

EMPLOYER'S DUTY TO MONITOR WEBSITE USE

An employer must carefully administer the actions of his or her employees for several reasons. Under New York law, it is well settled that under the doctrine of *respondeat superior*, an employer may be vicariously liable for the acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment. *N.X. v. Cabrini Medical Center*, 97 N.Y.2d 247, 739 N.Y.S.2d 348 (2002).

However, with the internet on the desktops of most workers, employers must deal with the consequences of what their employees might be doing. The latest issue concerns what to do if an employer learns that an employee has been viewing illegal items on the employer's computer. A New Jersey Court has ruled on that issue and that ruling has raised the rule of "employer beware." The case of *Jane Doe v. XYZ Corporation*, 887 A.2d 1156 (N.J. 2005) discusses the rather novel issue of what potential liability employers face when employees use office computers to view pornographic, improper material at work.

A RECENT NEW JERSEY CASE

On June 21, 2001, an accountant for a New Jersey employer (called *XYZ Corporation* in the lawsuit) was arrested on child pornography charges. A police investigation prior to the arrest at the employee's company showed that the employee had stored nude pictures of underaged girls, including pornographic images of his ten year old stepdaughter. Moreover, the employee's website viewing history showed the employee had visited sites called "Young First Nude 13 to

17 years old” and “Incest Taboo.” *Jane Doe, supra*.

The stepdaughter’s mother sued *XYZ Corporation* based in negligence. The mother claimed that the employer knew or should have known that the accountant employee was using company computer systems to view, download and participate in child pornography.

The mother also alleged that the employer had a duty to report its employee to the proper authorities for crimes committed on its property during work hours. The suit claimed that because it had not made such a report, the employer had breached its duty. The complaint also alleged that the employee was able to continue molesting his stepdaughter, causing further harm, because the employer failed to report him. In terms of damages, the mother sought to recoup the cost of her daughter’s care and treatment related to the molestation.

The New Jersey Appellate Court found that by not fully investigating the employee’s prohibited activity, the company was exposed to negligence claims. The Court explained: “*The defendant’s Network Administrator testified that he was able to use the network’s daily log system to isolate and identify pornographic websites visited by Employee. However, he did not pen any specific sites and, after reporting his findings to his supervisor, was instructed not to investigate Employee’s internet usage again.*” *Jane Doe, supra*.

The supervisor was then instructed by corporate management to instruct the employee to cease whatever he was doing. The Court found that if the employer had properly investigated the employee’s computer usage, it would have discovered the child pornography. The Court then

found that if the employer had discovered the illegal usage, it had an obligation to report the employee to law enforcement authorities. Specifically, the Court stated: “*We agree with plaintiff that defendant [the employer] had a duty to report Employee’s activities to the proper authorities and to take effective internal action to stop those activities, whether by termination or some less drastic remedy.*” *Jane Doe, supra.*

The Court then sent the case back to the lower court for a trial on whether the employer’s action was the cause of the claimed injuries.

IMPACT

The *XYZ Corporation* decision and how it affects employers relates to how employers should monitor their employees’ computer usage. Employers really need to understand and regulate computer usage by employees. Under normal circumstances, individuals and employers are not required to report illegal activity they witness. However, this case establishes a duty to report and investigate.

In New York, a negligent retention claim against an employee requires a showing by plaintiff that the employer breached its duty to use reasonable care in the employment, training and supervision of its employees. A duty exists to find out whether they are competent to do their work without danger of harm to others. *New York Pattern Jury Instructions (PJI) Section 2:240.* An employer fails when it knows that an employee is incompetent, has vicious propensities, has a bad disposition, is given to horseplay, and the employer fails to use reasonable care to correct or remove the employee. An employer may also be held to fail in the duty of reasonable care

when it knows of facts which would lead a reasonably prudent person to conduct a search or an investigation about an employee and fails to do so. *New York Pattern Jury Instructions (PJI)* Section 2:240.

Employers may take some of the following measures to help avoid similar liability:

1. **Monitor usage.** As a precaution, employers should use software and other technological tools to analyze employees' computers, website visits and emails. This will establish a preventative system to discover any improprieties, and also gives employers a sense of how employees are spending their time. Some employers may find it surprising that a recent survey showed that 62% of male employees in the U.S. and 54% of female employees have accessed non-work related web sites on company computers. (*"Surfing the Web at Work May Be as Addicting as a Cup of Joe,"* by Jennifer Cutler, May 9, 2005).
2. **Develop computer policies.** Employers should have an express, conspicuous policy addressing usage of the internet and email. The policy should also address usage of company equipment and electronic equipment. The idea behind such policies is to state precisely that ownership of company equipment and electronic equipment is the employer's and eliminate any viewpoint that the employee has privacy for using company equipment. In addition, the policy should define the disciplinary actions for violations of the company policies.
3. **Investigate.** If an employer suspects wrongdoing, the employer cannot simply look the

other way. Burying an issue won't work when presented with a case like *XYZ Corporation*. If an employer simply ignores inappropriate usage of the computer by an employee, the employer may face liability. The costs associated with a suit involve damages and legal expenses. The current legal environment favors employers who can demonstrate that they tried to prevent and eliminate any improper or inappropriate behavior.

At the present time, the line for what actions an employer may be liable for has not been clearly drawn. The risks associated with an employee's use of the internet can be substantial. The employer must guard against sexually inappropriate work environments. The elimination of pornographic internet usage while at work would help avoid such liability.

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