabled when it mistakenly believes that the person has an impairment substantially limiting a major life activity, believes that a non-limiting impairment is more severe than it is in reality and that it substantially limits a major life activity. The Court observed that the plaintiffs alleged that United regarded them as substantially limited in the major activity of working, specifically, that their impairment was more severe than it really was and that is precluded them from working as global airline pilots. However, the Court reasoned that to substantially limit the major life activity of working, an impairment must limit an individual from a brad class of jobs. Global airline pilot was not such a broad class of jobs. Among other positions that could utilize the plaintiffs' skills were regional airline pilot and pilot instructor.

In *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999), the Court applied its holding in *Sutton* to hold that an individual with hypertension, who had been refused employment as a mechanic because the position required driving a commercial motor vehicle, was not disabled because, when medicated, the individual had no restrictions on his normal activities. The Court further held that the individual was not regarded as disabled because, at most, he was regarded as unable to perform the job of mechanic operating a commercial motor vehicle. This did not impair him from many mechanic jobs, and thus, he was not regarded as substantially limited in the major life activity of working.

Finally, In *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999), the Court held that a truck driver with monocular vision was not disabled because his brain had developed subconscious mechanisms for compensating with his vision impairment. The Court stated that it could see "no principled basis for distinguishing between measures undertaken with artificial aids . . . and measures undertaken, whether consciously or not, with the body's own systems."

The Court also held that Kikinburg was not otherwise qualified for the position of truck driver with Albertsons because he did not meet the vision requirements imposed by U.S. Department of Transportation regulations. The Court recognized that the DOT had given Kirkinburg a waiver pursuant to a waiver program that it had initiated. However, the Court found that the waiver program was an experiment and was not based on a conclusive finding that, under certain conditions, persons with monocular visions could operate commercial motor vehicles safely. Consequently, according to the Court, Albertsons was entitled to continue to rely on the basic regulations and was not required by the ADA to participate in the DOT experiement.

FLSA Developments

Sovereign Immunity

In *Alden v. Maine*, 119 S. Ct 2240 (1999) the Supreme Court held that Congress does not have the power, under Article I of the United States Constitution, to subject non-consenting States to private lawsuits for damages for violations of the Fair Labor Standard Act. States retain sovereign immunity.

In 1992, a group of probation officers filed a suit in the United States District Court for the District of Maine, alleging that the State had violated the overtime provisions of the FLSA. While this suit was pending, the Supreme Court decided *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), in which it held that Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced in federal courts. Relying on *Seminole*, the Federal District Court dismissed the plaintiffs' FLSA lawsuit. The plaintiffs refiled in state court. Although the language of the FLSA authorizes private actions against states in their own courts regardless of consent, the Maine Supreme Judicial Court affirmed the state trial court's dismissal of the lawsuit based on sovereign immunity.

The U. S. Supreme Court addressed whether Congress had the authority under Article I to abrogate a State's immunity in its own courts. The Court did not find any historical, practical or constitutional basis to grant Congress this authority. The Court reinforced that the sovereign immunity of the States is derived from the structure of the original Constitution and not limited exclusively by the Eleventh Amendment. Looking to the text of the Constitution, the Court recognized that the founders were silent regarding the States' immunity from lawsuits in their own courts and interpreted this silence to mean that the sovereign's right to assert immunity from a lawsuit in its own courts was so well established that any language reinforcing this concept was unnecessary. Relying on past and present congressional history, the Court acknowledged that no statute had been enacted purporting to authorize lawsuits against non-consenting States in state court.

However, the Court recognized the limitations of a State's constitutional privilege to assert sovereign immunity in its own courts. Acknowleding that many states have enacted statutes consenting to suits, pursuant to subsequent Constitutional amendements, the Court held that the States' sovereign immunity prohibits lawsuits only in the absence of such consent. Additionally, the Court reinforced that sovereign immunity bars suits against States but not against lesser entities such as municipal corporations or police officers.

The State of Maine adheres to the general rule that "a specific authority conferred by an enactment of the legislation is requisite if the sovereign is to be taken as having shed the protective mantle of immunity." Because the plaintiffs were unable to establish a waiver of immunity under this standard, the Court concluded that the State of Maine had not consented to suit. ♦

FURTHER REFERENCES

(complied by Margaret A. Chaplan, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

Bennedict, Mary Ellen, and Lisa Wilder Naber: UNIONIZATION AND TENURE AND RANK OUT-COMES IN OHIO UNIVERSITIES. Journal of Labor Research, vol. 20, no. 2, Spring 99, pp. 185-201.

Does working at a unionized public university improve a faculty members's chances for promotion and tenure? In an empirical study using data from seven public universities in Ohio, the authors attempted to determine whether unionized faculty have better job security and attain higher ranks than nonunion faculty and whether there are gender differences in these outcomes. Results suggest that the probability of being tenured and the probability of holding higher rank are higher and that unions also appears to reduce the tenure and rank differences between male and female faculty and among disciplines.

Siegel, Gilbert B.: WHERE ARE WE ON LOCAL GOVERNMENT SERVICE CONTRACTING? Public Productivity & Management Review, vol. 22, no. 3, March 1999, pp. 365-388.

The author reviews the literature on contracting out of local government services, grouping empirical and nonempirical sources into three topic areas: the environment of service contracting and the extent of it; the process of contracting, along with the elements necessary for its success; and evaluative research. A concluding section examines the lessons to be learned from these studies, and a useful appendix lists and summarizes evaluative studies by government function.

Rassuli, Ali, Ahmad Karim, and Raj Roy. THE EFFECT OF EXPERIENCE ON FACULTY ATTITUDES TOWARD COLLECTIVE BARGAINING: A CROSS-TEMPORAL ANALYSIS. Journal of Labor Research, vol. 20, no. 2, Spring 1999, pp. 203-218.

In this study, done at a large Midwestern university, faculty attitudes toward union representation were examined first at the time of the initial representation election and then four years later in order to determine whether experience with the union's performance caused any changes in attitudes. An analysis of faculty expectations regarding financial issues, self-governance issues, work environment issues, and promotion and tenure issues revealed major differences in faculty attitudes toward the importance of these issues four years later. At the time of the initial vote, work environment issues were the most important, but four years later financial issues replaced them.

Shell, G. Richard. BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE. New York: Viking, 1999. 286p.

Written by the director of the Wharton School Executive Negotiation Workshop, this book is an easy-to-use guide to negotiation strategies and processes for any kind of bargaining situation. The author gives step-by-step advice for negotiators who want to improve their negotiating effectiveness while maintaining their integrity and preserving their ethical standards.

(Books and articles anotated in Further References are available on interlibrary loan through ILLINET by contacting your local public library or system headquarters.)

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