

Can E-mail be Considered Harassment?

In millions of in boxes in millions of offices around the country, e-mails are appearing in company systems that have nothing to do with company business. E-mails promoting everything from sex-related Web sites to sexually or racially offensive materials are being downloaded onto company servers alongside legitimate business e-mails. While on the surface the problem may appear to be no more than a nuisance, some experts are saying that unsolicited, or spam, e-mail could be the reason that some employers end up in court defending sexual harassment suits.

Though it sounds like a stretch, the idea that an unsolicited e-mail could land an employer in a litigious battle is not so far-fetched. Courts already hold employers responsible for sexual harassment committed against employees by vendors or other outside parties. So it's not inconceivable, say some, that this could hold up in court.

"Employers may think they have no liability, but are they willing to spend the time and attorneys' fees to defend such a case, even if they eventually win?" says Rogge Dunn, partner in the labor employment law practice at Clouse Dunn Hirsch, Dallas. "If someone has pornographic material on the company computer and that person intentionally or accidentally forwards it to others, then you have a potential claim that

the company wasn't doing enough to keep employees from distributing pornographic materials." Dunn says it's similar to allowing employees to circulate an offensive magazine.

The difference is that a magazine or other such material is easier to see. "The danger with pornographic spam or e-mails is that they can be distributed much more widely without being detected. With e-mail or offensive jokes, you can push a button, it can go on a Web site, other people can see it, and other employees can see it. You can literally broadcast—and rebroadcast—to millions of people."

The problem begins with the accessibility of the company e-mail addresses, say the experts. "Spammers get your name from a variety of sources," says James Gordon, VP of Information & Technology Group at Pinkerton Consulting Investigations, Los Angeles. "They have 'crawlers' that search the Web and pick up e-mail addresses off Web sites. A lot of people are surfing from their computers, which tend to use identifiable information (such as cookies). In fact, spammers can trick the computer into creating e-mail addresses for the users by assuming that a user name is the same as an e-mail name." E-mails posted to any newsgroup or online venue are vulnerable.



"It's difficult to stop," Gordon says. "If it's a direct e-mail to you, it will probably go through unless your company is using

some of the spam software that's out there."

Software exists that can block e-mails that contain offensive words or language. Says Gordon: "The spam software does several things. It has a list, just like a virus list, of IP addresses from which spammers operate. It will shut it down and not allow the e-mails through the firewall. It can block all e-mail coming from certain regions of the world. It can also word search it to try to determine if it's spam based on a combination of word factors."

Still, nothing is 100 percent foolproof. The way a company handles such a situation could mean the difference between a quick dismissal and costly litigious battle. "The issue is going to be whether employers took prompt, remedial action when they knew or should have known there was a problem?" says Dunn. "Obviously, that's going to be the standard of liability in most cases. My advice to employers goes beyond simply whether or not they'll be legally liable. My advice is whether you're ultimately liable or not is not the important question to be asking. It's whether or not there's an efficient way to eliminate this from becoming an issue."

Spam itself isn't harassment, says Gordon. The fact that spam reaches the employee isn't grounds for a lawsuit. But employee complaints that are ignored or not handled correctly could lead an employer into a court situation. "But if a company has implemented some kind of filtering software or other policies and procedures to try to minimize that, it's not really a hostile work environment."

Says Dunn: "The fact that an employer can say that it didn't know spam porn was coming in and that an employee wasn't immediately deleting it; they're probably going to win that case. But they're also going to spend tens of thousands of dollars on attorneys' fees, internal investigations, employee unhappiness, and lots of nonproductive time."

—Lori Widmer