

BUSINESS

BIG BROTHER'S WATCHING

HIGH-TECH WORKPLACE ISSUES HAVE FOCUSED ATTENTION ON INDIVIDUAL PRIVACY RIGHTS

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Staff Writer

Can e-mailing a racy joke using a computer at work be grounds for dismissal? Or accessing Internet sites your employer deems inappropriate, offensive or pornographic?

"The answer is yes — and no. 'It's a matter of degree,' said Chuck Tahirali, research director and consultant at the Central Ontario Industrial Relations Institute in Thornhill.

"As odd as it sounds, it's possible to be found to have engaged in harassment (by using e-mail or the Internet inappropriately) without giving cause for dismissal."

Ron Minken, an employment lawyer in Markham, agreed.

Employers have the right to dismiss for improper use of the Internet based on the nature and severity of the misconduct and the impact on the employer or other employees, he conceded.

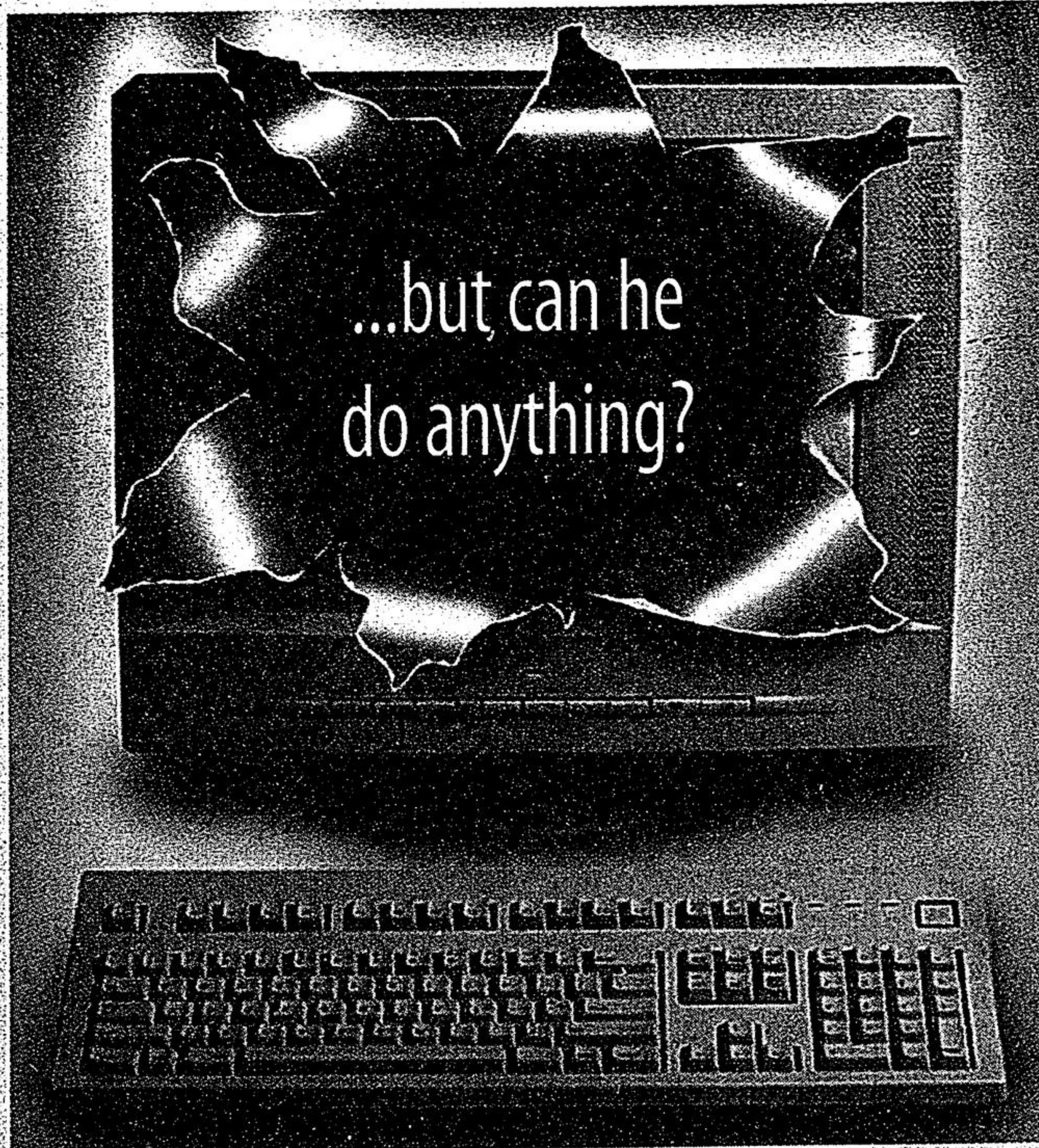
But he added, "Possession of, or evidence of access to, pornographic materials will not in, and of itself, be cause for dismissal. For there to be cause for dismissal, the employer must show conduct that either affects other employees or that has a direct and substantial impact on performance."

With a burgeoning number of workers having access to e-mail and the Internet at their desks, employers are becoming more aware of the potential for misuse and abuse.

Minken said using company computers to access adult Web sites and send out pornography by e-mail have replaced workplace blunders such as making personal telephone calls on company time or using the office photocopier for personal business.

The issues arising from such behaviour, Minken said, are neglect of duty, serious misconduct or sexual harassment.

He also brought up the issue of employees whose work involves children or who occupy



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positions of trust toward children or vulnerable individuals.

"These employees are held to a higher standard with respect to the sort of Web sites they are accessing," Minken said. "They could even be dismissed for cause if they were accessing Web sites such as child pornography on their home computer after office hours."

Such high-tech workplace issues have focused attention on individual privacy rights. Do employers have the right to monitor not only Internet use but also the content of e-mail messages employees send and receive?

Minken believes they do. "Employers have the right to control and regulate the use of their computers and activities of their employees during working hours," he said. "The employee has no expectation of privacy when using the employer's computer."

Tahirali, however, said there aren't any clear-cut answers.

"Companies' knee-jerk reaction is that

since it's company time and equipment being used, there should be no expectation of privacy on the part of employees," he said. "Employers believe they have the right to monitor."

Tahirali said it is essential for companies to develop clear-cut policies on harassment and e-mail and Internet use

But he said it is too soon to offer an opinion on how employee privacy rights are going to be addressed.

"Because many Ontario companies are owned by U.S. companies, they're following the lead of U.S. (in) thinking that there's no expectation of privacy," he explained. "But some Canadian legal experts have questioned whether we can follow the U.S. lead. This is still a grey area. Sure as shooting, it will be litigated eventually."

Tahirali said it is essential for companies to develop clear-cut policies on harassment and e-mail and Internet use, adding it is critical the policy be enforced consistently, with supervisors regularly discussing the regulations with employees.

"At the end of the day, you don't want

employees to say they weren't aware of the rules," he said.

For companies without well-defined policies, the consequence of dismissing an employee for inappropriate use of e-mail or the Internet can be costly.

"An employee can't necessarily be fired outright without the company facing a wrongful dismissal suit," Tahirali said.

Minken said personal use of the Internet and e-mails for innocuous pursuits such as research, vacation planning and brief messages to and from friends is difficult for an employer to forbid.

"Any dismissal other than a dismissal for just cause will result in severance obligations by the employer, which could be as high as two months' pay for every year of work or greater," he said.

"We recently negotiated two years of pay for a 30-year employee and obtained a judgment of six months of pay for a six-month employee, plus punitive damages of \$20,000."

"Currently, the law is on the side of the employee," he added. "It is very difficult for an employer to find just cause today."

Another problem is determining what is offensive and what is not.

Said Tahirali: "In Ontario, the law defines harassment as offensive behaviour or behaviour that should have been known to be offensive." He said many companies have taken the stand that jokes involving sex, race, religion or ethnicity are inappropriate.

"An e-mail joke transferred between two people of like minds is still risky," he said.

Tahirali said there are four general categories in terms of computer misuse or mischief:

- Intentionally or unintentionally engaging in a form of harassment such as e-mailing sexist or racist jokes, using explicit screensavers or storing potentially offensive websites;

- Damaging or tainting the company reputation. "What people don't realize is that some e-mails identify the company the employee works for," Tahirali said. "Forwarding offensive e-mails or accessing chat rooms, bulletin boards or news groups can taint the company by association."

- Divulging proprietary or confidential information. "E-mail is not secure," he said. "A typical e-mail can travel to numerous computers before reaching its destination."

- Wasting company time and resources by playing games, surfing or downloading programs that might interfere with company programs.

Tahirali said since the institute started collecting statistics in 1999, 50 per cent of companies surveyed have policies addressing e-mail and Internet use.

"It's some indication of the extent to which companies are addressing the issue of potential misuse," he said.

But statistics showing the extent of misuse in the workplace are harder to come by, he said, noting less than 1 per cent of respondents were willing to admit they used e-mail or the Internet for personal use, inappropriate or otherwise.

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