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Paul R. Klenck
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Caught in the Web: On and Off-Duty Use of Computers

By Paul R. Klenck

I. Introduction

Americans love their smaller, cheaper and more mobile technology. Broadband, wireless and satellite connections allow individuals to be connected all day at work, home and play. The lines between home life and work life blur. As a consequence, courts, agencies, arbitrators and practitioners must grapple with and resolve tensions between personal privacy and employer rights in the off-duty and on-duty uses of cyberspace. The following examples show how these tensions have changed in fifteen short years.

In 1993, Ms. Pastel, a high school art teacher, displayed her photography of nude subjects, including images of herself and her boyfriend, at an out of state gallery she visited in the summer. In 2008, she created a website entitled "Scenes of Nature" that displayed the same images. One of her students found the website and shared it with classmates.

In 1993, Mr. Party, a first year nontenured teacher, went to the neighborhood bar with college friends and engaged in buffoonish, but legal, behavior and sent a personal e-mail to a friend about it. The e-mail remained private. Conversely, in 2008, Mr. Serious, a first year non-tenured teacher and his friends wrote on their Facebook[1] page about their loutish, but legal behavior that occurred in their homes over the summer and included pictures. John, one of Mr. Serious's students, asked for and was given permission to be a "friend"[2] of Mr. Serious and gain access to his Facebook page. Mr. Serious deleted all the messages about the summer parties but not the pictures. John saw the pictures. Further, John noticed that his older brother is a classmate of one of Mr. Serious's friends, Stan. John asked Stan if they could be "friends" and have access to each other's Facebook pages. Stan granted permission to "friend" John and as a result, John was able to read Mr. Serious' loutish comments on Stan's site.

Jan, a teacher's aide, took a lunch time drive one day in 1993 to an "adult store" and bought some "sex toys" to bring home that night. In 2008, Jan visited Amazon.com at lunch time from her school computer and ordered clothes, kitchen supplies, and sex toys and had them shipped to her home.

This article will explore some of the challenges public employers, unions and employees face with computers and the internet. As individuals spend more time on the Web and as computers become ever more pervasive in the workplace, new areas of tension and subjects of employee discipline arise. Part II describes how technology has changed the workplace. Part III discusses issues arising from the use of employer-provided technology. Part IV reviews types of employee discipline issued for misuse of employer equipment and for private behavior that is disclosed on the Web. Part IV also examines the standards courts and arbitrators apply to these situations. Part V concludes with some practical advice for employees.

II. From Fred Flintstone to George Jetson: How Technology and the Web Changed the Workplace

Only a few years ago, off-duty behavior may have had only a remote possibility of being censured by a government employer. Today such off-duty behavior poses greater risk of discipline by employers. For example, in the previous decade, Ms. Pastel's nude photography likely would not have been seen by her community unless someone purchased one of her images and then displayed it in the area. Now, students, 96 percent of whom are reported to spend nine hours a week on social network sites, can find Ms. Patel's photos on the internet and circulate copies in the classroom.[3] As a result, the employer must decide whether Ms. Pastel's legal, artful, off-duty expression so disrupts the workplace that the employer must intervene. Similarly, Mr. Party had greater control over information about his 1990's private life, while Mr. Serious, despite his efforts to control similar information, is watching it spiral out of control.

INSIDE

In today's technological age, the infiltration of the World Web Wide into nearly all aspects of private and work life creates confusion as to what types of private, off-duty conduct may have a nexus to the workplace. Moreover, it has become increasingly difficult to define work time and work site. The proliferation of Blackberries,[4] smartphones[5] and similar devices, has resulted in employees responding to e-mails, submitting work, and updating electronic work information at all hours of the day and night and frequently at locations far distant from the usual workplace. Further, these devices allow employees to engage in personal tasks at the workplace, during work or break time, with no significant disruption of work.[6]

Moreover, not only does life on the Web blur boundaries of time, it also creates additional "space" in which people act and communicate. Our community has greatly expanded beyond the physical environment in which we work and live to include virtual space in which people communicate. For example, by actively participating in online forums, people create close personal or professional relationships with other individuals throughout the world who share similar interests and/or occupations. Participants may share private information with virtual friends who they, most likely, have never met face-to-face.

Social networking sites are becoming increasingly common. On-line social and professional networks such as LinkedIn,[7] Facebook, or MySpace[8] assist people in maintaining and establishing connections with individuals in distant locations as easily as with the person next door. These connections are often useful resources for employees of a specified occupation to communicate with others in the field to discuss work-related issues and experiences and to offer advice. For example, U.S. News & World Report recently told of thousands of teachers giving their insight into education and school experiences through blogging.[9] Educators are participating in groups such as "K-3 Teachers Talk," on Facebook where teachers around the world share resources and experiences that are successful in their classrooms.[10] Further collaboration and networking among educators takes place in the International Society of Technology in Education's (ISTE) virtual world where teachers create an avatar in Second Life[11] and attend educator conferences.[12] Although teachers recognize the risks of making their views more public through increased use of the internet, they see enhanced benefits of sharing their view with others and learning colleagues' best practices.

The expansion of social media on the Web vastly expands the ease of obtaining information about others and allows individuals to distribute information to a huge audience at virtually no cost. As a result of this ease of obtaining information, the National Association of Colleges and Employers reported in 2006 that over 20 percent of employers have expanded their background check of prospective employees to include web based searches as easy as "Googling" the applicant or reviewing social networking sites.[13]

Today, the ease of distributing information is in stark contrast to even two decades ago. This change is illustrated by two cases within the Ninth Circuit. Back in the quaint days of 1988, in *Burch* v. *Barker*, the court examined whether a school district could restrict distribution of 350 copies of a four page "underground newspaper."[14] In *Burch*, the school district policy required any material written by a high school student be approved by school officials before such material could be distributed on school premises or at school functions. The policy applied to student writings not contained in official school publications. Students subsequently violated the policy when they distributed unauthorized material at a school-sponsored class barbecue. The students received minor discipline but filed suit against the school district alleging the policy violated their right to freedom of speech. Eventually, the Ninth Circuit held that the policy violated the students' first amendment rights.

In contrast, in 2007, a district court upheld the discipline of a student who surreptitiously made video and audio recordings of his teacher in class and uploaded an edited version on MySpace and YouTube for the world to see.[15] The video was rapidly distributed throughout the internet.

In this new technological world where people openly communicate and interact on the internet, the employer, the citizen, the student, and the student's parent have many opportunities to gather information about the public employee. Although sitting at home engaging in private activities with people all over the world, the

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Paul R. Klenck is Deputy General Counsel of the Illinois Education Association. He litigates employment matters and counsels employees, locals and the state association in all aspects of labor, employment and association law. The IEA represents over 130,000 members and over 900 locals of pre-K through 12 certificated employees, educational support professionals and higher education employees. He has previously represented employees and unions in federal sector employment as well as employees, unions and employers in the private sector. He received his J.D. from DePaul University College of Law and a B.A. in History from Northwestern University.

Paul's off-duty Web interests include moderating the nature photography website NatureScapes.Net and his photography is displayed at www.klenck.com. He also wonders what newly created movie his high school age son might post next on his Facebook group: http://www.facebook.com/video/?oid=5636434257#

employee is leaving a computer record of that activity. Further, the employee may be at home or in the workplace and engaging in work activity one minute and personal matters the next. Both the overlapping of personal and work matters, as well as the ease with which information regarding an employee can be discovered, raises confusion for employers and employees with respect to the following issues: (1) whether a particular activity is solely private, (2) whether the employer can restrict the employee's computer activity, and (3) whether the employer can gather information about employees.

III. Use of Employer-Provided Technology

A. What right does an employer have to monitor an employee's use of technology or conduct a search to obtain electronic records?

Labor relations statutes restrain an employer's ability to monitor employee use of technology. An employer will commit an unfair labor practice if it seeks to monitor employees' union activities. For example, in *Konop v Hawaiian Airlines*,[16] a pilot established a password-protected website on which he posted articles critical of management and of his incumbent union. Access was restricted to Hawaiian Airlines employees and expressly denied to management. A vice president accessed the website using the names of two pilots with the consent of the pilots.[17] The United States Court of Appeals for the Ninth Circuit held that Hawaiian's unauthorized access to the website was akin to surveillance of employee protected concerted activity and violated the Railway Labor Act unless the airline could establish a legitimate business justification.[18]

Similarly, the employer will likely have to bargain regarding the installation of monitoring equipment. For example, in *National Steel Corp. v NLRB*,[19] the Court of Appeals for the Seventh Circuit upheld a National Labor Relations Board holding that the installation of hidden cameras is a mandatory subject of bargaining under the National Labor Relations Act. Furthermore, equipment that would record audio will violate Illinois law unless there is individual approval.[20]

Public employees have a constitutional right to be free from unreasonable searches. In *Maes v Folberg*,[21] the University of Illinois seized a laptop computer purchased by the University but frequently kept at home by Professor Maes.[22] Because the University had no policy regarding use of the school's equipment, the court held that Maes had a reasonable expectation of privacy regarding those computer records.[23] Maes survived the defendant's motion to dismiss because she adequately pled that there was no legitimate basis to search her computer.[24] However, an employer's announcement that it will inspect work computers may defeat its employees' claims of a reasonable expectation of privacy.[25]

Merely obtaining records of an employee's electronic activity may expose the employer to liability. In *Quon v. Arch Wireless Operating Co.*,[26] the Ontario, California Police Department issued pagers to its police officers.[27] The employer's computer usage policy did not address pagers or text messaging,[28] but an informal policy provided that employees would pay for any text usage above 25,000 characters.[29] In 2002, the city ordered a transcript of all pagers where employees exceeded the limit. Officer Quon exceeded the monthly limit by more than 15,000 characters, by sending personal messages, often of a sexual nature.[30] He sued the city and the wireless carrier who provided the transcripts to the city, alleging violations of the Stored Communications Act,[31] and the Fourth Amendment. The court found that Quon indeed had an expectation of privacy in the content of his text messages based on the city's informal policy and that the wireless provider violated the Stored Communications Act by releasing the transcripts to the employer.[32] Moreover, the court said that because the city's informal policy allowed personal use of the pagers, Quon could not have committed misconduct, and thus a formal proceeding could not be instituted against him.[33] The employer's failure to align its computer policy with the actual technology used left it open to liability.

B. What are the consequences of misuse of Employer's technology?

Assuming an employer legally obtains information about an employee's electronic activities, what may the employer do? An initial question will be whether the employee misused the employer's equipment or violated a legitimate acceptable use policy (AUP).[34] Misuse of an employer's equipment or violation of the employer's AUP creates a link between the misconduct and work. In the illustration at the beginning of this article, Jan used the school computer to purchase various personal items during her lunch break. Whether and to what extent Jan could be disciplined would depend on the employer's rules and practices regarding employee use of school equipment during personal time. Additionally, the search and purchase of "sex toys" might aggravate the situation if the employer could prove any additional harm due to potential exposure to students or to other employees who might object to seeing such images in the workplace. As discussed below, the employer would need to show what actual or at least potential harm occurred. In her defense, Jan would need to show what measures she took to reduce that harm.

Generally, absent specific work rules defining proper use of employer technology, employees will be permitted occasional personal use of employer equipment, such as making a personal phone call, without disciplinary consequences. To discipline the employee, the employer needs to prove that the employee's use was excessive or interfered with work. For example, in *Independent School Dist. 284, Wayzeta, Minnesota*,[35] a teacher was terminated for personal use of the school computer. The teacher admitted to buying his fiancée's engagement ring on eBay and helping plan his wedding during class time.[36] The school alleged he was spending entire class periods engaged in personal business on the computer rather than instructing students.[37] However, the union's computer expert challenged the District's allegation that each of the 55,000 URL hits noted on the teacher's computer during a 20–day period consisted of the teacher actually clicking on a mouse. Both the union and the school's experts agreed that the "hits" could have been the browser refreshing.[38] The arbitrator found that the school failed to prove grossly excessive misuse by the employee and there was, therefore, no just cause to terminate the teacher. Accordingly, the arbitrator reduced the penalty to a two month suspension.[39]

IV. Off-Duty Conduct in the Internet Age

A. Greater Exposure of Private Behavior Makes Employers Nervous

As illustrated in the examples from Part I and in several cases discussed below, private acts can be more easily exposed either by intentional self-disclosure or by the nefarious acts of others. A spurned spouse may intentionally publish private photos. What once may have been surreptitiously circulated, now can be widely distributed throughout a community in minutes. A teacher may not know she was photographed engaging in embarrassing activity and then years later learn parents have stumbled upon the photos on the Web. Once these photos become public, the employer wonders how it should respond when its employees are expected to be role models. All involved parties are confused as to where to properly draw the line between private conduct beyond the employer's reach and conduct so affecting employment as to justify discipline.

B. What are the Standards for Disciplining Employees for Off-Duty Conduct?

1. Legislating Morality

The Illinois School Code has long explicitly provided that school boards can "dismiss a teacher for . . . immorality."[40] Many states have similar "morality" statutes for teachers. The idea of what private behavior is immoral changes over time. In 1972, Elizabeth Reinhardt was fired as a teacher because she became pregnant while not married.[41] Fortunately for Ms. Reinhardt, the Appellate Court reversed the dismissal. It is highly unlikely any school board in Illinois today would even consider a termination on similar grounds.

2. Showing a Connection between the Off-Duty Conduct and the Employee's Work and Ability to Perform Official Duties

Decision makers tread on thin ice when attempting to define and then enforce morality. Consequently, courts and arbitrators require employers to prove a nexus between the off-duty conduct and the job. The California Supreme Court in *Morrison v. State Board of Education*[42] recognized that terms such as "immorality" are highly subjective, so it established unfitness for duty standards now used by many other courts and arbitrators. To determine whether conduct indicates a teacher's unfitness for duty, the court said it would examine:

1) the likelihood that conduct may have adversely affected students or fellow teachers;
2) the degree of such adversity;
3) the proximity or remoteness in time of the conduct;
4) the type of teaching certificate held by the party (or the ages and maturity of the students);
5) the extenuating or aggravating circumstances, if any;
6) the praiseworthiness or blameworthiness of the motives resulting in the conduct;
7) the likelihood of the conduct would recur; and
8) the extent to which punishment would affect the constitutional rights of the teacher or other teachers.[43]

In *Morrison*, the court was called upon to decide whether a male teacher with a clean criminal record and an impeccable record as a teacher should lose his teaching credentials due to homosexual conduct outside of the workplace. The petitioner had, in the course of providing informal marital counseling to a male friend and colleague, engaged in sexual contact with this colleague. This colleague ultimately reported it to the school, prompting the petitioner to resign. Over a year later, the State Board of Education revoked the petitioner's teaching credentials.[44] In reversing the revocation decision, the court held that the board had not come forward with sufficient evidence to demonstrate the petitioner's unfitness to teach. Relying on the unfitness factors, the court reasoned that the sexual conduct was a six-year-old isolated incident that was already three years old when the credentials were revoked. Moreover, the petitioner's motives "involved neither dishonesty nor viciousness, and the emotional pressures on both petitioner and [his colleague] suggest[ed] the presence of extenuating circumstances." Finally,

the court found no evidence that the petitioner's "ability to command the respect and confidence of students" would be impaired.[45]

The D.C. Circuit Court of Appeals has similarly warned that a public employer enters dangerous territory when it attempts to determine standards of morality.[46] The court held that the nexus standard is critical to curbing government excess:

> The rational nexus requirement is perhaps nowhere more important than where an adverse action is taken against an individual on the basis of lawful, consensual, social behavior that is considered by his superiors to be "immoral" or "notoriously disgraceful." Without the limitations provided by the nexus requirement, such a standard would give the [government] free reign to purge itself of persons found to be distasteful . . . A pronouncement of "immorality" tends to discourage careful analysis because it unavoidably connotes a violation of divine, Olympian, or otherwise universal standards of rectitude.[47]

Whether there is a nexus between the conduct and employment will depend on the work of both the employer and employee. An IRS employee who fails to file a tax return can be disciplined by her employer because she is supposed to be a role model on tax compliance.[48] Similarly, a HUD employee charged with enforcing federal housing laws can be disciplined for being a slum landlord while off-duty.[49] Conversely, a librarian would likely not face discipline by her employer for either offense. But a driver's education teacher arguably would be more likely to face discipline for an off-duty DUI conviction than a physics teacher.[50] Disciplinary actions based on off-duty conduct trigger a factually intensive, case-by-case analysis.

3. Applying the Nexus Test in the Electronic Frontier

Three recent dismissal decisions with varying outcomes are illustrative of the challenges facing public employees when their private behavior is publicly exposed.

First, an elementary school in L'Anse Creuse, Michigan terminated a teacher for her behavior over the summer at a couple's joint bachelor-bachelorette party.[51] At a notorious outdoor summer party area, mannequins were rigged to allow party goers to drink shots of alcohol while appearing to perform oral sex on the mannequins.[52] Unbeknownst to the teacher and without her permission, someone took pictures of her making it appear she engaged in oral sex in a public area.[53] The pictures were uploaded to a website about the party area.[54] Two years later parents discovered the website, and students, community members and school staff viewed the pictures.[55] When questioned by the school administration, the teacher said what she did off school property and off school time was "not anybody's business."[56] The teacher expressed no regret or remorse; although, after the dispute escalated she wrote to the website operator and asked that the photographs be removed.[57]

The teacher's discipline and termination was entirely based on the school's claim that the teacher engaged in immoral and unprofessional activity that was contrary to the school's sexuality curriculum and was in disregard for her responsibilities as a role model.[58] Under the Michigan Teacher Tenure Act, the school suspended the teacher with pay pending the outcome of the dismissal hearing.[59] Two cases resulted: a grievance arbitration and a teacher tenure hearing. As to the grievance proceeding, the Michigan Education Association grieved the teacher's suspension; and, arbitrator William Daniel found that the school could not establish just cause for any discipline.[60] However, in the end, the arbitrator held that the paid suspension was not grievable since the school was acting in accordance with the Teacher Tenure Act.[61]

Even so, when evaluating the merits of the school's conduct regardless of whether the suspension was grievable, the arbitrator found that the school would not have just cause to discipline her for her "adult activity of a salacious nature" because the teacher's activity did not involve the school or her capacity to teach.[62] After the grievance hearing, the school terminated the teacher, clearly disregarding the grievance arbitrator's opinion that such discipline would not be for just cause.[63] Once discharged, the teacher appealed her dismissal at the Michigan State Tenure Commission.[64] Much like the school, the Tenure Commission did not consider the arbitrator's decision; however, similar to the arbitrator, the Commission concluded that the teacher's behavior "was not professional misconduct."[65] The Commission did not doubt the sincerity of the school community's objection to the teacher's conduct, but when evaluating the circumstances surrounding the teacher's actions, the Commission found the conduct did not involve a school activity, students or teaching obligations.[66] The activity was not illegal,[67] it harmed no one and there was no evidence that children were present. Further, the teacher never discussed her activity while at school.[68] The Commission ultimately concluded that since the teacher's acts were not misconduct, the negative publicity concerning those acts was irrelevant.[69] Thus, the Commission ordered the school to reinstate the teacher with backpay.[70]

In a similar case, a school district in Warren City, Ohio dismissed a high school teacher whose nude pictures were posted on the Web by his estranged wife.[71] Early in the

teacher's marriage, he had posed for a picture in the couple's bedroom while "exhibiting an exaggerated smile with his hand on his erect penis."[72] As the marriage deteriorated, his wife threatened to embarrass him at work with the photos.[73] The teacher later learned from a fellow high school teacher that more nude pictures appeared on a MySpace site which had been created, presumably by the ex-wife, using a name similar to his.[74] The site stated that he desired to party with "girls, guys or goats" and included multiple false blog entries, designed to embarrass the teacher.[75] In addition, the photos were uploaded to two dating sites.[76] Students printed the photos, the local newspaper identified the websites and the pictures were posted on the front door of a local pub.[77] Four days later, the teacher began efforts to shut down the websites.[78] However, the teacher's efforts could not curtail the harm already caused by all of the photos and statements.[79]

In response, the school board placed the teacher on home assignment and launched an investigation into the teacher's online activity.[80] During the investigation, the school board found, that in addition to the ex-wife's salacious conduct, the teacher admitted he twice inappropriately used the school district's email server.[81] The first incident involved an email to his wife which included a picture of the couple's "baby daughter with superimposed adult naked female breasts."[82] The second email was of an article about orgasms and sexual health.[83] Based on both the publicity of the nude photos and the impropriety of the teacher's two emails, the school board terminated the teacher's contract, and the teacher grieved his dismissal.[84]

Arbitrator Thomas Skulina had "no doubt in my mind that a frontal nude photograph of a male with a supercilious grin and his hand on his erect penis qualifies as immoral, aka obscene."[85] The obscenity, though, was not the basis for the arbitrator's decision, and he later qualified his judgment by saying it would not be proper for an arbitrator "to opine about the morality of the photo play of this married couple in the privacy of their bedroom."[86] Instead, the arbitrator concluded that the teacher's actions and inactions after the photo was taken justified his dismissal.[87]

More specifically, the arbitrator determined that a person holding a "responsible position at his place of employment" has a duty to "secure obscene photos of himself."[88] He also faulted the teacher for not hiring an attorney to help him get the photos or to legally restrain his wife from disseminating them.[89] The teacher made a *pro se* effort to get an order of protection, but did not attempt to get an order regarding the pictures and did not make any disclosure about the pictures to the prosecutor.[90] Further, the arbitrator faulted the teacher for not warning his principal about his wife's threats to use the pictures and for the teacher's failure to get help from the principal or from the computer experts at the school.[91] Thus, the arbitrator's final conclusion rested not only on the content of the photos, but rather on the publicity of the photos and the lack of effort on the teacher's part to rein in that publicity.[92]

Both of these cases show that behavior occurring far away in place and time from the workplace can intrude into the workplace because of third parties' use of the internet. The "offense" in both cases was very similar – photos of teachers engaged in sexual activity. However, the Warren City teacher had advanced warning that the pictures could be disclosed, while the other teacher was blindsided. Critically, the Warren City teacher did not take any action to prevent the disclosure of the picture or to warn his employer that the disclosure might occur.

Similarly, the arbitrator in *Washington Metropolitan Area Transit Authority* determined that the actions which an employee takes to mitigate the harm of an electronic communication may be critical to a just cause analysis.[93] Here, the employee, a white Washington, D.C. Metropolitan police officer, received a racially and sexually offensive "joke" from a friend as a text message on his phone.[94] The officer believed that he deleted the message from his phone.[95] Instead, while off-duty, he had inadvertently forwarded the message to his wife, in-laws, co-workers and others.[96] After his displeased wife told him what he had done, he attempted to find out whom he had sent the message to so that he could apologize.[97] Most notably, the officer had inadvertently forwarded the racially offensive text message to an African-American co-worker.[98] Understandably, the co-worker who received the message was highly offended.[99]

Seeking forgiveness, the police officer immediately apologized to the co-worker and attempted to do so again later in the day.[100] However, once the department's Division of Professional Responsibility and Inspections found out about the racially charged text message, the officer was fired for discrediting himself and his department.[101] The officer's union grieved the termination, but the arbitrator concluded that this set of facts created a sufficient nexus to the workplace because the offensive message went to a co-worker.[102] The arbitrator, though, reduced the dismissal to a suspension because the action was inadvertent and because the employee immediately apologized and sought forgiveness.[103]

V. Conclusion and Words of Advice

To attract and retain talented employees in a world wired and webbed, employers must recognize the importance of a host of new boundaries. Employers are con-

fronted with lines between work time and personal time, between work space and personal space that are more blurred than ever before. Because of this difficulty, the employer can no longer tightly control its image or its message.

On the other side of the equation, employees need to understand that today's employer may be uncomfortable in this new reality. Given the recent focus on the nexus test, employees need to know when they are potentially harming themselves or their employer. The speed and distance at which messages are broadcast requires that employees be vigilant at protecting their own image by acting quickly when their employment may be adversely affected.

So what advice does an education union lawyer give union members about their off-duty conduct on the internet? As with other legal issues, the client first needs to fully assess the value that he or she places on the activity: What pleasure or gain are you receiving? Then, the client should fully assess the risks associated with the activity: How can this activity put your employment at risk? Based on the calculation of both value and risk, the client can come to a decision about what conduct they choose to partake in. The following are a few tips to help public employees reduce liability by being mindful of the new risks presented by the increasingly technological workplace:

1. Know the employer's rules and follow them. If you are using your employer's resources, understand and abide by the Acceptable Use Policy. A large percentage of employee misuse occurs, not because the employee intends to disobey the employer, but rather because the employee does not know the rules about computer usage. If you are required to sign a policy about technology use, then you should fully read or understand this policy, ask questions about confusing language or unstated issues and retain a copy of the rules for reference when questions later arise.

2. Assume you have no privacy regarding computer postings and email when you use your employer-sponsored system. Only post information that you would feel comfortable reading on the front page of your local newspaper.

3. Carefully determine what image you want to display to your various work acquaintances and take steps to control those images available to your business affiliations. For teachers, this means maintaining professional boundaries with students, parents, and other teachers. For police officers, this means maintaining similar boundaries with your fellow officers and with the public. If you have personal pages on social networking sites, consider creating a separate one that is open to students and parents. Do not give students access to your other profiles. So long as you do not have an interest in showing the world your life, keep access to your personal pages exclusive to only your friends, family, and other persons whom you actually know. Set the same professional boundaries on-line that you do in the classroom. If you wouldn't talk about last night's party in front of your class of students, then don't post a description of the party on a personal page which is open to the public at large.

4. Recognize generational differences in communication styles. Some older readers (i.e., supervisors, parents) may be dismayed about the personal information younger employees are willing to publicly disclose. Don't wait to evaluate the content of your information until it is too late (i.e. after your supervisor has suspended you for a personal story that you initially thought was appropriate.)

5. With the internet, prevention is key. Addressing a comment before it is posted is the best way to control it. Information on the internet can spread throughout the community and the world with more speed than an infection spreads through the body. Remember that it may be easier to get rid of a tattoo than it is to remove a comment that you have posted on the Web.

6. Don't visit sites or access emails of even a remotely questionable nature while using any computer that may be subject to an investigation. This tip works only to the extent that you follow Tip #1, knowing the Acceptable Use Policy (i.e. knowing which computers may be subject to search). A "deleted" computer file, including e-mail, can often be accessed by an experienced investigator and may even reveal how much time was spent accessing or viewing certain sites.

7. Assume that information posted on the internet, even information on a private profile with limited access, is accessible to everyone you know and, more importantly, by those you don't know. You may not know everyone who is viewing your site. In fact, this is quite likely. Assume students, parents, colleagues, and supervisors may gain access at some point. Even private social networking profiles may be cached by someone who has access to the profile, and then disclosed to others who may not have direct access or permission from you.

8. Assume that no posting is anonymous. Supposedly anonymous postings could be traced back to you. Unless a person is an expert at using the most advanced software and techniques available, a posting leaves a trail back to the computer from which it was posted. Your internet service provider or website owner could be subpoenaed to indentify you as the one who posted the content. Once again, a comparison to the real world is appropriate: you would not

assume that wearing a ski-mask would entirely prevent a later investigation from discovering your identity, so don't assume that leaving your name off of an internet post is a foolproof method of concealing your identity either.

9. "Investigate" yourself to see what others might find if they did their own investigation. Perform regular searches to locate on-line records about you, and attempt to remove negative information. Typing your name into the search engine "Google" is a common practice by employers and could reveal personal or even false information about you. Once you find information, you can take steps to change or delete the information that you do not wish displayed. For example, many web hosts such as MySpace will assist educators and others in removing false or offensive profiles by sending an email to schoolcare@myspace.com. Similar services are offered by other websites. ♦

If you would like to participate in a discussion of the issues raised in this article, please go to http://www.facebook.com/pages/Illinois-Education-Association/31105432855#/topic.php?uid=31105432855&topic=6299. You will need a Facebook profile to join the discussion. I look forward to your ideas, reactions and suggestions to this topic. See you on the Web!

Notes

1. Facebook is a social networking website that allows users to join networks organized by city, workplace, school and region to connect and interact with other people. Users of Facebook can add friends and send them messages and update their personal profile to notify friends about themselves. *Wikipedia*, http://www.wikipedia.org/wiki/Facebook.
2. Facebook "friends" are individuals on facebook who have access to another member's profile and Facebook page. Before a member's profile can be viewed, the member requires that the viewer become a virtual "friend."
3. National School Boards Association, *Creating & Connecting/Research and Guidelines on Online Social and Educational Networking*, (2007), http://www.nsba.org/SecondaryMenu/TLN/Creatingand Connecting.aspx.
4. Blackberry is a wireless handheld device which allows users e-mail, text message, internet, fax, web browse and mobile telephoning capabilities. *Wikipedia*, http://en.wikipedia.org/wiki/Blackberry (last updated Nov. 8, 2008).
5. "Smartphones" is the term used to describe mobile phones offering advance capabilities beyond a typical mobile phone, such as e-mail, internet capabilities, and/or a full keyboard. *Wikipedia*, http://en.wikipedia.org/wiki/Smartphone (last updated Nov. 6, 2008).
6. *See* Black Book PR & Communications, *Residential Internet Services: At Home with Generation Y*, (Aug. 19, 2008), http://www.itweb.co.za/office/ysl/080819093 8.htm (Generation Y employees demand faster internet connections at home to do more work at home); Emily Jesper, *Bright Side of Life*, (Oct. 14, 2008), http://www.fastcompany.com/blog/emily-jesper/gen-y-perspective/bright-side-life (lines blurred between work and play for Generation Y). *See also Gen Y and Boundaries (or Lack Thereof)-Part 1*, (Aug. 24, 2008), http://onboardinggeny.com/gen-y-and-boundaries-or-lack-thereof-part -1/ (career counselor advises employers that Generation Y employees blur time and space between work and private life.
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15. *Requa v. Kent Sch.* Dist. 415, 492 F.Supp.2d 1272 (W.D. Wash. 2007).
16. 302 F.3d 868 (9th Cir. 2002).
17. *Id.* at 872-73.
18. *Id.* at 884.
19. 224 F.3d 928 (7th Cir. 2003).
20. 720 ILCS 5/14-1 to 5/14-6.
21. 504 F.Supp.2d 339 (N.D.Ill. 2007).
22. *Id.* at 347.
23. *Id.*
24. *Id.* at 348.
25. *See Muick v. Glenayre Electronics*, 280 F.3d 741, 743 (7th Cir. 2002).
26. 529 F.3d 892 (9th Cir. 2008).
27. *Id.* at 895.
28. *Id.* at 896.
29. *Id.* at 897.
30. *Id.* at 897-98.
31. 18 USC §§ 2701-11.
32. *Quon,* 529 F.3d at 903.
33. *Id.* at 910.
34. *See generally* Susan J. Willenborg, *Labor Relations in the Public Sector Electronic Workplace*, 25 Ill. Pub. Emp. Rel. Rep., Summer 2008, at 1.
35. 125 L.A. 257 (2008) (Daly, Arb.).
36. *Id.* at 263.
37. *Id.* at 258.
38. *Id.* at 264.
39. *Id.* at 266.
40. 105 ILCS 5/10-22.4 (2008).
41. *Reinhardt v. Bd. of Ed. of Alton Cmty. Unit Sch. Dist. No. 11*, 19 Ill.App.3d 481, 311 N.E.2d 710 (5th Dist. 1974).
42. *Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969).
43. *Id* at 386.
44. *Id.* at 377-78.
45. *Id.* at 392.
46. *Hoska v U.S. Dept. of the Army*, 677 F.2d 131 (D.C. Cir. 1982).
47. *Id.* at 145 (citing *Norton v. Macy*, 417 F.2d 1161, 1165 (D.C. Cir.1969)).
48. *See Bennett v Dept of Treasury*, 2005 MSPB LEXIS 6655 (2005).
49. *See Wild v U.S. Dept. of Housing and Urban Dev.*, 692 F.2d 1129 (7th Cir. 1982).
50. However, in *Stanbeck v. Summitt*, 1995 WL 370241 (Tenn. Ct. App 1995), a drivers education instructor who was convicted of DUI and had his licensed revoked was reinstated to his teaching position by the court. The court held that there was no evidence that the conviction affected the instructor's teaching capabilities or effectiveness.
51. *Land v. L'Anse Creuse Pub. Sch. Bd. of Educ.*, Docket No. 07-54, 1 (State of Mich. State Tenure Comm'n, 2008), available at <http://web1mdcs.state.mi.us/NXT/gateway.dii?f=templates&fn=default.htm&vid=mdoeal:public>.
52. *Id.* at 4.
53. *Id.*
54. *Id.* at 5.
55. *Id.*
56. *L'Anse Creuse Public Schools*, 125 L.A. 527, 528 (2008) (Daniel, Arb.).
57. *Id.*
58. *Id.* at 528-29; *see supra* note 51.
59. 125 L.A., at 528.
60. *Id.* at 530.
61. *Id.* at 530-31.
62. *Id.* at 530.
63. *Supra* note 51.

64. *Id*.
65. *Id*. at 7.
66. *Id*. at 5-7.
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69. *Id*. at 6-7.
70. *Id*. at 10.
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72. *Id*. at 534.
73. *Id*.
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76. *Id*.
77. *Id*. at 534-35.
78. *Id*. at 535.
79. *Id*.
80. *Id*.
81. *Id*.
82. *Id*.
83. *Id*.
84. *Id*. at 532, 535.
85. *Id*. at 536.
86. *Id*.
87. *Id*. at 536-37.
88. *Id*.
89. *Id*.
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91. *Id*.
92. *See id*.
93. *Wash. Metro. Area Transit Auth*., 124 L.A. 972, 978 (2008) (Evans, Arb.).
94. *Id*. at 973.
95. *Id*.
96. *Id*.
97. *Id*.
98. *Id*.
99. *Id*.
100. *Id*. at 973-74 n.2.
101. *Id*. at 973-74.
102. *Id*. at 976 n.9.
103. *Id*. at 978. ♦

Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes, and the equal employment opportunity laws.

IELRA Developments

Confidential Employees

In *Midwest Central Community Unit School District 191 v. Midwest Central Education Association, IEA-NEA*, Case No. 2008-UC-0004-S (IELRB 2008), the IELRB found that the district's Data Director was not a confidential employee under Section 2(n)(i)-(ii) of the IELRA.

The Data Director's essential function was "to operate, coordinate and supervise all aspects of the MCUD Local Area Network (LAN) and the MCUD link to the CivicNet Wide Area Network (WAN) to provide fair and equitable access to electronic resources for all MCUD students and staff." According to the job description, "confidentiality in terms of passwords, log-ins and student/staff private information is essential."

The district argued that the Data Director's duties resulted in unfettered access to all district computer files, including those containing collective bargaining and personnel information. The district further maintained that the Data Director's role in several specific investigations demonstrated the position's access to sensitive confidential material. This investigatory and reporting role, the district contended, rendered the Data Director a confidential employee.

Under the labor nexus test of Section 2(n)(i), confidential employees are those whose duties entail "assist[ing] and act[ing] in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations." The IELRB found the Data Director's investigatory duties insufficient to satisfy the labor nexus test.

The Board held also that the Data Director was not confidential under the access test, which requires "unfettered access ahead of time" to information concerning "pending collective-bargaining policies." Collective-bargaining policy information would include the district's strategy in an organizing campaign, bargaining proposals, or contract administration information. The IELRB applied the factors from *Board of Control of Lake County Area Vocation System*, 20 PERI 5 (IELRB 2004): "1) whether there is evidence of actual access to confidential collective bargaining information in the regular course of duties; 2) job description; and 3) the employee's day-to-day activities." Actual access is defined as "real" and not simply "incidental" access in the regular course of an employee's duties.

The district failed to establish the Data Director had actual access to confidential collective bargaining information. Specifically, the employee's duty to examine confidential financial and other files in the course of an investigation failed to reveal access to information regarding organizing campaigns, district bargaining proposals, or contract administration information. Further, the Data Director job description mentioned confidential information, but did not reference labor relations information. Finally, the district failed to demonstrate that the Data Director's access to confidential labor relations information in her day-to-day activities is "real" or anymore than "incidental."

IPLRA Developments

Duty to Bargain

In *Harvey Park District v. American Fed'n of Professionals*, 24 PERI 110 (Ill. App. Ct. 4th Dist. 2008), the Fourth District Appellate Court upheld the ILRB State Panel's dismissal of an unfair labor practice charge against the union where it refused to sign a collective bargaining agreement after the union membership voted against ratification.

In July 2005, the union was certified as the exclusive bargaining representative of certain park district employees and the parties began negotiations. When the parties reached an agreement, the union submitted the contract to a membership vote which failed to ratify. The union informed the employer of the failure to ratify and requested that the parties resume bargaining. The employer refused, demanded the union sign the agreement and filed the unfair labor practice charge alleging violation of sectins 7 and 10(b)(4) of the IPLRA.

The court affirmed the ILRB's dismissal of the change, concluding that although the IPLRA does not require a ratification vote, the union's constitution required ratification before signing any agreement. The court rejected the employer's argument that negotiators are presumed to have authority to negotiate and agree to any agreement, unless such right is "clearly,

unequivocally, and expressly preserved at the bargaining table." The court provided five grounds for rejecting this assertion: (1) there was no past history indicating that ratification was not necessary, (2) the parties did not identify ground rules for the bargaining sessions, (3) the union's constitution required ratification by the membership, (4) no union representative stated that he was not bound by a majority ratification and (5) the employer did not act in a way to clarify the union representative's authority.

Supervisors

In *Village of Hazel Crest v. ILRB*, 24 PERI 106 (Ill. App.Ct.1st Dist. 2008), the First District Appellate Court reversed an ILRB State Panel decision and held that village police sergeants were statutory supervisors within the meaning of the IPLRA. The police department was headed by a police chief with two deputy chiefs. Five sergeants sought representation. Sergeants were assigned to a patrol shift and during that shift performed administrative functions and patrolled the streets. Each sergeant oversaw the work of about four patrol officers, and continually monitored subordinates, documenting wrongdoing and completing performance evaluations. Sergeants had authority to discipline subordinates through training, counseling and verbal warnings.

The evidence demonstrated that the sergeants exercised discretion to counsel, train and issue verbal warnings to subordinates for minor infractions. All verbal warnings were documented in a log book and remained for two years during which time the log book could be referred to in evaluations.

The court found that the ALJ gave no weight to evidence of the sergeants discretionary authority to discipline subordinates for minor infractions. The ALJ concluded that because all disciplinary action sergeants took against subordinates needed to be reported to the police chief, the sergeants did not have discretion to discipline.

The Appellate Court noted that with respect to police employment, a statutory supervisor need not devote a preponderance of his employment exercising supervisory functions. According to section 3(r), a police officer is a supervisor if he (1) performs principal work substantially different from that of his subordinates; (2) has authority in the interest of the employer to perform one or more of the 11 supervisory functions or to effectively recommend such action; and (3) consistently uses independent judgment in performing or recommending the enumerated actions.

In applying *City of Freeport v. ISLRB*, 354 135 Ill. 2d 499, 554 N.E.2d 155 (1990), the court concluded that the verbal reprimands issued by the sergeants met the definition of discipline because the reprimands were documented in the police department's logbook and were referred to for future discipline. Although *City of Freeport* established that the verbal reprimands must be documented and placed in an employee's personnel file, the Appellate Court did not distinguish placement of the reprimands in the logbooks as opposed to in personnel files.

The court rejected the union's position that the sergeants did not exercise independent judgment in recommending greater discipline where those recommendations were independently reviewed by the deputy chief and chief. The court did not find it significant that in a para-military organization recommended discipline would be reviewed by superiors and stated that "a recommendation need not be rubber-stamped to constitute discipline within the meaning of Section 3(r) of the Act." The village had presented evidence that the sergeants recommended greater discipline in two instances and although the ALJ concluded that the infrequency of such action indicated that the authority was not exercised consistently, the court disagreed. Again citing *City of Freeport*, it noted, "[i]t is the authority to use independent judgment imposing discipline, rather than how often such discipline is imposed, [that] is important." The Court concluded that the sergeants were exempted from the IPLRA as statutory supervisors.

EEO Developments

Disability Discrimination

On September 25, 2008, President Bush signed the ADA Amendments Act of 2008 ("Act"). The Act, which takes effect on January 1, 2009, aims to restore to the definition of "disability" under the ADA the broad remedial scope that Congress originally intended.

The Act retains the three-prong definition of "disability" as originally enacted in the ADA in 1990: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." In the Act's Findings and Purposes Section, Congress expressly rejected the Supreme Court's determination in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002), that the terms "substantially" and "major" in the definition of "disability" "need to be interpreted strictly to create a demanding standard for qualifying as disabled." The Act requires the "definition of disability to be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."

As to this first prong, the Act significantly expands the meanings of "substantially limits" and "major life activities." Substantial limitation under current Supreme Court precedent requires an impairment that "prevents or severely restricts" an individual from performing major life activities. Additionally, the Court requires one to be "presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999). Finally, the Court requires lower courts and the EEOC to consider mitigating measures since an impairment "corrected by mitigating measures" does not "substantially limit." In *Sutton*, the plaintiff had severe visual myopia that could be corrected to perfect 20/20 vision with glasses. The Court held the myopia was not a disability because with the mitigating measure of glasses, the plaintiff was not

presently substantially limited. The Court's holding was expanded in the companion case of *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999), that the mitigation rule applied not only to "artificial aids," but also to "measures undertaken, whether consciously or not, with the body's own systems."

In the Act's Findings and Purposes Section, Congress expressly rejects the Court's "prevents or severely restricts" definition of substantial limitation as well as the EEOC's definition of "significantly restricted." However, the Act fails to substitute an alternative definition. Rather, Congress has opted to punt the issue to the EEOC, charging it to "revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act." The Act effectively limits the *Sutton* case to its facts by effacing the requirement of considering mitigating measures except for the "ameliorative effects of . . . . ordinary eyeglasses or contact lenses." The Act mandates that the "substantially limits" determination "shall be made without regard to the ameliorative effects of mitigating measures." The Act is very specific in illustratively listing artificial mitigating measures that shall not be considered in ascertaining whether an impairment is substantially limiting, including: medication, medical supplies, prosthetic limbs, low-vision devices, mobility devices, and oxygen therapy equipment. Natural mitigat-ing measures, explained in the Act as "learned behavioral or adaptive neurological modifications," may also no longer be considered in the "substantially limits" analysis.

Under current Supreme Court precedent, "major life activities" are those that are of "central importance to most people's daily lives." The Act enumerates the following volitional major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Also enumerated are non-volitional major bodily functions, including functions of the: immune system, normal cell growth, digestive system, bowels, bladder, neurological system, brain, respiratory system, circulatory system, endocrine system, and reproductive system. Neither of these lists is exhaustive, and the Act admonishes against strict interpretations of the word "major." Congress expressly rejects the Court's strict interpretation of "major life activity" as needing to be "of central importance to most people's daily lives."

Perhaps the Act's most sweeping changes are to the "regarded as" prong of "disability." To be regarded as disabled, the Supreme Court has required that either an employee be (1) wrongly perceived as having an impairment that substantially limits performance of a major life activity or (2) wrongly perceived as being substantially limited by an actual impairment that does not actually limit the employee substantially. In both scenarios, the employer must perceive a substantial limitation and discriminate against the employee on the basis of that perception. Ostensibly, the Court has presumed the "regarded as" prong defines "disability" in the same manner as under the first prong. The ADA Amendments Act turns the foregoing analysis on its head.

Under the Act, an employee is regarded as disabled whenever subjected to discrimination based on an "actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*." This language is a fundamental change in the "regarded as" prong and is indicative of the Act's complete paradigm shift to expansive coverage. Now an employee must merely demonstrate the employer perceived an impairment and discriminated because of it.

Genetic Discrimination

Effective November 21, 2009, the federal Genetic Information Nondiscrimination Act of 2008 ("GINA") prohibits employers from failing to hire, discharging, classifying, segregating, or discriminating against an employee because of genetic information. GINA also prohibits employers from requesting, requiring, or purchasing an employee's genetic information, except where necessary to comply with the Family and Medical Leave Act, or to genetically monitor the effects of toxic substances in the workforce, or to perform DNA analysis for law enforcement purposes at a forensic laboratory.

GINA adopts Title VII's definition of employer, which includes all employers that have fifteen or more employees each working day for at least twenty weeks out of a year. GINA also adopts several Title VII procedures, including requirements for administrative filings with the EEOC, and Title VII remedies, including attorney's fees and equitable relief. GINA also includes a no-retaliation provision comparable to that found in Title VII. Jury trials are available in GINA cases.

There are several areas of concern for employers regarding the use of biometrics (genetic and other unique physical identifiers like retinal scans), including protecting the data from identity theft and protecting the equipment from employee vandalism or manipulation. GINA increases these concerns due to its broad definition of genetic information, which includes genetic test results for individuals and their families, the manifestation of a particular disease or disorder in a family member, and participation in genetic research and requests for genetic services. Employers could unintentionally acquire such information while trying to accommodate employees under the ADA or with non-FMLA leave.

GINA allows disclosure of genetic information only in limited circumstances: to the employee upon request, to a health researcher, as directed by a court order, to a government official investigating compliance with GINA, or in connection with federal and state family and medical leave statutory provisions. In all other circumstances, employers may be liable for inadvertent disclosure of employee genetic information. ♦

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