

PRIVACY IN THE WORKPLACE:  
ON THE FRONTIER BETWEEN  
THE RIGHTS OF  
EMPLOYEES AND EMPLOYERS

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Privacy in the workplace is an issue that is frequently debated but infrequently litigated. The evolving concerns for the privacy rights of employees and the heightened sensitivity for the obligations on employers to provide a secure and productive workplace have not as yet generated a body of case law on which all involved may rely. While such issues as employer monitoring of employee e-mail on the job are the topic of numerous articles in the trade and popular press, there is literally no clear statement of the case law to guide both employees and employers.

The development of the law of privacy in the workplace is in part inhibited by the absence of a generally accepted concept that there is a right to privacy guaranteed to citizens from some source, such as the United States Constitution or state constitutional law. A full exposition of the right to privacy is beyond the scope of this paper, but it is fair to say that any rights to privacy in this country in general are only fragmentary at best. The popular idea that there is a constitutionally-protected and -defined, enforceable right to privacy is simply not matched by a body of case law. To the contrary, some states have case law declaring the absence of a defined right to privacy.<sup>1</sup>

For a variety of reasons, there appears to be a modest number of reported opinions addressing the frontier of privacy rights in

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In Virginia and New York, to cite two examples, no general right to privacy exists under state common law, and no cause of action for intrusion into privacy has yet to be sustained. See, for example, *Falwell v. Penthouse International, Ltd.*, 521 F.Supp. 1204 (W.D. Va. 1981); *Waldron v. Ball Corp.*, 619 N.Y.S.2d 841 (App. Div. 1994).

the workplace.<sup>2</sup> The increasing sensitivity among employees and in society in general to what are seen as intrusions into privacy likely will generate more litigation over the rights and obligations involved in such situations. In addition, the advent of the concept of disability harassment under the Americans with Disabilities Act will lead to the litigation of issues surrounding the acquisition and dissemination of personal information concerning employees in the context of what is alleged to be discriminatory treatment in the workplace.<sup>3</sup>

Privacy claims will continue to be asserted in the context of Title VII and ADA actions into the foreseeable future, because of several significant factors. Primary among the incentives to pursue Title VII and ADA claims is the availability of attorneys' fees for prevailing plaintiffs in cases in which the key element of a plaintiff's damages may be limited to outrage. In the absence of hard damages for plaintiffs whose privacy has been intruded upon, the plaintiff's bar will continue to pursue cases that permit recovery of attorneys' fees through fee shifting statutes.

For those jurisdictions in which the state law right to privacy is ambiguous or non-existent, the ADA in particular offers a familiar framework in which to consider claims arising from the workplace without the need to confront entrenched, hostile attitudes against creating a state law cause of action for which no precedent exists. Other innovative approaches have attempted to

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There are surprisingly few treatises providing guidance to employers and employees concerning privacy in the workplace. See, for example, Finken, *Privacy in Employment Law* (BNA Books 1995); the three volume set edited by Trubow, *Privacy Law and Practice* (Matthew Bender 1991) is now out of print. Many of the case references cited here are from Prof. Finken's work.

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Until quite recently, it had not been established that there was a cause of action under the ADA for harassment based on disability, parallel to sexual harassment. The impetus created in 1998 in the Supreme Court decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) will inevitably confirm the viability of a claim for disability harassment that up until *Faragher* has been assumed to exist but, like quarks in physics, no sighting had been positively confirmed. See, e.g., *Walton v. Mental Health Association of Southeastern Pennsylvania*, 168 F.3d 661, 666 n.2 (3d Cir. 1999) (citing cases in which ADA harassment claims were assumed to be viable).

attach liability to employers for the wrongs committed in the workplace. The success of such claims as negligent hiring and negligent supervision have added to the incentive of employers to seek broader protection through increased monitoring of employee activities and communications both on the job and elsewhere.

It is beyond doubt that the rights of employees to be secure in their confidential information and communications increasingly will confront the obligation on employers to maintain a safe and productive workplace. The escalating concerns for violence in the workplace will compel employers to inform themselves of employee behavior warning of potential outbursts. Employers will seek to avoid problems, and liability, by anticipating offensive and illegal behavior among employees, which comes down to a process of obtaining information about those employees and their activities on the job and after hours. Employees will continue to assume a right to freedom in their actions and thoughts and to the privacy of their personal lives. The logical battleground for the resolution of these competing interests will be the courtroom as the frontier between employee and employer rights is explored.

The right to privacy is generally implicated through the acquisition and distribution of information about an employee. The information may then trigger actions concerning the employee in the form of changes in the job itself or the work environment, or in the attitude of management or co-workers toward the employee. How the confidential information about the employee is acquired, transmitted or managed by the employer is the crux of the issue in adjudicating privacy claims.

The great majority of the workplace privacy cases reported to date have at their core the employer's acquisition and management of information concerning the individual claiming intrusion into his or her privacy or breach of confidentiality.<sup>4</sup> The frontier that is now being contested is the extent to which the employer has a right or an obligation to obtain and disseminate this information, or has the obligation to maintain such information in confidence to prevent injury to the affected employee from its

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"Invasion of privacy" is a catchall term that encompasses four separate privacy torts: (1) intrusion upon seclusion, (2) public disclosure of private facts, (3) false light publicity, and (4) misappropriation of likeness or name. Privacy Law and Practice, *supra*, note 2, at ¶9.06. While the torts of false light publicity and misappropriation of name or likeness are serious and worthy of concern, the workplace concerns are focused on the first two of the identified torts, and they will be the focus of this paper.

dissemination. The employer's defense to claims for wrongfully acquiring and transmitting employee information is the reasonableness of the purpose of the information gathering and the safeguards employed to prevent its misuse.

The available reported opinions reveal the permitted scope of an employer's inquiries into the activities of its employees and the use of the information obtained. Those instances in which liability has been imposed upon the employer for the wrongful acquisition of information or the misuse of information appropriately obtained are instructive as defining what has been held to be reasonable or unreasonable, as a guide to advising employers in their ongoing operations. The litigation of experience of others may be instructive in addressing the employer's need for the acquisition of employee information and the purpose of its transmission in advance of creating a cause of action.

The tort of intrusion upon seclusion is defined by the Restatement (Second) of Torts § 652B:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another of 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.

The tort embodying this rule may occur by (1) physical intrusion into a place where an employee has secluded himself or herself; (2) use of the employer's representative's senses to oversee or overhear the employee's private affairs; or (3) some other form of investigation or examination into the employee's private concerns. Liability attaches only where the intrusion is substantial and would be highly offensive to "the ordinary reasonable person."<sup>5</sup>

What are the limits of the "reasonable intrusion" by the employer into the private affairs of an employee? The reported litigation that is available has tested the reasonableness of employers' action in a number of contexts, ranging from facially

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This is taken from the detailed analysis of the right to privacy in *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621 (3d Cir. 1992) (applying Pennsylvania law of privacy in a challenge to mandatory drug testing in a private workplace), quoting *Harris by Harris v. Easton Publishing Co.*, 483 A.2d 1377, 1383 (Pa. Super. 1984).

routine to quite bizarre. The analyses by the various courts called upon to assess the claims that have been made by employees have looked to a range of aspects of the situations presented:

- The form of the intrusion, or the method of acquisition of the information about the employee;
- the nature of the solitude or expectation of privacy held by the employee, or whether there was implied or explicit consent to the intrusion;
- the entirely subjective assessment of the offensiveness of the intrusion, otherwise known as the reasonableness of the employer's actions in making the intrusion under the circumstances;
- the purpose of the employer in obtaining or maintaining the information about the employee, or the use to be made by the employer concerning what was being learned about the employee; and
- whether there is a privilege in the employer's acquisition, maintenance or use of the information, and whether such privilege is qualified or unqualified.

No court (or treatise author) has yet to announce a clearly-enunciated rule to be applied to all employers under each conceivable fact pattern, and there can be no reasonable expectation that one will emerge any time soon. From a review of the available decisions can come some sense of what intrusions are likely to be found to be reasonable, those that are likely to be deemed offensive, and those for which the outcome of any litigation is entirely unpredictable.

### **I. Mandatory Drug and Blood Testing**

There appears to be unanimity that a requirement that employees provide a blood or urine sample is an intrusion into the privacy and bodily sanctity of any individual. Whether there is an overriding justification for the testing of the individual's bodily fluids for drugs or infectious diseases requires a balancing test for reasonableness. The reasonableness of drug testing for power plant operators, school bus drivers, U.S. Customs employees, oil pipeline workers, and corrections officers has been recognized; testing of mental health workers' blood for HIV and hepatitis has been rejected as unreasonable, given the lack of risk of

transmission on the job.<sup>6</sup>

But the privacy interests go beyond the standard analysis. The *method of collection* of urine samples has been scrutinized on privacy grounds. "The process of collecting the urine sample to be tested clearly implicates 'expectations of privacy that society has long recognized as reasonable'. . . Monitoring collection of the urine sample appears to fall within the definition of an intrusion upon seclusion because it involves the use of one's senses to oversee the private activities of another. . . . If the method used to collect the urine sample fails to give due regard to the employees' privacy, it could constitute a substantial and highly offensive intrusion upon seclusion."<sup>7</sup> At least one court has upheld a jury verdict for the invasion of employees' common law privacy rights where the employer's drug-testing urinalysis involved direct observation of the employees' provision of the samples.<sup>8</sup>

It is clear by this point that, solely in the context of health care workers, employers have a right to require HIV tests for any employee as a condition of employment. Despite the widely-recognized implications of the maintenance of information concerning the fact of an HIV diagnosis in society at large, the privacy rights of the employee are subordinate to the perceived necessity of the protection of patient rights and the liability of the employer in this context.<sup>9</sup>

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See *Glover v. Eastern Nebraska Community Office of Retardation*, 867 F.2d 461 (8<sup>th</sup> Cir. 1989) and the citations therein, at 463-464.

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*Borse v. Piece Goods Shop, Inc.*, *supra*, note 5, 963 F.2d at 621, quoting *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 617 (1989); see also, among many decisions, *Luedtke v Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989) (detailed examination of the state constitutional, statutory and common law rights of citizens in Alaska to be free from unwarranted intrusion into their private lives, but finding sufficient public policy in health and safety of workers to justify drug testing program for pipeline workers).

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*Kelly v. Schlumberger Technology Corp.*, 849 F.2d 41 (1<sup>st</sup> Cir. 1988) (applying Louisiana common law right of privacy).

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By this point it is well established that any medical personnel who may conduct invasive or surgical treatment for patients, or are

## II. Electronic, Photographic, and Video Monitoring and Recording and Interception of Employee Communications

These areas cannot help but be major battlegrounds in the immediate future. Too many employees are using too many communications systems and too many employers are interested in monitoring employee activities in the workplace to avoid inevitable clashes of interests. Remarkably, there is little available authority from any jurisdiction on these issues.

### A. Interception of electronic communications

In evaluating any issue concerning the interception of workplace e-mails, the distinction has to be made from the outset as to whether the claim raised is a statutory one of electronic interception or a common law action for intrusion into the employees' privacy expectations and rights.

An "interception" of electronic messages implicates the Federal Electronic Communications Privacy Act, 18 U.S.C. § 2511 et seq., under which a civil remedy is provided against any person who intercepts or accesses without authorization electronic communications, such as e-mails or pages. A full examination of the reach of the Electronic Communications Privacy Act is beyond the scope of this paper, but the Act has already been the subject of a number of claims by employees against their employers'

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simply part of the surgical team, can be excluded from practicing their professions if they are HIV-infected or refuse to be tested for the presence of HIV. *Leckelt v. Board of Commissioners, Hospital District No. 1*, 714 F.Supp. 1377 (E.D. La. 1989), *aff'd*, 909 F.2d 820 (5<sup>th</sup> Cir. 1990). An interesting issue is whether the hospital or clinic has an obligation to inform itself of the HIV or other infectious disease status of its surgical personnel in order to avoid potential liability for the anxiety generated when patients learn that their surgeon could have exposed them to such infection without their knowledge and consent. This is the precise issue raised in *Faya v. Almaraz*, 620 A.2d 327 (Md. 1993), imposing liability on Johns Hopkins University Hospital for permitting an AIDS-afflicted surgeon to continue practicing after his condition became known to the hospital, which withheld that fact from his patients.

interception or retrieval of electronic pages or e-mails.<sup>10</sup> States have also enacted legislation for the protection of computer privacy, including civil remedies for the invasion of personal information by a computer or computer network.<sup>11</sup>

Perhaps joined with or alternative to statutory actions will be common law claims that the employer has intruded upon the employees' expectation of privacy in viewing and retransmitting e-mail messages intended to be confidential by the employees. In one case, an employee alleged tortious invasion of privacy against an employer who had promised its employees that all e-mail communications on the employer-provided system would be confidential and privileged and that employee e-mails would not be intercepted and used as a basis for termination. In reliance on that policy, an employee sent and received e-mails on the company system from his home; three messages were intercepted and served as the basis for his termination.

The court held that no cause of action was stated. No reasonable expectation of privacy in the company e-mail system was available, the court determined, notwithstanding the employer's assurances to the contrary. Even if such an expectation had been found, the court held that the "intrusion" was not one that could be termed "highly offensive" in order to support a valid tort claim:

[B]y intercepting such communications the company is not, as in the case of urinalysis or personal property

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See *Bohach v. City of Reno*, 932 F.Supp. 1232 (D. Nev. 1996) (city not liable for interception and retrieval of messages sent on employees' pagers where city provided paging system for their use); *Wesley College v. Pitts*, 974 F.Supp. 375 (D. Del. 1997) (inadvertently viewing employee's e-mail on computer screen not "interception" per the statute; in what Professor Finken views as an anomaly, *supra*, note 2 (1998 Supp.), at 97, court holds that employer who did not provide e-mail service may disclose contents of electronic message unlawfully obtained from electronic storage, because statute only prohibits disclosure by provider of communication service). See also *Amati v. City of Woodstock*, 829 F.Supp. 998 (N.D. Ill. 1993) (recording of employee telephone conversations gives rise to action for intrusion into seclusion).

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See, for example, §§ 18.2-152.5, -.12, Code of Virginia, setting forth the elements of both the criminal act of Computer Invasion of Privacy and the civil remedy provided for victims of such crime.

searches, requiring the employee to disclose any personal information about himself invading the employee's person or personal effects. Moreover, the company's interest in preventing inappropriate and unprofessional comments or even illegal activity over its e-mail system outweighs any privacy interest the employee may have in those comments.<sup>12</sup>

A case involving the Navy's interception of a servicemember's AOL account, in which his sexual orientation was revealed and led toward his discharge from the military, reached the opposite conclusion.<sup>13</sup> This will surely be a battleground into the future given the coming universality of e-mail access in the workplace.<sup>14</sup>

An interesting corollary relates to the employee's innocent acquisition of sensitive data from the employer. In one case, an employee was assigned a computer that had formerly been used by a human resources official of the company. On the hard drive were records that the employee believed implicated the employer in violations of the ADEA in termination decisions, including that of the employee himself. When the employer learned that he had brought this information to his attorney, he was discharged. Summary judgment against the employee was reversed on appeal, allowing the ADEA claim to proceed, because the employee's acquisition of the computerized information was innocent and his distribution of it limited to his own counsel. The court considered the employee's acquisition to be akin to finding a damaging document left in a copier or fax machine in the

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*Smyth v. Pillsbury Co.*, 914 F.Supp. 97, 101 (E.D. Pa. 1996).

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*McVeigh v. Cohen*, 983 F.Supp. 215 (D.D.C. 1998).

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A recent Fourth Circuit opinion in a criminal case found no expectation of privacy for an employee in the hard drive of the computer in his government office. While the employee was held to have an expectation of privacy in his CIA office, he was subject to a valid warrantless search of his office computer, where child pornography was found to have been downloaded from the Internet while he was at work. The government's interest in work-related misconduct was found to outweigh any reasonable expectation of privacy in the computer files. United States v. Simon, \_\_\_ F.3d \_\_\_ (4<sup>th</sup> Cir. 2/28/2000).

workplace.<sup>15</sup>

B. Video and other forms of workplace monitoring

The limits of the extent of the employer's right to photograph or take video of employees in the workplace are similarly imperfectly established by case law.

From the available decisions, some arguments have been tested and commented upon in this area. A teacher who was videotaped in her classroom doing her job, and then was terminated as a consequence of the performance thereby revealed, raised and lost a claim that her privacy was violated by the use of such recordings. It appears from the decision that the videotaping must have been done with her knowledge at the time the taping was going on.<sup>16</sup> Similarly, no liability for intrusion into seclusion or false light publicity was found where, as entertainment for the company Christmas party, the employer edited a training video in which employees described unpleasant job tasks into responses to the question, "What's sex like with your partner?"<sup>17</sup>

Generally, an employer may photograph employees in plain view, at their workstations and during working hours, for time-and motion studies or as part of an investigative process.<sup>18</sup> No invasion of privacy or other violation was found where an employer engaged in extensive monitoring of an employee's activities on the job in an attempt to verify the she was obeying a directive to curtail overtime. The employer used managers, co-workers and security personnel to monitor the employee's whereabouts on the job site, and authorized use of the controlled-access computer system. The court found no liability for the surveillance despite the

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*Kempcke v. Monsanto Co.*, 132 F.3d 442, 446 (8<sup>th</sup> Cir. 1998).

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*Roberts v. Houston Independent School District*, 788 S.W.2d 107 (Tex. Civ. App. 1990).

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*Stein v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374 (Utah 1997), a truly bizarre factual situation; what was management thinking?

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*Finken, supra*, note 2, at 104, citing *Thomas v. General Electric Co.*, 207 F.Supp. 792 (W.D. Ky. 1962); *Smith v. Colorado Interstate Natural Gas Co.*, 777 F.Supp. 854 (D. Colo. 1991).

employee's sense that it was oppressive and distressing.<sup>19</sup>

A number of instances of employee surveillance have produced reported opinions, evaluating the permissible scope of such activities. Where the employer simply photographs or films an employee in a place open to the public, such as the public street, no invasion of privacy has been found.<sup>20</sup> An employee who files a claim for work-related damages has been held to have waived an expectation of privacy and to have an expectation that an investigation may be undertaken, including surreptitious filming.<sup>21</sup> A trespass for the purpose of surveillance is unacceptable<sup>22</sup>, however, but securing access to an employee's home by deceptively posing as market researchers over a three-month period to observe the employee in his home- was held not to be "highly offensive to a reasonable person."<sup>23</sup> The instances of surveillance found to be permissible and not actionable were based on the legitimate business purpose served by the reasonable acts of the employer.

A female correctional officer established that her privacy had been invaded where her supervisor secreted himself for seven hours in a crawl space in the ceiling of the staff restroom to monitor the officer's actions with inmates. The invasion of privacy was found despite the officer's execution of a consent to be searched

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*Schibursky v IBM*, 820 F.Supp. 1169 (D. Minn. 1993).

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*Munson v. Milwaukee Board of School Directors*, 969 F.2d 266 (7<sup>th</sup> Cir. 1992) (employee observed from public streets to ascertain his residence); *Jasmantas v. Subaru-Isuzu Automotive, Inc.*, 139 F.3d 1155 (7<sup>th</sup> Cir. 1998) (ADA plaintiff filmed by employer gardening in yard to refute claim of disability).

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*Johnson v. Corporate Special Services, Inc.*, 602 So.2d 385 (Ala. 1992); *Seldana v. Kelsey-Hayes Co.*, 443 N.W.2d 382 (Mich. App. 1989).

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*McLain v. Boise Cascade Corp.*, 533 P.2d 343 (Ore. 1975).

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Finken, *supra*, note 2, citing *Turner v. General Adjustment Bureau, Inc.*, 832 P.2d 62 (Utah App. 1992).

at any time for any reason.<sup>24</sup> A cause of action was found to be stated for the invasion of privacy of models at a fashion show, where the security company on duty rigged a camera that would have recorded them undressing. Despite the absence of evidence that any recording was actually made of the models, a cause of action was found to be stated for such an objectionable intrusion in an area where the employees had an expectation of privacy.<sup>25</sup>

C. Mail interception and other physical intrusions into privacy

Inevitably, situations arise in which employers find it useful to examine the personal mail or other items of employees, generally in an attempt monitor employee performance or actions in the workplace. While the law is currently unsettled regarding electronic counterpart of these actions through the interception of e-mails, case law has addressed more definitively the physical intrusions into privacy.

In a case asserting rights under both the ADA and common law privacy, an employee with a known history of bipolar disorder, also known as manic depression, wrote private thoughts in a diary during his work breaks. His co-workers seized the diary and read it, and copied and delivered pages to the employee's supervisor, other administrators, and co-workers. As a consequence of the incident with the diary, the employee was transferred to a job in which he had no contact with other employees and was denied the right to apply for a better job. The appellate court reinstated the ADA claim for the personnel actions taken following the seizure of the diary; while finding the diary disclosure to be "unwarranted and

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*Speer v. Ohio Department of Rehabilitation & Correction*, 624 N.E.2d 251 (Ohio App. 1993).

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*Doe by Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422 (8<sup>th</sup> Cir. 1991). Compare *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176 (7<sup>th</sup> Cir. 1993), a decision that Prof. Finken finds not easily reconciled with *B.P.S.*, in which female employees claimed a invasion of their privacy from the installation of a video camera recording who used a locker room reserved for female employees. The camera was installed for the purpose of monitoring whether certain employees were using the locker room in dereliction of duty. Other employees not the subject of the investigation were found to have no claim unless they could allege that they were actually recorded by the camera.

improper", the court in a footnote rejects the claim that the employer's failure to prevent the distribution of the diary is a constitutional violation.<sup>26</sup>

An employer who opens and reads the mail addressed to an employee, marked "personal", and delivered to the corporate workplace is liable for intrusion upon the employee's privacy. Employees "have a reasonable expectation that their personal mail will not be opened and read by unauthorized persons," obviously including their supervisors when personal mail is delivered to the workplace.<sup>27</sup> Conflicting decisions have addressed the issue of expectations of privacy from employees' disposal of papers in waste receptacles.<sup>28</sup>

Unwelcome touching and physical contact has in recent years been found to sustain a claim for invasion of privacy.<sup>29</sup> Although

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*Duda v. Board of Education of Franklin Park Public School District No. 84*, 133 F.3d 1054, 1062 n. 16 (7<sup>th</sup> Cir. 1998). Compare *Verri v. Nanna*, 972 F.Supp. 773 (S.D.N.Y. 1997), where no right to privacy was found in a police officer's diary (note that New York has no common law right to privacy, *supra*, note 1) found by a private citizen and turned into the chief of police. The court's analysis in dismissing the suit focused on an employer's obligation to safeguard employees' lost and found property rather than any privacy implications from reading private recorded thoughts.

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*Vernars v. Young*, 539 F.2d 966, 968-9 (3d Cir. 1976) (applying Pennsylvania law, and citing *Marks v. Bell Telephone Co. of Pa.*, 331 A.2d 424 (1975), for the suggestion of liability for an employer intentionally overhearing employee's telephone conversation). See also *Doe v. Kohn Nast & Graf P.C.*, 866 F.Supp. 190 (E.D. Pa. 1994).

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*Rogers v. McKoy*, 1997 WL 10133 (S.D. N.Y. 1997) (no cause of action and no expectation of privacy for papers disposed of in public waste receptacle); *Camp, Dresser & McKee v. Steimle & Associates*, 652 So.2d 44 (La. App. 1995) (cause of action based on expectation of privacy in nonpublic waste receptacle).

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*Vernon v. Medical Management Associates of Margate*, 912 F.Supp. 1549 (S.D. Fla. 1996); *Van Jelgerhuis v. Mercury Financial*, 940 F.Supp. 1344 (S.D. Ind. 1996); *Brewer v. Petroleum Suppliers*, 946 F.Supp. 926 (N.D. Ala. 1996); *Kelley v. Troy State University*, 923

not directly based on a privacy analysis, an employer was found liable for the outrageous conduct of a male supervisor who performed a strip search of a female employee suspected of a \$20 theft.<sup>30</sup> The trend is clear that causes of action may well be found in cases with even single incident physical contacts with sexual overtones. In the absence of such circumstances, such as police frisks of employees at the request of employers, no cause of action may arise.<sup>31</sup>

In at least two instances, a constitutional dimension has been found to what Professor Finken terms "informational self-determination"; the right to privacy for a job applicant regarding intrusive questions posed in interviews and questionnaires as part of the initial employment process. Both of these cases involve public employment. No case has extended the scope of a constitutional right to privacy to a private employer, and such applicants have to this point been limited to statutory protections from discrimination in interviews and questionnaires on such grounds as gender.<sup>32</sup>

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F.Supp. 1494 (M.D. Ala. 1996); *Scarborough v. Brown Group*, 935 F.Supp. 954 (W.D. Tenn. 1996). See also *Simon v. Morehouse School of Medicine*, 908 F.Supp. 959 (N.D. Ga. 1995) (applying Georgia law, rape of employee by her supervisor with whom she was engaged in an affair was intrusion into her privacy and subjected employer to liability); *Phillips v. Smalley Maintenance Service, Inc.*, 711 F.2d 1524 (11<sup>th</sup> Cir. 1983) (striking a female employee across buttocks as part of pattern of sexual harassment constitutes an actionable intrusion into seclusion).

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*Bodewig v. K-Mart, Inc.*, 635 P.2d 657 (Ore. App. 1981).

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*Koepplin v. Zortman Mining, Inc.*, 881 P.2d 1306 (Mont. 1994) (no cause of action for requesting police frisk of potentially violent employee when he was to be given notice of discharge); *Raines v. Shoney's, Inc.*, 909 F.Supp. 1070 (E.D. Tenn. 1995) (no cause of action for frisk by police summoned by employer).

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The two public employment cases in which a constitutional violation in employer inquiries of a personal financial and sexual nature are discussed are *Norman-Bloodshaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9<sup>th</sup> Cir. 1998) (U.S. Constitution prohibits unrestrained employer inquiries into personal sexual matters that have no bearing on job performance) and *Fraternal Order of Police, Lodge 5 v. City of Philadelphia*, 812 F.2d 105 (3<sup>rd</sup> Cir. 1987) (discussing

An employer who conducted an unauthorized search of an employee's purse and locker in search of stolen items was found to have intruded on the employee's privacy.<sup>33</sup> More recently, no invasion of privacy was found where an employer discovered alcohol in an employee's car in violation of the employer's rules; the employer had a policy against possession of alcohol on the jobsite, and the unauthorized search of the car given reasonable suspicion of the presence of alcohol was not an unreasonable intrusion under the circumstances.<sup>34</sup> Employers' searches of desks and other furniture in employee offices have produced conflicting rulings on the extent of the employees' expectation of privacy.<sup>35</sup>

With this prelude, the recent case of *Haybeck v. Prodigy Services Co.*, 944 F.Supp. 326 (S.D. N.Y. 1996), has some interesting implications. A customer who used Prodigy's on-line services alleged that she met a Prodigy employee, Jacks, in an on-line chat room. She further alleged that she contracted HIV after engaging in sex with Jacks, and that Prodigy knew of Jacks' activities of meeting and having sex with customers he met while on line. It is not clear from the opinion granting Prodigy's motion to dismiss whether the activities complained of were initiated

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permissible scope of inquiries for employment in special investigative unit for police department). See Finken, *supra*, note 2 (Supp. 1998), at 53, citing *Tomsic v State Farm Mutual Auto. Insurance Co.*, 870 F.Supp. 318 (D. Utah 1994) (no cause of action stated for outrageous conduct where female applicant was asked how her husband would feel if she made more money than he did).

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*K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632 (Tex. Civ. App. 1984) (upholding verdict in excess of \$100,000).

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*Terrell v. Rowsey*, 647 N.E.2d 662 (Ind. App. 1995).

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See *Doe v. Kohn Nast & Graf P.C.*, 862 F.Supp. 1310 (E.D. Pa. 1994) (extent of reasonable expectation of employee in privacy of papers in desk and credenza and offensiveness of employer's search posed jury questions); *O'Bryan v. KTIV Television*, 868 F.Supp. 1146 (N.D. Iowa 1994), *aff'd in part and rev'd in part*, 64 F.3d 1188 (8<sup>th</sup> Cir. 1995) (no expectation of privacy for salesman in unlocked desk in common sales area); *Nelson v. J.C. Penney Co.*, 70 F.3d 962 (8<sup>th</sup> Cir. 1995), *vacated in part*, 75 F.3d 343 (8<sup>th</sup> Cir. 1996) (applying North Dakota law, in which no tort for invasion of seclusion had been recognized, no cause of action for supervisor's opening of employee's locked desk).

while Jacks was on duty in his Prodigy position. The court dismissed the case, applying traditional New York law on respondeat superior and negligent hiring, noting that the complaint failed to allege that Prodigy knew that Jacks was having unprotected intercourse with customers without informing them of his HIV status. Prodigy asserted that it had no knowledge of Jacks' HIV status at any point in his employment.

The pleading in the *Haybeck* case does not assert an obligation on the employer to monitor the activities of the employee to avoid the situation that ultimately occurred. The outcome of the case under the same facts as were alleged may not be the same in every jurisdiction, where more expansive theories of respondeat superior and negligent hiring prevail.<sup>36</sup> The *Haybeck* decision has particular resonance in an era in which employers are increasingly facing questions of what they should have known and what they should have done about employees with propensities to violence, for example, and whose actions could have been monitored by the employer. Whether the employer *should* have taken more forceful action to intercede and avoid a tragedy in any given case is a difficult and complex issue to be resolved.

### III. Disclosure of Personal Facts

An obviously related concept is the dissemination of facts revealed or otherwise acquired by the employer concerning an employee. While the simple expedient of obtaining the employee's consent would moot these issues, employers continue to face liability claims for what in many instances can only be seen as an insensitivity to the employee's right to maintain confidentiality of personal information.

The quintessential fact situation raising this issue involved an employer's revelation of the fact of an employee's mastectomy to the other employees in her workgroup. This and similar cases have lead to the pronouncement of the rule that disclosure of personal

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See, for example, *J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391 (Va. 1988) (employer liable for negligent hiring of janitor with history of sex offenses who subsequently abused church members with whom he had contact in performance of his job); *Lyon v. Carey*, 174 U.S.App.D.C. 422, 533 F.2d 649 (D.C. Cir. 1976) (employer liable for actions of employee sent to deliver appliance, where employee raped homeowner to whom delivery was made).

information by its publication into the workgroup of an employee is actionable. The employee's right to be free from invasion of his or her privacy can be said to be proportional to the offensiveness of the disclosure and to the personal and embarrassing nature of the information revealed.<sup>37</sup>

Some situations may require disclosure of sensitive information concerning an employee, or the disclosure could be said to be privileged because of the nature of the conduct disclosed. Several courts have found that the revelation of the finding that an employee committed sexual harassment is appropriate, given the employer's interest in conveying a message that such conduct is unacceptable.<sup>38</sup> The recently-enhanced obligation found to be imposed on employers to clearly announce and enforce policies against sexual and other forms of harassment will expand the frequency with which such disclosures will be made among co-workers of those found to be harassers.

Cases discussing the disclosure of other facts, while true and embarrassing, have produced at times conflicting decisions on such points as privilege. No privacy right was implicated by an employer's release of the record of an employee's felony

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*Miller v. Motorola, Inc.*, 560 N.E.2d 900 (Ill. App. 1990) (disclosure of mastectomy); *Beaumont v. Brown*, 257 N.W.2d 522 (Mich. App. 1977); *Vassiliades v. Garfinckel's Brooks Brothers*, 492 A.2d 580 (D.C. App. 1985) (disclosure of fact of face lift actionable); *Landrum v. Board of Commissioners of Orleans Levee District*, 685 So.2d 382 (La. App. 1996) (disclosure of employee's failure of drug test actionable); *Arroyo v. Rosen*, 648 A.2d 1074 (Md. 1994) (release of investigative report to reporter of alleged scientific fraud by employee actionable); *Doe v. Attorney General*, 941 F.2d 780 (9<sup>th</sup> Cir. 1991) (release of physician's HIV status held actionable under Rehabilitation Act). See also *Doe v. Methodist Hospital*, 639 N.E.2d 683 (Ind. App. 1994) (disclosure of fact that employee had tested positive for HIV held not actionable because disclosure made only to one person, husband of co-worker).

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*Smith v. Arkansas Louisiana Gas Co.*, 645 So.2d 785 (La. App. 1994); *Hines v. Arkansas Louisiana Gas Co.*, 613 So.2d 646 (La. App. 1993); *Garziano v. E.I. Dupont de Nemours & Co.*, 818 F.2d 380 (5<sup>th</sup> Cir. 1987), all sustaining as privileged employers' disclosure that sexual harassment was basis for discipline or termination.

conviction, given the public nature of the court record.<sup>39</sup> Release of an investigative report of a death threat by a game warden involved no wrongful intrusion unless the means of gathering the information was excessively objectionable and improper.<sup>40</sup> No invasion was found when a police chief revealed on a radio talk show that the wife of a police union official had failed the entrance exam for police officer candidates.<sup>41</sup> On the contrary, no privilege as a matter of law was found when the fire chief revealed on a television newscast that a firefighter, lead plaintiff in a class action in which race discrimination was found, had failed required exam multiple times and read on a third-grade level.<sup>42</sup>

#### IV. Employer Monitoring of the Personal, Off-Duty Lives of Employees

Does the employer have right to inform itself of the off-duty activities of its employees, and to take action toward the employee based on those activities? Does the employer have an *obligation* to inform itself of dangerous, or provocative, or offensive activities of its employees in their personal lives?

These issues are perhaps as little resolved at this point as at any time in American history. In the past, there was little doubt that an employer could take whatever action it cared to concerning an employee. If the employee voted the wrong way, associated with others whom the employer found displeasing, or conducted a social life that the employer frowned on, then the employee had no remedy when his or her job was terminated or otherwise threatened by the employer. The past is not a model for the current environment in the workplace.

Traditionally, such employees as police officers were considered to be on duty at all times, so that their personal lives

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*Eagle v. Morgan*, 88 F.3d 620 (8<sup>th</sup> Cir. 1996).

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*Johnston v. Fuller*, 706 So.2d 700 (Ala. 1997).

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*Alexander v. Peffer*, 993 F.2d 1348 (8<sup>th</sup> Cir. 1993).

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*Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884 (Iowa 1989).

were the subject of management concern and discipline.<sup>43</sup> Some of the decisions involving department discipline of officers in the past for such infractions as failure to pay creditors or a male officer maintaining what appeared to be a homosexual lifestyle are positively quaint in the current context, but reflect well-established principles as to the right of the employer to set standards for employee conduct, even off-duty.<sup>44</sup>

In the private employment setting, what activities by an employee outside of the workplace are properly the concern of the employer? Put another way, what information does the employer have the right to acquire concerning the employee regarding activities outside the workplace, and what actions, if any, may the employer take in response to the receipt of such information? Does the employer have an obligation to take some action against an employee whose outside activities create risks or threats in the workplace or create anxiety among co-workers or customers? These issues have no easy resolution from the available precedent.

Several cases have raised privacy issues following discipline or termination of employees for their romantic involvements with co-workers. No public policy or privacy right has been found to be implicated in the enforcement of nonfraternization rules prohibiting dating between co-workers.<sup>45</sup> A more difficult issue is the discipline or termination of an employee for a sexual or romantic relationship with someone not in the company's employ. At least one court has ruled that termination of an employee because of her romantic relationship with the employee of a competitor gave

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See *Fabio v. Civil Service Commission of the City of Philadelphia*, 414 A.2d 82 (Pa. 1980) (police officer discharged for extramarital affair with 18-year old); Annotation, *Sexual Misconduct or Irregularity as Amounting to "Conduct Unbecoming Officer", Justifying Officer's Demotion or Removal or Suspension from Duty*, 9 ALR4th 614.

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See *Nodes v. City of Hastings*, 170 N.W.2d 92 (Minn. 1969) (disqualification of officer for inexcusable neglect in failing to pay debts); *Warren v. City of Asheville*, 328 S.E.2d 859 (N.C. App. 1985) (no justification for terminating officer over issue of his homosexuality, which officer denied).

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*Rogers v. IBM*, 500 F.Supp. 867 (W.D. Pa. 1980); *Patton v. J.C. Penney Co.*, 719 P.2d 854 (Ore. 1986); *Jarema v. Olin Corp.*, 4 F.3d 426 (6<sup>th</sup> Cir. 1993).

rise to a cause of action in tort, although the precise policy basis for the action is not made clear in the court's decision.<sup>46</sup> A more recent case found no invasion of privacy where a female employee asserted claims that her co-workers undermined her status in her job by discussions that she had a conflict of interest because she had had an extramarital affair with a client, who then divorced his wife to marry the employee.<sup>47</sup>

No violation of public policy has been found in instances in which an employee has been discharged because his or her spouse was employed by a competitor.<sup>48</sup> Similarly, no cause of action has been found for the discharge of a manager for dating a client of the employer, even in the absence of a formal rule prohibiting such conduct.<sup>49</sup>

Beyond romantic relationships, employees have generally unsuccessful in their claims that their privacy and associational rights are infringed by discipline for social friendships.<sup>50</sup>

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*Rulon-Miller v. IBM*, 208 Cal.Rptr. 524 (Cal. App. 1984). In *Henegar v. Sears, Roebuck & Co.*, 965 F.Supp. 833 (N.D. W.Va. 1997), the employer was found to have violated state antidiscrimination law for its termination of an employee who was considered to be violating her supervisor's religious moral code because of her off-duty association with a married man.

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*Chisholm v. Foothill Capital Corp.*, 3 F.Supp.2d 925 (N.D. Ill. 1998). *Chisholm* is perhaps a model for the current form of privacy litigation; the plaintiff there included in the same suit claims arising under Title VII, the Equal Pay Act, defamation, and invasion of privacy.

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*Bloom v. General Electric Supply Co.*, 702 F.Supp. 1364 (M.D. Tenn. 1988); *Salazar v. Furr's Inc.*, 629 F.Supp. 1403 (D. N.M. 1986).

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*Ward v. Employee Development Co.*, 516 N.W.2d 198 (Minn. App. 1994). This is to be distinguished from situations in which health care professionals are disciplined by their employers for sexual contact with patients in violation of the employees' professional ethical rules. See, e.g., *Meleen v. Hazleden Foundation*, 928 F.2d 795 (8<sup>th</sup> Cir. 1991).

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*Ferguson v. Freedom Forge Corp.*, 604 F.Supp. 1157 (W.D. Pa. 1985) (discharge for association with former president of employer);

Employers generally have been sustained in limitations imposed on employees' off-duty use of tobacco products, for the purpose of limiting health insurance and disability claims.<sup>51</sup>

What limits are there on the right or the obligation of the employer to consider an employee's off-duty activities and the potential risks arising in the workplace? Is bizarre or potentially dangerous conduct by the employee away from the workplace a valid basis for discipline or termination? Too few decisions delineate the frontier between the right of the employee to be free from such scrutiny and the employer's right or obligation to protect its operations and other employees.

In this regard, a recent Tenth Circuit case considered the actions of an employee terminated after eight incidents in which the employee was found to have entered without permission the homes of neighbors, some of whom were co-workers. The employee was prosecuted for unlawful entry and trespass and entered pleas of nolo contendere. The employer feared that the employee had a problem with the abuse of prescribed pain killers. The case turned on the issue of the application of the ADA to those perceived to be drug addicted, but the court discussed off-duty and potentially disability-related conduct as an appropriate basis for termination and disciplinary decisions.<sup>52</sup>

This is the most recent in a limited number of cases in which off-duty or family members' (associational?) misconduct has been addressed as a valid basis for termination in defense of claims brought under the ADA.<sup>53</sup> Several ADA cases have upheld termination

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*Privette v. University of North Carolina*, 385 S.E.2d 185 (N.C. App. 1989) (discharge for friendship with former co-worker who was out of favor with employer); *Norman v. Recreation Centers of Sun City*, 752 P.2d 514 (Ariz. App. 1988) (discharge for support of former manager ousted by employer's board of directors).

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*City of North Miami v. Kurtz*, 653 So.2d 1025 (Fla. 1995). See also *Town of Plymouth v. Civil Service Commission*, 686 N.E.2d 188 (Mass. 1997).

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*Nielsen v. Moroni Feed Co.*, 162 F.3d 604 (10<sup>th</sup> Cir. 1998).

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In *Den Hartog v. Wasatch Academy*, 129 F.3d 1076 (10<sup>th</sup> Cir. 1997), a school employee who lived on campus claimed that he was terminated in violation of the ADA because of his association with

or discipline for alcohol- or drug-related misconduct outside of the workplace (such as off-duty DWI convictions) in the context of claims that "disability-caused misconduct" was itself protected and was to be accommodated under the ADA, which has special provisions for drug addicted and alcohol-dependent employees.<sup>54</sup> Particularly instructive is the case of a diabetic police officer terminated after he "erratically drove his squad car at high speed through residential areas more than forty miles outside his jurisdiction" because of his failure to properly monitor his medication levels. The court upheld the award of summary judgment for the employer, holding that the disability was not the basis for termination; the employer acted on the employee's failure to monitor his condition, which was a factor within his control for which discipline was appropriate.<sup>55</sup>

#### V. Where Does All This Go in the Immediate Future?

It is easy to predict that there will be many, many lawsuits concerning privacy in the workplace. Predicting the likely outcomes of specific cases or broad categories or classes of claims cannot be done with any degree of confidence. The infinite variety of potential fact patterns, and the randomness of human behavior, assures that there will be claims litigated that fit no existing legal analytic framework. The existing precedential base is so slight that no one involved in these issues, either on behalf of management or the employees, can be assured as to the direction these cases will take when judges and juries are called upon to

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his adult son, a manic depressive. The son lived with the employee and committed acts of violence against others in the school community. No violation was found because of the direct threat posed by the son in the workplace. The opinion presents interesting issues concerning the right of the employer to consider the conduct of others in addition to the employee in termination decisions.

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*Despears v. Milwaukee County*, 63 F.3d 635 (7<sup>th</sup> Cir. 1995) (alcoholic employee demoted because he lost driver's license after off-duty DWI conviction); *Maddox v. University of Tennessee*, 62 F.3d 843 (6<sup>th</sup> Cir. 1995) (alcoholic employee discharged after off-duty arrest for drunk driving).

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*Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7<sup>th</sup> Cir. 1995).

assess liability and damages.

The inevitability of litigation flows from the innovative resources now available to management that are being utilized by necessity, to improve productivity and profitability and as a line of defense to liability for claims from both employees and third parties. The incentive for employers to intrude on the personal lives of their employees has never been higher and the means of doing so have never been more available. The perceived need for employers to know more about their employees and their activities on and off duty has developed at the same time as technology has provided ever more effective means of acquiring such information. Employers have also faced litigation over the failure to acquire and act upon information about employees who harass and otherwise harm co-workers and third parties, and this trend will only continue to pose economic threats to employers.

As a recent article in the ABA Journal put it:

At the close of the 20<sup>th</sup> century, companies are just about as inquisitive about their workers as they ever were. Companies investigate employees' blood, urine, smoking habits, dating partners, litigation histories, credit reports, and other personal information in attempts to ensure that only "suitable" people work for them.<sup>56</sup>

It is perhaps inevitable that, with the means now available, employers will seek to enter into relationships with employees with a wide range of knowledge of the employee's past experience and history concerning such issues as prior employment, health and medical treatment, and dangerous or notorious personal activities and interests. The availability of the technology and the acquisition of detailed information then raise broader questions: what is the appropriate use for the information obtained concerning the employees?

However useful employee health and insurance claims information might be to an employer in making hiring and retention decisions, there are compelling reasons not to collect and maintain such data, such as exposure to claims under the ADA and the potential for liability for the release of embarrassing personal medical information. In this instance, there is a base of statutory law and case decisions defining the frontier between the

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Tebo, "No Peeking: Efforts to restrict monitoring of workers' outside activities gain favor", ABA Journal, March 2000, at 22.

rights of employees and employers.

More problematic and less well defined are related issues for which no significant precedents exist. One certain battleground will be the extent to which an employee's use of the employer's e-mail system may be monitored by the employer. Products currently available, reasonably priced and easy to use, permit an employer to monitor all employee e-mail messages for key words (examples are such loaded terms as "Aryan", "reefer" and "fondle", but extend into "job offer" and "signing bonus"<sup>57</sup>); the promotional literature for the monitoring software specifically cite the potential for liability to the employer for abusive or harassing e-mail messages sent by employees. Whether an employer obtains waivers from employees or posts a policy claiming the right to monitor e-mail, it is certain that some monitored messages will result in discipline, termination, and litigation.

As many observers have noted, the absence of clearly defined rights and obligations in workplace privacy creates uncertainty for all involved. The readily available technology for monitoring employees' activities and collecting personal data about them can blind management to the key question: what do you do with the information once you have it?<sup>58</sup>

The obvious fact from the available precedents is that there is a risk of liability to the employer simply from the act of collecting data on its employees; a further risk arises from the potential for liability from the intended use of the collected data, and the misuse or unintended distribution of such information. The addictive appeal of what in other contexts is termed "gossip" ensures that there will be unauthorized dissemination of personal information in some of the many instances in which personal information is being collected.

All-encompassing legislation governing this area is not going to be forthcoming. Judge-made law will develop as cases are filed,

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McNichol, "Naughty Word Alert", *Wired Magazine*, March 2000, at 99. The article cites the American Management Association as the source of an estimate that "30 percent of major US companies snoop on their employees' electronic messages".

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The ABA Journal article quotes an attorney representing management who phrases the question in this way: "Sometimes, when a client asks me, 'Can we do this?' I say, 'Yes, you can, but are you sure you want to?'" ABA Journal, *supra* note 56, at 24.

presumably alleging a range of claims including intrusion into privacy, defamation, Title VII and ADA violations, statutory violations as available under Federal and local enactments, and whatever else enterprising plaintiffs' counsel can come up with. The immediate future is going to be a challenge for all concerned as these rights and obligations are defined.