



YOU HAVE ZERO PRIVACY – GET OVER IT

By: Jim Astrachan

How much privacy should an employee expect relative to e-mails sent over his employer's e-mail system?

"These are crazy times", the development manager complained to me by telephone. "I supervise an employee whom I think is capable of violent acts. Not only capable, but maybe even planning something. And I'm responsible for the well being of a lot of folks."

My eyebrows reached for the ceiling. "You really know that this employee is thinking of doing something that would endanger other employees?" I asked.

"I do", she shot back. "This employee's immediate supervisor gave me a copy of a confidential e-mail the employee mailed to her. I think the employee's nuts. Yeah, she could be violent, and I can't chance that."

The problem was whether the employee's right of privacy had been invaded by the reading and limited publication of the email she had sent to her supervisor. Even if she had

rights of privacy, should the employer invade these rights for the good of its other employees?

The problem was compounded by assurances made by the employer to its employees that their e-mails would not be read, and even if they were read, that the company would not use the contents of the e-mails to reprimand, demote or terminate the employee sender. What advice do you provide under these circumstances? Does the employee have a right of privacy in her e-mail, exacerbated by the Company's assurances? Can the employee be fired?

"What did she write in the e-mail?" I asked the supervisor, trying to find time to organize my thoughts.

"Well, she referred to the upcoming company holiday party as the 'Jim Jones Kool-Aid Party'. She also threatened to 'kill the back-stabbing bastards.'" It's just not funny, and I am a little frightened."

Fine. Her supervisor really felt that the employee must be removed from the company and quickly. And the supervisor was adamant that the e-mail be provided to upper management and used as the basis for the employee's termination. Could the e-mail be used as the reason to terminate the employee without subjecting the company to a massive lawsuit? Or to put it another way, exactly what right to privacy can an employee

reasonably expect when she uses the company's e-mail system to send an e-mail that she has been told will not be read and published to her detriment?

The question, then, is whether the employer had violated the employee's right to be free from 'intrusion upon her seclusion', a tort defined by the Restatement (Second) of Torts as

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

I knew that at least one court had dealt with exactly this question. A United States District Court in Pennsylvania began its analysis of this issue by adopting a balancing test under which the employee's privacy interest was weighed against the needs of an employer to provide a drug and violence free workplace for the safety of its employees. The court also examined the nature of the way in which the employee's privacy was invaded, recognizing that invasions can range from requiring a blood or urine sample to lifting a telephone off its cradle and listening to a conversation.

"This employee is not likely to successfully assert she has a reasonable expectation of privacy in an e-mail she voluntarily sent to her supervisor", I said. I reasoned that once the employee communicated the offending remarks to her supervisor over the company's e-

mail system utilized by the entire company, any reasonable expectation of privacy should be lost. There was no offensive, invasive act by the employer. No requirement that the employee disclose personal, private information. Instead, the employee made a voluntary communication. "Nah. I don't think a court would find she has a privacy interest in the e-mail", I concluded.

"Even if a court were to conclude that she has an expectation of privacy, I still don't think it would consider that limited publication to upper management for safety reasons, would be considered by any reasonable person to be a substantial and highly offensive invasion of her privacy", I ventured, thinking that there is no unreasonable invasion of privacy as there might be if the employer demanded a blood or urine test or videotaped a locker room.

Finally, weight must be accorded the employer's substantial interest in preventing unprofessional and inappropriate, or worse, behavior. This weight, under proper circumstances, is heavier than the employee's right to privacy under the same circumstances.

I told the supervisor there were two important steps the company should take to avoid liability in the future. First, there was no reason to communicate a policy that the company would maintain as confidential all e-mails sent over its system. This policy must be eliminated. Second, the employer should adopt and communicate to its employees a policy of monitoring all Internet use and e-mail communications.

There may be circumstances that differ from these, say for example, when an employer decides to read an e-mail sent by one employee to another before it is read by the intended recipient. Then, a myriad of federal and state laws may apply, such as the U.S. Electronics Communications Privacy Act, and these must be carefully considered as they have needle-sharp teeth. Violation of ECPA, for example, can result in imprisonment for five years and a \$10,000 fine.

"Thank you, but no, I will not be able to attend the company's holiday party. I'll be out of town." I lied. Your party is way too dangerous, I thought.

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