

## **Harassment Prevention in the Workplace via Email Monitoring/Filtering**

Most enlightened organizations strive to maintain a “zero tolerance” policy against racial and sexual harassment in the workplace. Despite those goals, ever-changing legal definitions and the lack of foolproof methods for monitoring employee activity fuels the seemingly endless string of civil and criminal actions filed against well-meaning employers for harassment, discrimination and workplace violence complaints.

In the latest twist, Courts have determined that an “office affair” between willing participants constitutes sexual harassment towards other employees who were not even involved in the affair.

Take the case of two female employees of a California State correctional facility who sought damages in a sexual harassment suit because their supervisor was involved in sexual affairs with several of the plaintiffs’ co-workers. In [Miller v. Department of Corrections](#), the Court ruled that even though the plaintiffs themselves were not the subject of direct sexual harassment, *"the demeaning message is conveyed to female employees that they are viewed by management as 'sexual playthings' or that the way required for women to get ahead in the workplace is by engaging in sexual conduct"* constituted sexual harassment under the law.

The implications of this ruling are far reaching in that it establishes a de facto requirement for employers to monitor the social lives of their employees in so far as those social lives spill into the workplace. What other seemingly personal activities, thoughts, or opinions can the courts interpret as harassing or threatening? Is the fact that our electronic communications are spilling over from personal space to the workplace becoming a cause for concern?

While jury awards for significant workplace harassment actions averaged around \$500,000 in the early 1990s, juries are increasingly upping the costs of ignoring serious workplace harassment as evidenced in the 1994 case of *Weeks v. Baker & McKenzie* where the jury awarded the plaintiff \$7.2 million for being sexually harassed by a partner in her employer’s law firm.

In [Gober v. Ralphs Grocery Company](#), an astounding \$30.6 million was awarded in a sexual harassment action.

In the 2005 case of *Marcisz, et. al v. UltraStar Cinemas*, a jury awarded the teenage female plaintiffs a total of \$6.8 million for experiencing sexual harassment from the managers of a movie theatre where the teens were employed.

[EEOC Figures](#) show that \$582 million dollars were paid out in harassment and discrimination fines and penalties for the period of FY 1992 – FY 1994.

Penalties, settlement costs and legal fees can sting the largest employers and totally destroy smaller ones.

### **What about *invisible* harassment?**

Although it is difficult to imagine that the warden of a major correctional institution would be able to engage in sexual harassment without his supervisors being alerted by some disgruntled subordinate, or that supervisors could consistently engage in a pattern of ongoing sexual harassment as seen in the other cases cited, there are less obvious forms of “invisible” harassment that are actually more pervasive in the workplace than those depicted here so far.

Rapidly expanding technology and the existence of the Internet have created new workplace harassment dangers that didn’t even exist a decade or so ago. One of the most common examples of this new generation of threats in the workplace involves e-mail.

E-mail usage is not slowing down; Gartner projects the e-mail archiving market to grow at a 57 percent compound growth rate through 2007.<sup>1</sup> What makes e-mail a particularly pervasive harassment vehicle is that so much of it consists of off-color and racial jokes, pornography, and other potentially actionable content. In many cases these messages are either ignored by management or, worse, encouraged by managers who participate in the harassment by either initiating improper e-mail messages, or forwarding improper e-mail messages to co-workers and subordinates.

### **Beyond Quid Pro Quo**

There are two types of sexual harassment claims that can be brought against an employer under Title VII of the Civil Rights Act of 1964. A *Quid Pro Quo* action is appropriate for cases where a person in authority requires that a subordinate trade sexual favors as a condition of obtaining or retaining some particular employment benefit.

While this is certainly a situation that any employer wants to avoid, the fact is that many more sexual and racial harassment incidents occur under the second category which is known as creating a *Hostile Work Environment*.

A hostile work environment arises when any co-worker, subordinate or supervisor engaging in “*unwelcome and inappropriate sexually based behavior, renders the workplace atmosphere intimidating, hostile, or offensive.*” Most e-mail related claims are brought under this provision.

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<sup>1</sup> Gartner: Forecast: Storage Management Software, Worldwide, 2001-2008 (April, 2004)).

The U.S. Equal Opportunity Employment Commission (EEOC) suggests that employers “*take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise, and how to raise, the issue of harassment under Title VII, and developing methods to sensitize all concerned.*”

In addition to publishing written policies on sexual harassment, organizations need to take proactive steps to ensure that these policies are not being violated. With e-mail being one of the most common vehicles used in the transmission of *hostile work environment* type messages, it makes sense to develop a comprehensive electronic communication monitoring policy.

In a 1998 Supreme Court decision handed down in *Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton*, the Court held that “*sexual harassment that results in a tangible adverse employment action triggers vicarious liability for the employer for which the employer has no defense. Even if the employee did not suffer an adverse employment action, the employer is still liable, unless the employer can establish a new affirmative defense.*”

Now, more than ever, it is critical that an employer be able to ***establish a new affirmative defense*** by showing that it had in place reasonable safeguards designed to prevent and correct sexual harassment and that it made those safeguard available to all employees equally.

### **Keeping the e-mail menace at bay**

According to an article in [USA Today](#), “*10% of US employers have been subpoenaed to produce employee e-mails in lawsuits. The report also found that 8% of firms had to deal with sexual harassment or discrimination claims because of inappropriate use of e-mail and the Internet by employees.*”

One of the reasons that e-mail plays such a pivotal role in harassment cases is its immediate and seemingly informal nature. Employees are much more likely to write or forward an offensive e-mail message than they would a traditional written message. The general feeling is that e-mail is not “real”.

Because the employer has control over the organization’s network infrastructure, courts have consistently ruled that employers are liable for content transmitted over that infrastructure.

### **Is any joke worth 2.2 million dollars?**

A good example of this is the Chevron case filed by four female employees who were offended by an e-mail depicting “25 reasons why beer is better than women.”



The employee who initially sent that e-mail through the company's e-mail system, as well as every employee who laughed as they forwarded it on, did their part in contributing to the circumstances which resulted in [Chevron paying \\$2.2 million dollars](#) to settle that case.

An effective e-mail monitoring system would have prevented that loss to Chevron's shareholders.

### **Right to Privacy vs. a Harassment-Free Workplace**

More and more risk-adverse employers are taking proactive steps to monitor employee e-mail. U.S. employers who clearly and regularly inform employees that all e-mail entering and leaving the employer's network is subject to monitoring have little to fear from invasion of privacy actions as long as the policy is applied and enforced fairly and evenly.

Software-based e-mail filters are a good first step towards establishing an effective e-mail monitoring program. These systems provide a method of tangibly enforcing written e-mail policies including inappropriate content and attachments. A network security manager or HR person can be notified whenever suspected inappropriate content is caught in the filter. The monitoring authority can review the content and either release it from quarantine, if the e-mail is found to be appropriate, or hold it for further investigation or action.

Electronic e-mail monitoring systems are highly efficient and cost effective alternatives to the spiraling legal costs associated with even the most minor workplace-related lawsuits. They are an alternative that you can't afford to overlook.

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