

# WHAT HATH THE TWENTY FIRST CENTURY WROUGHT? ISSUES IN THE WORKPLACE ARISING FROM NEW TECHNOLOGIES AND HOW ARBITRATORS ARE DEALING WITH THEM

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*The common law arbitrator, like the common law judge, follows a little and leads a little.*<sup>1</sup>

Employees are using new technologies. They are using GPS, electronic mail, the Internet, cell phones and other handheld devices, blogs, Twitter, texting and social networking sites. They are using new technologies while at the workplace and while away from the workplace, while working and while engaging in personal pursuits. They may be using the technologies appropriately or to the detriment of their employers. Employers are also using new technologies. They are monitoring their employees, both in the workplace and away from it. They too may be doing so appropriately, or they may be doing so in a manner invasive of their employees' privacy or dignity.

Needless to say, the use of these new technologies gives rise to employment disputes that differ in kind from those of times past. Many scholars have written about the failure of the law to keep pace with the workplace changes brought about by new technologies. Many have also written about the failure of the federal and state statutory laws and of the common law to systematically and sensibly resolve employment disputes arising out of the use of new technologies. But one place that disputes arising out of new technologies are being grappled with in a systemic manner, and handled in a relatively sensible manner, is by arbitrators in the union sector.

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<sup>1</sup> Stuart Bernstein, *The Art of Opinion Writing*, 35 PROC. NAT'L ACAD. ARB. 68, 78 (1982).

This article surveys the types of issues being arbitrated, the criteria arbitrators use to decide the cases, and the outcomes of the cases. It builds on and updates my prior work in the area.<sup>2</sup> Section I provides an introduction to the article. Section II provides an overview of my research. Section III addresses the types of cases involving new technologies arising as challenges to discipline for lack of just cause. Section IV addresses the related issue of employer monitoring of employees. Section V focuses on cases involving new technologies that have arisen under provisions of the collective bargaining agreement other than a just cause provision.

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<sup>2</sup> Ariana R. Levinson, *Industrial Justice: Privacy Protection for the Employed*, 18 CORNELL J.L. & PUB. POL’Y 609 (2009).

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**I. INTRODUCTION**

The use of new technologies, such as GPS, electronic mail, the Internet, cell phones and other handheld devices, blogs, Twitter, texting, and social networking sites in the workplace, and outside of it, often gives rise to disputes and grievances.<sup>3</sup> While the grievances may be similar in type to those of times past, such as a challenge to discipline for lack of just cause, they raise modern day issues about the blurring of boundaries between work and private life, security of information in a world where an inadvertent press of a button can transfer large amounts of confidential data, and the role of the law in addressing the use of technology.

This article surveys the types of issues being arbitrated, the criteria arbitrators use to decide the cases, and the outcomes of the cases. It builds on and updates my prior work in the area.<sup>4</sup> Section II provides an overview of my research. Section III addresses the types of cases involving new technologies arising as challenges to discipline for lack of just cause. Section IV addresses the related issue of employer monitoring of employees. Section V focuses on cases involving new technologies that have arisen under provisions of the collective bargaining agreement other than a just cause provision.

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<sup>3</sup> Of 34 respondents to our survey, 18 (53%) reported involvement in a grievance or arbitration about the use of modern technology. The technologies involved included e-mail, electronic imaging, GPS, Internet, dashboard cameras, smart phones, webcams, social networking sites, and blogs.

<sup>4</sup> Ariana R. Levinson, *Industrial Justice: Privacy Protection for the Employed*, 18 CORNELL J.L. & PUB. POL’Y 609 (2009).

## II.        OVERVIEW OF RESEARCH

I recently surveyed approximately 400 arbitration decisions addressing GPS, e-mail, blogging, and the Internet located in the Bureau of National Affairs' labor arbitration decisions database dating from 1999 to 2007.<sup>5</sup> Of these, I reviewed sixty-eight more closely in order to discern the manner in which arbitrators are dealing with the issues of privacy arising out of the use of technology in, or outside, the workplace.<sup>6</sup>

Fifty-nine cases involved a grievant challenging discipline under a just cause provision.<sup>7</sup> In 36 of those cases, the arbitrator overturned or reduced the discipline imposed by the employer.<sup>8</sup> Eight of the cases involved a union alleging violations of some other type of contractual provision or of past-practice.<sup>9</sup> The arbitrators in six of those cases upheld the grievance, at least in part.<sup>10</sup> The remaining case was an interest arbitration.<sup>11</sup> The arbitrator in that case rejected the union's proposal that the employees perform routine maintenance on their assigned computers.<sup>12</sup> Twenty-two of the cases explicitly addressed employees' privacy concerns.<sup>13</sup>

To write this article, I updated the research, with help from my research assistant. We focused on any issues raised by new technologies, rather than primarily on privacy issues. In this article I thus include 24 additional cases in which the decision was issued from 2006 to 2009. Of these cases, 20 involved a grievant challenging discipline for lack of just cause. The grievance was sustained, at least in part, in 15 of the cases. The grievance was denied in six. Four of the cases involved union grievances over some other provision in the collective bargaining agreement. In three of these cases, the grievance was denied, and, in one, it was sustained.

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<sup>5</sup> Levinson, *supra* note 4, at 637.

<sup>6</sup> *Id.* at 639.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

### III. ISSUES IN JUST CAUSE CASES

Many of the arbitration cases challenging just cause for discipline raise the issue of whether an employee used technology in an inappropriate way or must be disciplined due to the use of technology outside of the workplace. This section first addresses the types of misuse that occur relating to on-duty activity. It then addresses the impact of technology outside of the workplace. Finally, it addresses the critical issue in all cases of the quality or reliability of the evidence produced by new technologies.

#### A. *Workplace Technology*

This sub-section addresses the issue of discipline for inappropriate use of technology in the workplace. It includes a discussion of the following types of cases: employees using employer-issued technology for personal use in violation of a prohibition on personal use; employees using employer-issued technology for personal use during non-break time; employees engaging in excessive personal use of employer-issued technology; employees using employer-issued technology for unlawful purposes; employees violating rules prohibiting racially or sexually offensive communications; employees using proprietary information for personal reasons; and employees using employer-issued technology to make statements disrespectful of the employer.

##### 1. Violation of Rules Prohibiting Personal Use of Company Computers and Other Devices

Arbitrators generally uphold rules prohibiting personal use of company computers and other devices provided they are enforced and progressive discipline is followed. Several uphold discipline for violation of an enforced rule that provides for no personal use of company-issued computers. For instance, in one case the arbitrator held that as long as the rule is consistently enforced, an employer may appropriately preclude employees from using the computer and e-mail system for personal reasons, including exchanging recipes with co-workers.<sup>14</sup>

In another case, the employer had a rule prohibiting use of company equipment “for other than company business without authorization.”<sup>15</sup> A human

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<sup>14</sup> See *Conneaut Sch. Dist.*, 104 Lab. Arb. Rep. (BNA) 909, 914 (1995) (Talarico, Arb.).

<sup>15</sup> *Kuhlman Elec. Corp.*, 123 Lab. Arb. Rep. (BNA) 257, 258 (2006) (Nicholas, Arb.).

resources manager found personal e-mail addressed to the grievant on her printer on two occasions, and she also found a printout of a webpage addressed to the grievant.<sup>16</sup> After further investigation, the grievant was terminated for personal use of the computer system, as well as for other things.<sup>17</sup> The arbitrator held that discipline for violation of the rule was warranted, although the discipline was reduced for other reasons.<sup>18</sup>

In a third case, a police officer was suspended for using his employer-issued computer during work time to work for a trailer fabrication business that he owned with his brother.<sup>19</sup> The arbitrator held that the employer had “just cause to discipline the [g]rievant for misuse of [employer] property when he intentionally used such property for personal benefit, without authorization, to produce designs, schematics, and related business documents for his business while at work.”<sup>20</sup> The arbitrator did, however, reduce the suspension from 40 to 24 hours due to his long record of service without significant discipline.<sup>21</sup>

A number of cases, however, have held that failure to enforce a rule prohibiting personal use will cause disciplinary action based on such a rule to fail or be reduced. For example, in one case, the arbitrator held that a past practice of permitting use of e-mail for non-business related activity “completely negated” the employer’s written policy to the contrary.<sup>22</sup> In another case, where a grievant in a non-union setting sent his newsletter via e-mail, “the past practice of the Employer that allowed, over a ten year period, the publication of the offending newsletter lulled the Grievant in to a false sense of security.”<sup>23</sup> In a third case, the employer permitted an internal, non-Internet, communication system designed for use in emergencies to be utilized to notify employees when “muffins were being delivered to the office.”<sup>24</sup> The arbitrator held that the non-emergency use mitigated the level of discipline of an

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<sup>16</sup> *Id.* at 258.

<sup>17</sup> *Id.* at 259.

<sup>18</sup> *Id.* at 262.

<sup>19</sup> City of El Paso, 123 Lab. Arb. Rep. (BNA) 691-92 (2006) (Greer, Arb.).

<sup>20</sup> *Id.* at 696.

<sup>21</sup> *Id.*

<sup>22</sup> Chevron Prods. Co., 116 Lab. Arb. Rep. (BNA) 271, 275 (2001) (Goodstein, Arb.).

<sup>23</sup> AlliedSignal Engines, 106 Lab. Arb. Rep. (BNA) 614, 624 (1996) (Rivera, Arb.).

<sup>24</sup> Co. of Sacramento, 118 Lab. Arb. Rep. (BNA) 699, 701 (2003) (Riker, Arb.).

employee who used the system to send sexually explicit messages to a co-worker.<sup>25</sup> In another recent case, an arbitrator held that misuse of a company-issued computer for personal gain would not justify discharge when three others who had committed similar misconduct had not been terminated.<sup>26</sup> But, the discharge was upheld due to additional infractions.<sup>27</sup>

Finally, in another recent case, the grievant was discharged for, among other things, using an employer-issued cell phone for personal calls.<sup>28</sup> The employer's policy provided that the phones could be used only when absolutely necessary, and that the employee must reimburse the employer for any personal calls, even if the call did not add expense because the calls for the month were within the monthly minimum.<sup>29</sup> The arbitrator reviewed the cell-phone records.<sup>30</sup> He found that the grievant did not make calls daily, that the calls were generally only one or two minutes long and often near the end of the workday, and that, with only one exception, the calls did not result in extra cost to the employer.<sup>31</sup> The exception was a "call to England to check on her mother who had a stroke."<sup>32</sup> The parties disputed whether the grievant had paid for that call.<sup>33</sup> The arbitrator held that discipline was an inappropriate response and only counseling or an oral warning was warranted.<sup>34</sup> The arbitrator reasoned that "[w]hatever its stated policy," as a practical matter, the employer "expect[s] reimbursement only when the personal usage results in an additional charge."<sup>35</sup>

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<sup>25</sup> *Id.* at 701.

<sup>26</sup> *See* State of Ohio Rehab. Serv. Comm'n., 125 Lab. Arb. Rep. (BNA) 1509, 1517 (2008) (Murphy, Arb.).

<sup>27</sup> *Id.* at 1518.

<sup>28</sup> Clatsop County, 126 Lab. Arb. Rep. (BNA) 620, 622 (2009) (Reeves, Arb.).

<sup>29</sup> *Id.* at 634.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 635.

<sup>35</sup> *Id.*

## 2.            Personal Use during Non-Break Time

Several decisions suggest that personal use of computers can be limited to break time.<sup>36</sup> For instance, in one case, the arbitrator found that it was appropriate to admonish a union representative for using the e-mail system during his work time to notify other members of a union meeting without first seeking the permission of management.<sup>37</sup> The arbitrator reasoned that the representative could not have been on his 15-minute break at the time of day that he sent the e-mail.<sup>38</sup>

Another decision also upheld limiting Internet use to break time. The grievant's supervisor saw him access the Internet for what appeared to be non-business reasons several times.<sup>39</sup> She also saw him call over other employees to view his computer screen and announce breaking news.<sup>40</sup> The supervisor requested an audit of the grievant's computer use. The audit disclosed that the grievant was repeatedly using the computer during work time for non-business related purposes, such as accessing websites such as Ticketmaster, weather.com, the St. Petersburg Times, and USA jobs.<sup>41</sup> The arbitrator found that personal use could reasonably be limited to break times because intermittent viewing of websites would "be disruptive and inefficient as to productivity."<sup>42</sup> As a result it would likely adversely affect the employee's work performance, as the arbitrator found it had in the case.<sup>43</sup>

## 3.            Excessive Computer Use

Arbitration decisions suggest that employers have a legitimate business interest in ensuring that excessive personal computer use does not result in interference with successful job performance.<sup>44</sup> For example, in one case, a campus

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<sup>36</sup> Levinson, *supra* note 4, at 666.

<sup>37</sup> Dep't of Veterans Affairs, 118 Lab. Arb. Rep. (BNA) 1543, 1545 (2003) (Oberdank, Arb.).

<sup>38</sup> *Id.* at 1546.

<sup>39</sup> Dep't of Veterans Affairs, 122 Lab. Arb. Rep. (BNA) 106, 108 (2006) (Hoffman, Arb.).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 109, n.3.

<sup>42</sup> *Id.* at 111.

<sup>43</sup> *Id.*

<sup>44</sup> Levinson, *supra* note 4, at 666. *Cf.* Univ. of Mich., 114 Lab. Arb. Rep. (BNA) 1394, 1401 (2000) (Sugerman, Arb.) (upholding directive not to make personal calls while on break because excessive calls were interfering with employee's job performance).



police officer self-reported his work time, yet computer records revealed that he had been using another employee's computer during the time he was self-reporting the completion of checking the premise of one facility.<sup>45</sup> The arbitrator upheld his termination, because the amount of time spent on the computer indicated that it would have been impossible for him to have completed the necessary premise check, thus leaving the premise unchecked and unsecured.<sup>46</sup>

And at least one arbitration decision has upheld discipline for apparent excessive personal use of a computer even when there was no evidence that the use interfered with the quality of the employee's work.<sup>47</sup> Co-workers testified that they observed the grievant using the computer for personal reasons, and the decision upheld a 24 hour suspension for "occasional to frequent" use of the work computer for the employee's "personal metal fabrication business."<sup>48</sup>

Yet other decisions indicate that arbitrators will reduce the level of discipline imposed when the excessive use does not actually interfere with the employee's satisfactory performance. For instance, in one recent case, a high school teacher was terminated for failure to teach and for excessive use of the computer for prohibited reasons during instructional time.<sup>49</sup> The school district's technology use policy prohibited use "for personal commercial activity," but allowed "reasonable personal use."<sup>50</sup> After several parents, students, and teachers complained to the associate principal that the grievant was "spending an inordinate amount of time on the Internet rather than instructing," the assistant principal observed the grievant minimize his computer screen several times when the assistant principal entered the room.<sup>51</sup>

The assistant principal, thus, asked the technology coordinator to review the grievant's computer use.<sup>52</sup> When she reported that the grievant "had visited

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<sup>45</sup> Univ. of Chicago, 120 Lab. Arb. Rep. (BNA) 88, 95 (2004) (Briggs, Arb.).

<sup>46</sup> *Id.* at 95-96; *see also* Hoosier Energy Rural Elec. Coop, 116 Lab. Arb. Rep. (BNA) 1043, 1048, 1053 (2001) (Cohen, Arb.) (upholding termination for, among other reasons, using computer for non-work reasons for six to eight hours a week during work-time).

<sup>47</sup> City of El Paso, 123 Lab. Arb. Rep. (BNA) 691, 695 (2006) (Greer, Arb.).

<sup>48</sup> *Id.* at 694-96.

<sup>49</sup> Indep. Sch. Dist. #284, 125 Lab. Arb. Rep. (BNA) 257, 258-59 (2008) (Daly, Arb.).

<sup>50</sup> *Id.* at 261.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

numerous Internet sites that were unrelated to his teaching assignments,” the district-wide technology coordinator captured “a full report of websites and URL hits from” the grievant’s computer during the past month using a recently implemented Internet monitoring system.<sup>53</sup> According to the report, the grievant’s computer “had logged approximately 55,000 URL hits over the course of the 20-workday period.”<sup>54</sup> The report filled an entire banker’s box.<sup>55</sup> Many of the hits were to an on-line auction website, where 29 bids were made by the user of grievant’s computer, and others were to eBay.<sup>56</sup> “The amount of time spent . . . on shopping sites was 18 hours 17 minutes and 40 seconds . . . .”<sup>57</sup> Both an employer and a union computer forensic expert testified that banner ads and pop-ups can generate non-user initiated “hits,” and that while on a particular site, additional “hits” can be generated even when no one is clicking the mouse.<sup>58</sup>

The arbitrator reasoned that the report did not accurately convey actual computer use due to activity other than clicking on the mouse generating “hits.”<sup>59</sup> The arbitrator advised that the grievant should better supervise his students.<sup>60</sup> But the arbitrator concluded that the grievant had not “so utterly misused the computer that he failed to teach his students and willfully neglected his duties.”<sup>61</sup> The arbitrator, thus, reduced the termination to a long-term suspension without pay.<sup>62</sup>

In another case, the grievant, a fire-fighter, was discharged for using the employer’s e-mail system extensively for personal messages and for the sexual content of those messages, among other things.<sup>63</sup> The arbitrator held that lesser discipline should have been imposed.<sup>64</sup> The arbitrator reasoned that the messages

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 262.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 264.

<sup>59</sup> *See id.* at 266.

<sup>60</sup> *See id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> City of Quincy, 126 Lab. Arb. Rep. (BNA) 767, 771 (2008) (Finkin, Arb.).

<sup>64</sup> *Id.* at 773.

were not pornographic or unwelcome, but rather many were “adolescent dilations on love and longing,” and some were “sexually oriented” but of a routine type for “contemporary American popular culture in all its sex-saturated vulgarity.”<sup>65</sup> The arbitrator further reasoned that the e-mails were sent only to one person, his lover, and that there was no evidence presented of neglect of duty.<sup>66</sup> The arbitrator reasoned that lesser discipline would have effectively corrected the problem.<sup>67</sup>

#### 4. Unlawful Use

An employer is able to prohibit employees from using computers for unlawful purposes and to discipline them for so doing. For example, in one case an arbitrator upheld an employee’s termination for downloading child pornography in violation of a company rule.<sup>68</sup>

While other instances of employee’s use of employer’s equipment in unlawful ways have not been reported, using employer’s technology to defame someone<sup>69</sup> or in a way that amounts to sexual harassment under Title VII would likely also justify termination.

#### 5. Racial or Sexually Offensive Communications

Arbitrators generally find rules prohibiting racially or sexually offensive communications reasonable.<sup>70</sup> For example, in one case, the arbitrator upheld the termination of an employee who sent racially offensive language to a “chat room.”<sup>71</sup> Similarly, in a different case, the decision upheld a five-day suspension for an employee who viewed sexually explicit web pages on an employer’s computer while off-duty.<sup>72</sup> Finally, in a third case, the arbitrator upheld a discharge because the

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<sup>65</sup> *Id.* at 772 (quoting *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 431 (7th Cir. 1995)).

<sup>66</sup> *See id.* at 773.

<sup>67</sup> *Id.*

<sup>68</sup> *Xcel Energy*, 119 Lab. Arb. Rep. (BNA) 26, 34 (2003) (Daly, Arb.).

<sup>69</sup> *See Tesoro Ref. & Mktg. Co.*, 120 Lab. Arb. Rep. (BNA) 1299, 1301 (2005) (Suntrup, Arb.) (noting a policy that forbids electronic communications that are defamatory).

<sup>70</sup> Three of 11 survey respondents reported involvement in a case where an employee accessed pornography.

<sup>71</sup> *MT Detroit*, 118 Lab. Arb. Rep. (BNA) 1777, 1779, 1782 (2003) (Allen, Arb.).

<sup>72</sup> *U.S. Dept. of Agric.*, 118 Lab. Arb. Rep. (BNA) 1212, 1216 (2003) (Cook, Arb.).

employee had viewed more violent and disturbing pornography than other employees who had not been discharged.<sup>73</sup>

Some level of discipline will be upheld even when the conduct involved does not arise to the level of legal harassment. For instance, in one case, the decision upheld a suspension for e-mailing a calendar that was offensive.<sup>74</sup> Certain pictures violated the employer's equal opportunity policies, which were more prohibitive than required by law.<sup>75</sup> In another recent case, the decision reasoned that transmitting an e-mail with an attachment of five photos of a nude male with tattooed genitalia that offended a co-worker violated company policy.<sup>76</sup> But the arbitrator reduced the discipline because the grievant was not watching a pornographic film, did not compromise the computer system by accessing a public website, and did not engage in external communications.<sup>77</sup> While the e-mail offended one co-worker, "it was not a significant event in the workplace that resulted in loss or other harm."<sup>78</sup> Thus, in light of the employee's longevity, the termination was reduced.<sup>79</sup>

But some arbitration decisions will reduce the discipline imposed when the communication was completely private and without ability to offend another.<sup>80</sup> In one well cited case, the arbitration decision reduced the penalty from discharge to a decision-making leave.<sup>81</sup> Although it violated reasonable work rules to view pornography on the Internet, the grievant's private viewing of pornography when no one else was present was not threatening or harassing and did not violate laws or

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<sup>73</sup> State of Minn., 117 Lab. Arb. Rep. (BNA) 1569, 1573 (2002) (Neigh, Arb.).

<sup>74</sup> S. Cal. Edison, 117 Lab. Arb. Rep. (BNA) 1066, 1072 (2002) (Prayzich, Arb.).

<sup>75</sup> *Id.* See also PPG Indus., Inc., 113 Lab. Arb. Rep. (BNA) 833, 842 (1999) (Dichter, Arb.) (concluding that sexual jokes sent to employees who did not take offense nevertheless violated employer's sexual harassment policy).

<sup>76</sup> Am. Red Cross, 125 Lab. Arb. Rep. (BNA) 1696, 1703, 1714-15 (2008) (Ruben, Arb.).

<sup>77</sup> *Id.* at 1715.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1715-16.

<sup>80</sup> City of Fort Worth, Tex., 123 Lab. Arb. Rep. 1125, 1130 (2007) (Moore, Arb.) (considering that employee did not disseminate e-mails as important in decision to reinstate employee with back pay); Snohomish Co. [Wash.] Pub. Util. Dist. No. 1, 115 Lab. Arb. Rep. (BNA) 1, 8 (2000) (Levak, Arb.) ("penalty of discharge was far too severe" when employee stopped sending inappropriate e-mails after receiving warning of potential termination, and e-mails were sent only to his own home e-mail address).

<sup>81</sup> Ga. Power Co., 123 Lab. Arb. Rep. (BNA) 936, 948 (2006) (Nolan, Arb.).

create liability.<sup>82</sup> Thus, the arbitrator reduced the penalty even though the grievant knew that viewing the content was prohibited, the grievant knew that the company would monitor electronic communications, and the grievant knew that he could be disciplined and possibly discharged.<sup>83</sup> Additionally, the company consistently enforced a policy of monitoring for attempts to access inappropriate sites and instituted an investigation of all computer use for all employees who attempted to access 20 or more inappropriate sites in one month.<sup>84</sup>

Some arbitrators also reduce the discipline imposed when the communication was shared with only a few other individuals or shared only with friends. For instance, in one case, the grievant sent “arguably sexually explicit and offensive e-mails to only three close friends none of whom would be offended.”<sup>85</sup> The arbitrator considered the limited dispersal to friends in deciding to reduce the termination to a suspension.<sup>86</sup>

Recently, at least one arbitrator significantly reduced the discipline imposed when offensive material was only accidentally viewed by co-workers.<sup>87</sup> The employer limited personal use of its computers, prohibited accessing sexually explicit websites, and prohibited “objectionable language.”<sup>88</sup> A supervisor found four pages of bigoted and “uniformly disgusting” material that the grievant printed jammed in the printer.<sup>89</sup> The grievant was suspended for 20 days.<sup>90</sup> The arbitrator noted that “chatting at the water cooler has now been replaced with time wasted surfing the Internet” and that “the Internet is populated by an abundance of gross and discriminatory refuse, the price we pay for the free marketplace of ideas.”<sup>91</sup> The arbitrator reduced the

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<sup>82</sup> *Id.* at 947.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 938.

<sup>85</sup> Levinson, *supra* note 4, at 676 n.392 (citing Chevron Prods. Co., 116 Lab. Arb. Rep. (BNA) 271, 274, 280-81 (2001) (Goodstein, Arb.)).

<sup>86</sup> Chevron Prods. Co., 116 Lab. Arb. Rep. (BNA) 271, 274, 280-81 (2001) (Goodstein, Arb.).

<sup>87</sup> City of Fort Lauderdale, 125 Lab. Arb. Rep. (BNA) 1249, 1254 (2008) (Abrams, Arb.).

<sup>88</sup> *Id.* at 1249.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1249.

<sup>91</sup> *Id.* at 1252-53.

discipline to a five-day suspension, reasoning that no evidence indicated that the grievant intended to make the offensive material available to other employees.<sup>92</sup>

As with a rule generally prohibiting personal communications, a rule prohibiting pornography or sexually or racially offensive communications must be consistently enforced in order to justify discipline. For instance, one decision found that because employees, including supervisors, routinely used the computer system to send e-mail for non-business related activities, including sending sexually related jokes, a company's policy forbidding such use was "completely negated."<sup>93</sup> The arbitrator reasoned that failing to monitor for prohibited use and instead relying only on complaints of inappropriate use meant that employees "have a right to believe that what they are doing has been condoned by the Company."<sup>94</sup> The arbitrator suggested that "by spot checking the e-mail messages sent over the Company computers, from time to time, the Company could determine whether anyone was violating the Company's e-mail Policy."<sup>95</sup> The grievant's termination was reduced to a three-day suspension.<sup>96</sup>

In another case, a decision found no just cause for the grievant's termination. Supervisors had "on a regular basis knowingly tolerated, condoned and joined" in sending e-mails which were inappropriate per a written policy.<sup>97</sup> The arbitrator reasoned that lax enforcement lulls employees into "a false sense of security."<sup>98</sup>

Similarly, as with most rules, arbitrators find notice of the rule prohibiting offensive communications important. For instance, one decision upheld a suspension for circulating an offensive calendar via e-mail where the employee was on notice of a detailed and comprehensive equal opportunity policy that prohibited derogatory pictures and suggestive calendar displays.<sup>99</sup>

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<sup>92</sup> *Id.* at 1254.

<sup>93</sup> *Chevron Prods. Co.*, 116 Lab. Arb. Rep. (BNA) 271, 272 (Goodstein, Arb.).

<sup>94</sup> *Id.* at 275.

<sup>95</sup> *Id.* at 279.

<sup>96</sup> *Id.* at 281.

<sup>97</sup> *Snohomish County*, 115 Lab. Arb. Rep. (BNA) 1, 7, (2000) (Levak, Arb.).

<sup>98</sup> *Id.* at 7.

<sup>99</sup> *S. Cal. Edison*, 117 Lab. Arb. Rep. (BNA) 1066, 1071-72 (2002) (Prayzich, Arb.).

Additionally, some arbitrators find no just cause to discipline an employee for receipt of inappropriate and sexually explicit e-mails, or for receipt of “earthy, candid, and disgusting” e-mails.<sup>100</sup> In such cases, the employee does not generate the pictures and does not disseminate them. Moreover, as the arbitrator in one case reasoned, “[w]hat may be one individual’s art may be another’s pornography.”<sup>101</sup>

## 6. Proprietary Company Information

Arbitration decisions hold that employers reasonably prohibit use of proprietary company databases for personal reasons. For example, one arbitrator imposed a one-day suspension on a deputy sheriff who ran acquaintances’ names through a law enforcement database containing motor vehicle and warrant information.<sup>102</sup> In another case, an employee checked a social services database to verify that a complaint of child neglect had been filed against her, and the arbitrator imposed a suspension.<sup>103</sup>

## 7. Disrespectful Communications

At least one arbitrator upheld the discharge of an employee who engaged in sending a disrespectful e-mail as well as making verbal threats against management. The e-mail, to all those with whom he worked, stated the employee had “continued to tolerate the abuse and micro management of the Comptroller’s shop.”<sup>104</sup>

Another arbitrator held, however, that a disrespectful e-mail sent as a protected concerted activity could not serve as the basis of discipline.<sup>105</sup> In this case, the grievant, a school teacher, received a written reprimand for, among other things, sending an e-mail that arguably “ridiculed and showed disrespect for building

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<sup>100</sup> City of Fort Worth, 123 Lab. Arb. Rep. (BNA) 1125, 1129-30 (2007) (Moore, Arb.); *see also* Monterey County, 117 Lab. Arb. Rep. (BNA) 897, 899-900 (2002) (Levy, Arb.).

<sup>101</sup> City of Fort Worth, 123 Lab. Arb. Rep. (BNA) at 1129.

<sup>102</sup> Franklin County Sheriff’s Office, 124 Lab. Arb. Rep. (BNA) 654, 660-63 (2007) (Bell, Arb.).

<sup>103</sup> Mont. Child & Family Serv., 122 Lab. Arb. Rep. (BNA) 656, 662 (2006) (Reeves, Arb.).

<sup>104</sup> Marine Corps Air Ground Command Ctr., 111 Lab. Arb. Rep. (BNA) 161, 162 (1998) (Gentile, Arb.).

<sup>105</sup> One survey respondent reported involvement in a case where the issue was whether the grievant’s use of the school employer’s e-mail system “to solicit comments about the employer was protected speech under Ohio law.” Based on the comparison of facts and information, it appears this respondent was involved in the Sycamore Board of Education case discussed *infra*.

administrators and the safety policies they sought to enforce.”<sup>106</sup> The arbitrator reasoned that the grievant sent the e-mail in his role as union representative and for the purpose of concerted activity. Specifically, the arbitrator reasoned that although the e-mail was “self-serving,” “unprofessional,” “disrespectful,” “belittling of building administrators,” and used inappropriate racially charged language,<sup>107</sup> it was a protected message seeking information necessary to adjust a grievance. It did not contain unlawful content or violate the contract, and thus could not serve as the basis of discipline.<sup>108</sup>

### *B. Technology Used Off-Duty*

As we all realize and as stated by one arbitrator, “[a]s a general rule, once an employee is off duty and away from the workplace, there is a presumption that the employee’s private life is beyond the employer’s control.”<sup>109</sup> As a result, the number of cases relating to new technologies and discipline for off-duty behavior are fewer than those relating to on-duty behavior. Yet there are some, as would be expected, due to the blurring of the boundaries between work and personal life occurring due to the rise of new technologies.

There are several types of off-duty conduct involving new technology that arbitrators generally find result in the “direct nexus”<sup>110</sup> justifying discipline. First, arbitrators encounter cases involving employees competing with their employers. For example, in one case, an arbitrator upheld a termination in part based on an employee’s e-mail soliciting business from a company that the grievant’s employer was also soliciting.<sup>111</sup> In another, the arbitrator upheld the termination of an employee who had set up an Internet website and purchased equipment to establish a directly competing business.<sup>112</sup>

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<sup>106</sup> Sycamore Bd. of Educ., 123 Lab. Arb. Rep. (BNA) 1588, 1596 (2007) (Van Pelt, Arb.).

<sup>107</sup> *Id.* at 1600.

<sup>108</sup> *Id.*

<sup>109</sup> Dep’t. of Corr. Servs., 114 Lab. Arb. Rep. (BNA) 1533, 1536 (1997) (Simmelkjaer, Arb.).

<sup>110</sup> Quaker Oats Co., 116 Lab. Arb. Rep. (BNA) 211, 212, 215 (2001) (Marino, Arb.). By “direct nexus” arbitrators mean the type of significant concrete harm to the employer that justifies discipline.

<sup>111</sup> GFC Crane Consultants, Inc., 122 Lab. Arb. Rep. (BNA) 801, 804 (2006) (Abrams, Arb.).

<sup>112</sup> Fox Television Station, 118 Lab. Arb. Rep. (BNA) 641, 645 (2003) (Allen, Arb.).



Second, arbitrators encounter cases where a role model engages in immoral or obscene conduct, drawing attention from those in the workplace and the community.<sup>113</sup> For example, in one case, the grievant, a school teacher, was terminated when his estranged wife posted obscene nude photos of him on MySpace and two other websites, in conjunction with “gross” write-ups.<sup>114</sup> Co-workers, children, parents, the local newspaper, and the community became aware of the photos. At least one child called a teacher in tears. The arbitrator reasoned that in such circumstances, an employee has some responsibility to keep off-duty conduct private from those in the workplace. The arbitrator reasoned that the grievant had been warned that his wife would likely make the photos publicly available, but failed to take measures to prevent her from doing it. The decision, thus, upheld the termination.<sup>115</sup>

In another recent case, an elementary school teacher was terminated for appearing nude on pornographic websites.<sup>116</sup> The superintendent received an anonymous package in the mail with a statement from concerned parents and printouts from the websites.<sup>117</sup> The arbitrator upheld the termination, reasoning that “teachers and other school employees often are held to a ‘heightened scrutiny’ of their personal lives because of the important role they fill as educators and caretakers of children.”<sup>118</sup>

Yet, in another case, an arbitrator stated that he could not uphold a termination where a teacher engaged in conduct that caused disruption to students and the community.<sup>119</sup> The teacher went to a festival that was generally known as a “rowdy occasion” with “public sexual activity.”<sup>120</sup> Her group decided to participate in performing fellatio and cunnilingus on mannequins in exchange for a shot of liquor. While the teacher was participating, she was photographed, and someone

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<sup>113</sup> See also *Cedarburg Educ. Ass’n v. Cedarburg Bd. of Educ.*, 756 N.W.2d 809 (Wis. Ct. App. 2008) (upholding refusal to enforce arbitration decision reinstating teacher who used school computer to view adult images on public policy grounds).

<sup>114</sup> *Warren City Bd. of Educ.*, 124 Lab. Arb. Rep. (BNA) 532, 535 (2007) (Skulina, Arb.).

<sup>115</sup> *Id.* at 536.

<sup>116</sup> *Phenix City Bd. of Educ.*, 125 Lab. Arb. Rep. (BNA) 1473 (2009) (Baroni, Arb.).

<sup>117</sup> *Id.* at 1473.

<sup>118</sup> *Id.* at 1476.

<sup>119</sup> *L’Anse Creuse Pub. Schs.*, 125 Lab. Arb. Rep. (BNA) 527 (2008) (Daniel, Arb.).

<sup>120</sup> *Id.* at 527.

posted the photos on a publicly available website, causing a commotion with the students, parents, and community. The employer, thus, placed the grievant on administrative leave. The arbitrator stated, “[h]ere the grievant was involved in an acknowledged adult activity of a salacious nature, however it did not directly involve either the school or her capacity to teach. For this reason, the arbitrator must find that the employer would not have had just cause for terminating her employment or otherwise disciplining her.”<sup>121</sup> But the arbitrator did hold that the paid administrative leave was appropriate because her outside activity “had carried over into the school community,” and thus she should not be teaching until the matter was resolved.<sup>122</sup>

Third, several cases address situations where off-duty conduct involves an employee’s relationship with co-workers. In one case, a police officer sent a racially “vile and repugnant ‘joke’” via text message from his personal cell phone to a number of individuals, including a black co-worker.<sup>123</sup> The decision found that the grievant inadvertently forwarded the message either because he intended to send it to someone else, or because he experienced a problem when purging his text message inbox. As soon as the grievant learned he had sent the message to the co-worker, he apologized and asked to be forgiven.<sup>124</sup> Nevertheless, the decision found that the grievant brought discredit to him and the department because, inadvertently or not, he forwarded the message to two co-workers, and such racist attitudes were unacceptable.<sup>125</sup> The arbitrators, however, reduced the grievant’s termination to a 21-day suspension.<sup>126</sup> They did so because the message was sent inadvertently, there was no evidence that any other employee was terminated for comparable conduct, and the grievant had a commendable record.<sup>127</sup>

Another arbitrator upheld the termination of an employee who used his work computer to exchange sexually oriented messages with the wife of one of his subordinates.<sup>128</sup> While the e-mails were exchanged while on duty, the arbitrator

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<sup>121</sup> *Id.* at 530.

<sup>122</sup> *Id.*

<sup>123</sup> WMATA/Metro, 124 Lab. Arb. Rep. (BNA) 972, 976 (2007) (Evans, Arb.).

<sup>124</sup> *Id.* at 977.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 978.

<sup>127</sup> *Id.*

<sup>128</sup> City of Quincy, 126 Lab. Arb. Rep. (BNA) 534 (2008) (Finkin, Arb.).

focused on the personal nature of the relationship, analogizing to off-duty conduct cases.<sup>129</sup> The arbitrator stated the applicable principle as follows: “[i]t is a fundamental principle of workplace justice that an employee’s private life is none of the employer’s concern save in those instances where there is a demonstrable deleterious impact in the workplace.”<sup>130</sup> The arbitrator reasoned that the relationship negatively impacted the workplace because the husband of the woman was unable to work with the grievant, and no schedule could permit them not to work together.<sup>131</sup>

Fourth, at least one decision addresses a situation where an employee uses technology outside of the workplace to publicly criticize the employer. The arbitrator upheld a suspension for, among other things, posting a rap song on a union website.<sup>132</sup> The grievant, a firefighter paramedic, was the union vice-president, and was being investigated by the fire department for various reasons. While working, he and a colleague wrote some lyrics protesting the investigation. Then, while off-duty, they turned the lyrics into a rap song that demeaned the fire department and the police department and posted it on the union website. The arbitrator reasoned that an employee is not “free to criticize publicly his employer over employment matters” in such circumstances.<sup>133</sup> Such public criticism might adversely affect the “internal harmony of a fire department.”<sup>134</sup>

Fifth, at least one arbitrator encountered a case where the company claimed its reputation was damaged by criminal conduct of a non-role-model employee made available to the community. In the case, an employee of the Coca-Cola Bottling Co. was convicted as a sex offender and registered as such on a state website.<sup>135</sup> The arbitrator reasoned that the company had a reputation as an “all-American” and “wholesome” company and that the public, customers, and co-workers could all be expected to object to the unsupervised delivery of products by the grievant.<sup>136</sup> The

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<sup>129</sup> *Id.* at 539.

<sup>130</sup> *Id.* at 538.

<sup>131</sup> *Id.* at 539.

<sup>132</sup> Union Twp. Bd. of Trs., 125 Lab. Arb. Rep. (BNA) 1638 (2008) (Rosen, Arb.).

<sup>133</sup> *Id.* at 1658.

<sup>134</sup> *Id.*

<sup>135</sup> The Coca-Cola Bottling Co. of Ohio/Ky. Dayton Sales Ctr., 121 Lab. Arb. Rep. (BNA) 1489, 1498 (2005) (Paolucci, Arb.).

<sup>136</sup> *Id.* at 1494, 1498.

arbitrator concluded that “[t]he type of crime is serious enough and its unacceptability to the public significant enough to justify the Grievant’s termination.”<sup>137</sup>

Finally, one case demonstrates that the generally applicable rule that “the employee’s private life is beyond the employer’s control”<sup>138</sup> applies equally to cases involving technology. In this case, the grievant, a sheriff’s deputy, attended a dance bar, and the bar posted a photo of the grievant dancing on its website.<sup>139</sup> The grievant called in late to work the next morning.<sup>140</sup> Management inquired about her reasons for being late, and she asserted that her power had gone out and her alarm clock had failed to ring.<sup>141</sup> Management, having viewed the bar’s publicly available web page and believing that her late night caused her tardiness, terminated her for lying about the reasons she was tardy.<sup>142</sup> The arbitrator reasoned that officers were not required to report reasons for tardiness and that she could attend a bar during her off-duty time if she so chose.<sup>143</sup> The arbitrator, thus, sustained the grievance.<sup>144</sup>

### *C. Quality of the Evidence*

Regardless of the type of case, new technologies raise issues about the reliability of the evidence that they produce. Arbitrators generally recognize that they must consider the quality of the photo or report to determine whether it is reliable.<sup>145</sup> Additionally, arbitrators generally consider the photos or records in light of the other evidence.<sup>146</sup> For instance, in one case, GPS reports did not establish a timeline of the grievant’s day, but they did sufficiently establish a conflict between the time logged by the grievant as spent at customer’s premises and the time actually

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<sup>137</sup> *Id.* at 1498.

<sup>138</sup> Dep’t. of Corr. Servs., 114 Lab. Arb. Rep. (BNA) 1533, 1536 (1997) (Simmelkjaer, Arb).

<sup>139</sup> Shawnee County, 123 Lab. Arb. Rep. (BNA) 1659, 1661 (2007) (Daly, Arb.).

<sup>140</sup> *Id.* at 1661-62.

<sup>141</sup> *Id.* at 1662.

<sup>142</sup> *Id.* at 1663.

<sup>143</sup> *Id.* at 1664.

<sup>144</sup> *Id.*

<sup>145</sup> Levinson, *supra* note 4, at 656.

<sup>146</sup> *Id.*

spent there.<sup>147</sup> In another case, “grainy” black-and-white photos were insufficient standing alone to prove the grievant had been smoking in violation of company policy.<sup>148</sup> But alongside management’s credible testimony that the grievant had confessed, they were sufficient to uphold the discipline.<sup>149</sup> On the other hand, in one case, management asserted that the grievant had been masturbating on the job.<sup>150</sup> The arbitrator held that video photographs did not prove this in light of the grievant’s credible testimony to the contrary that he was cleaning a boiler.<sup>151</sup>

When dealing with computers, the quality of the record evidence can be too complicated for the arbitrator to assess without aid and may require the testimony of experts.<sup>152</sup> In one case the employer, accompanied by an IBM technician, discovered 18 “images depicting child pornography which were located in temporary Internet files” on the grievant’s company-issued computer.<sup>153</sup> The employer reported the discovery to the police, which confiscated the computers to which the grievant had access.<sup>154</sup> The grievant stated that he had no knowledge of the images, volunteering “that it may have been attached to an unsolicited e-mail or was a ‘pop-up.’”<sup>155</sup> But the employer, nevertheless, suspended him with intent to terminate him. At the hearing, “[e]xpert witnesses credibly explained that files, including unwanted files, are frequently created on computers in normal operation.”<sup>156</sup> The arbitrator reasoned that if the grievant did not knowingly or intentionally engage in the misconduct, he could not be penalized for it.<sup>157</sup> The arbitrator also relied on the findings of the state trooper who examined the hard drive and determined that the images could have

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<sup>147</sup>Embarq, 123 Lab. Arb. Rep. (BNA) 923, 930-31 (2007) (Armedariz, Arb.).

<sup>148</sup>Montgomery Gen. Hosp., 122 Lab. Arb. Rep. (BNA) 949, 951 (2006) (Coyne, Arb.).

<sup>149</sup>*Id.*

<sup>150</sup>Kuhlman Elec. Corp., 123 Lab. Arb. Rep. (BNA) 257, 262 (2006) (Nicholas, Arb.).

<sup>151</sup>*Id.*

<sup>152</sup>*See e.g.*, Indep. Sch. Dist. #284, 125 Lab. Arb. Rep. 257, 264 (BNA) (2008) (Daly, Arb.) (computer forensic experts testified about generation of Internet hits by pop-ups and automatically refreshing web pages).

<sup>153</sup>AK Steel, 125 Lab. Arb. Rep. (BNA) 903, 904 (2008) (Dean, Arb.).

<sup>154</sup>*Id.*

<sup>155</sup>*Id.*

<sup>156</sup>*Id.* at 908.

<sup>157</sup>*Id.*

been accidentally stored.<sup>158</sup> The arbitrator reasoned that the employer had overlooked that exculpatory evidence when deciding to discharge the grievant.<sup>159</sup> For these reasons, the arbitrator sustained the grievance.<sup>160</sup>

#### IV.      EMPLOYER MONITORING OF EMPLOYEES

Another issue raised by the just cause cases and some cases brought under other types of provisions is whether employer technological monitoring of employees is appropriate and, if so, in what circumstances and with what safeguards. This section addresses cases discussing monitoring of on-duty actions, whether employees have any right to privacy in on-duty communications, monitoring of on-duty communications, monitoring of off-duty conduct, monitoring the employer's property when it is located on the employee's property, and negotiating over institution of technological monitoring.

##### *A.      Monitoring On-Duty Actions*

As in many discipline cases, notice is one important factor that arbitrators consider when deciding whether to uphold discipline for an infraction discovered via technological monitoring, such as by GPS.<sup>161</sup> Two cases involving monitoring by GPS illustrate how notice to the employee that the behavior is an infraction can be critical in determining whether to uphold the imposed discipline.<sup>162</sup> In both cases the employees were well aware that the employer was monitoring them via GPS.<sup>163</sup> In the first case, the employee was disciplined for driving an employer-owned vehicle to his home for lunch.<sup>164</sup> The arbitrator overturned a 24-hour suspension because no policy prohibited the employee from driving an employer-owned vehicle to his home for lunch.<sup>165</sup> On the other hand, in the second case, GPS records disclosed that an

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<sup>158</sup> *Id.* at 909.

<sup>159</sup> *Id.* at 910.

<sup>160</sup> *Id.* at 911.

<sup>161</sup> Levinson, *supra* note 4, at 651. One survey respondent reported involvement with a case where GPS was used in determining whether a truck driver deviated from his route.

<sup>162</sup> *Id.* at 651.

<sup>163</sup> *Id.* at 651-52.

<sup>164</sup> Orange Co., Fla. 123 Lab. Arb. Rep. (BNA) 460, 463 (2007) (Smith, Arb.).

<sup>165</sup> *Id.* at 465.

employee had misrepresented the amount of time he spent working at customer sites.<sup>166</sup> The employer had previously warned the grievant about falsifying time records; thus, primarily for this reason, the arbitrator upheld the discipline.<sup>167</sup>

The cases suggest that arbitrators are all over the map as to the issue of whether employers should be able to discipline employees for on-duty behavior discovered via surreptitious technological monitoring. One decision suggests that surreptitious use of a GPS is generally unwarranted.<sup>168</sup> The employee was terminated for “going home without permission on repeated occasions.”<sup>169</sup> The employer verified its suspicion that the off-site employee was not working during working hours by installing a GPS system in company vehicles of those employees working off-site without notice to those employees.<sup>170</sup> The arbitrator reduced the discipline because, among other reasons, the employer did not inform the employees of the installation of the GPS system.<sup>171</sup>

A second decision suggests that surreptitious monitoring is appropriate when there is a known violation, but there is no knowledge of who has engaged in the violation.<sup>172</sup> A hospital employer was faced with a situation where someone was smoking in violation of hospital policy.<sup>173</sup> The employer thus installed a webcam video device that identified the grievant as the culprit.<sup>174</sup> While the arbitrator did not explicitly address the issue of the employee lacking notice of monitoring, the arbitrator upheld the grievant’s discipline.<sup>175</sup>

A third decision suggests that surreptitious monitoring is generally unproblematic.<sup>176</sup> The arbitrator implied that “testimonial or documentary evidence

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<sup>166</sup> Embarq, 123 Lab. Arb. Rep. (BNA) 923, 930-31 (2007) (Armedariz, Arb.).

<sup>167</sup> *Id.* at 932.

<sup>168</sup> Levinson, *supra* note 4, at 654.

<sup>169</sup> Beverage Mktg. Inc., 120 Lab. Arb. Rep. (BNA) 1388, 1390 (2005) (Fagan, Arb.).

<sup>170</sup> *Id.* at 1391.

<sup>171</sup> *Id.* at 1392.

<sup>172</sup> Montgomery Gen. Hosp., 122 Lab. Arb. Rep. (BNA) 949 (2006) (Coyne, Arb.).

<sup>173</sup> *Id.* at 953.

<sup>174</sup> *Id.* at 950.

<sup>175</sup> *Id.* at 953.

<sup>176</sup> Levinson, *supra* note 4, at 655.

obtained through a nonconsensual search” is appropriate “so long as the methods employed are not excessively shocking to the conscience of a reasonable person . . . .”<sup>177</sup> The employer had printouts evidencing that an employee had used a computer for personal reasons without authorization in violation of a company rule.<sup>178</sup> The employer set up a camera to take photos of the employee while he was engaged in the infraction.<sup>179</sup> The camera did not photograph the employee misusing the computer, but the employer asserted it did photograph him viewing pornographic DVDs.<sup>180</sup> The employer discharged him for that behavior and other reasons. The arbitrator admitted the photos, but held that they were unclear and insufficient to prove the movie was pornographic rather than the comedy the grievant claimed to have watched.<sup>181</sup> Because of that and other mitigating factors, the grievant was reinstated without back pay.<sup>182</sup>

#### B.            *Privacy in Electronic Communications*

Several arbitrators have held that “e-mails are not private unless employer policy explicitly affords such protection.”<sup>183</sup> In one decision, for example, an employee sat at his supervisor’s desk and opened his supervisor’s e-mail.<sup>184</sup> The arbitrator assumed that the supervisor had no right to privacy in his e-mail.<sup>185</sup>

Thus, the policy governing an employee’s computer use is generally quite important. One arbitrator indicated that he might find a privacy right if management had told the grievant the e-mail was private.<sup>186</sup> And in another case a union agreed that use of the company e-mail system, even for representation purposes, was not

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<sup>177</sup> Kuhlman Elec. Corp., 123 Lab. Arb. Rep. (BNA) 257, 260 n.2 (2006) (Nicholas, Jr., Arb.) (quoting NORMAN BRAND, DISCIPLINE & DISCHARGE IN ARBITRATION 337 (1998)).

<sup>178</sup> *Id.* at 258.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 262.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Levinson, *supra* note 4, at 661.

<sup>184</sup> Monterey Co., 117 Lab. Arb. Rep. (BNA) 897, 897 (2002) (Levy, Arb.).

<sup>185</sup> *Id.* at 900.

<sup>186</sup> PPG Indus., Inc., 113 Lab. Arb. Rep. (BNA) 833, 839 (1999) (Dichter, Arb.).



private. The CBA provided that “[t]he Association and/or its members may use e-mail with no prior approval rights, but no expectation of privacy or security.”<sup>187</sup>

At least one arbitrator has implied, however, that the default rule is that employees do have a right to privacy in their electronic communications.<sup>188</sup> An employee was terminated for accessing files of another employee. The arbitrator overturned the termination, in part because of the indecent working conditions under which the employee worked, including monitoring of the employees’ computer use.<sup>189</sup> One employee testified, “[w]e were scrutinized completely . . . Our group was being held to a higher standard than anybody else as far as computer usage . . . our group was being investigated . . . We referred to it as the Gestapo.”<sup>190</sup> Another arbitrator has stated that a supervisor, as opposed to a non-supervisory employee, has some rights to privacy in his computer files.<sup>191</sup>

### C. *Monitoring On-Duty Communications*

Numerous arbitration decisions permit monitoring of electronic communications even when the employee has no notice of the monitoring, provided the employer has a reasonable cause to believe a violation of company policy has taken place and is monitoring for that reason.<sup>192</sup>

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<sup>187</sup> Sycamore Bd. of Educ., 123 Lab. Arb. Rep. (BNA) 1588, 1589 (2007) (Van Pelt, Arb.).

<sup>188</sup> Boeing-Irving Co., 113 Lab. Arb. Rep. (BNA) 699, 704 (1999) (Bankston, Arb.).

<sup>189</sup> *Id.* at 703-04.

<sup>190</sup> *Id.* at 702.

<sup>191</sup> Hoosier Energy Rural Elec. Coop., 116 Lab. Arb. Rep. (BNA) 1043, 1050 (2001) (Cohen, Arb.).

<sup>192</sup> *See, e.g.*, Dep’t of Veterans Affairs, 122 Lab. Arb. Rep. (BNA) 106, 108 (2006) (Hoffman, Arb.) (supervisor observed grievant repeatedly using computer for non-work related matters and calling other employees over to view his computer or announcing news to them, and, thus, requested a review of his Internet use); Dep’t of Veterans Affairs, 122 Lab. Arb. Rep. (BNA) 300, 306 (2005) (Petersen, Arb.) (e-mails evidencing a slowdown were discovered when someone alleged harassment and defamation; the arbitrator reduced the discharge to a written reprimand because that was the penalty for a slowdown under the employer’s progressive discipline policy); Tesoro Ref. & Mktg. Co., 120 Lab. Arb. Rep. (BNA) 1299, 1302-03 (2005) (Suntrup, Arb.) (investigation after employee posted hate group poster with listed URL); AE Staley Mfg. Co., 119 Lab. Arb. Rep. (BNA) 1371, 1375 (2004) (Nathan, Arb.) (company investigation of one employee led to discovery that another was e-mailing “hard core” pornography); City of Ft. Worth, 123 Lab. Arb. Rep. 1125, 1127 (2007) (Moore, Arb.) (search of e-mail conducted when one employee reported grievant was assisting another employee in theft of saw blades); S. Cal. Edison, 117 Lab. Arb. Rep. (BNA) 1066, 1069 (Prayzich, Arb.) (implying search of grievant’s e-mail was performed when co-worker complained about receiving offensive calendar).

For instance, in one case, the relevant policy permitted “limited, occasional or incidental personal, non-business use” of the computer, but it prohibited storing or retrieving discriminatory, offensive, derogatory, obscene, sexual, or defamatory communications.<sup>193</sup> The policy also indicated that the company did not intend to strictly monitor the computer system, but that it reserved the right to do so. In particular, the company might do so to ensure an employee’s use complied with the law and company policies, or when the company had a business need to monitor.<sup>194</sup> The policy warned that abuse of the policy would subject an employee “to disciplinary action without further warning, up to and including discharge . . . .”<sup>195</sup> A co-worker had e-mailed members of the bargaining unit, including the grievant, warning them not to access pornographic sites because he had been disciplined for doing so.<sup>196</sup> The grievant was, thus, arguably provided notice that infractions were being disciplined. Human resources instigated an investigation of the grievant’s computer use when he posted a hate group’s poster, complete with a Uniform Resource Locator (URL) address, on the company bulletin board.<sup>197</sup> Human resources discovered that the grievant had accessed hate sites and pornographic sites “innumerable times.”<sup>198</sup> The arbitrator upheld his termination based on the misuse of the computer system and additional misconduct.<sup>199</sup>

In another case with similar facts, the arbitrator reduced a discharge to reinstatement after nine months leave with no back pay.<sup>200</sup> The employer investigated the employee’s e-mail based on a co-worker’s complaint, and the investigation of the chain of e-mails led the employer to change the grievant’s password to access his e-mail.<sup>201</sup> Therein, the employer discovered hard-core material which had been e-mailed from grievant’s home computer and to other

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<sup>193</sup> Tesoro Ref. & Mktg. Co., 120 Lab. Arb. Rep. (BNA) 1299, 1301 (2005) (Suntrup, Arb.).

<sup>194</sup> *Id.* at 1302.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1307.

<sup>197</sup> *Id.* at 1303.

<sup>198</sup> *Id.* at 1306.

<sup>199</sup> *Id.* at 1308.

<sup>200</sup> PPG Indus., Inc., 113 Lab. Arb. Rep. (BNA) 833, 845 (1999) (Dichter, Arb.).

<sup>201</sup> *Id.* at 835.

employees and to an employee of an independent contractor.<sup>202</sup> The employee asserted a privacy right under the Electronic Communications Privacy Act, but the arbitrator explicitly determined that there was no violation of the employee's privacy rights.<sup>203</sup> The arbitrator reasoned that employees have no expectation of privacy, even when using an individualized e-mail password, because an employer has a right to see "material that would be confidential to others," and the company provides the computer access to the employee.<sup>204</sup>

In another case, a "chat room" operator informed an employer that an employee had posted a message containing offensive racial language.<sup>205</sup> The employer conducted an investigation to confirm that the message had originated from a computer that the grievant used.<sup>206</sup> The arbitrator upheld the grievant's termination.<sup>207</sup> And in a third case, one woman complained that she saw a naked woman on a co-worker's screen. The employer then performed an extensive investigation of a chain of pornographic e-mails and related computer use, resulting in the grievant's discharge, which the arbitrator upheld.<sup>208</sup> The arbitrator in another case made clear, however, that discipline will not be justified when an employer engages in unnoticed electronic surveillance for which an employer does not have reasonable cause.<sup>209</sup> In the case, the employer surreptitiously and selectively videotaped conversations without any evidence of misconduct.<sup>210</sup>

#### D. *Monitoring of Employees Off-Duty Conduct*

Closely related to the issue of disciplining employees for off-duty conduct involving new technologies is the appropriateness of employers monitoring off-duty

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<sup>202</sup> *Id.* at 841.

<sup>203</sup> *Id.* at 838, 845.

<sup>204</sup> *Id.* at 840.

<sup>205</sup> MT Det., 118 Lab. Arb. Rep. (BNA) 1777, 1779 (2003) (Allen, Arb.).

<sup>206</sup> *Id.* at 1779.

<sup>207</sup> *Id.* at 1782.

<sup>208</sup> State of Minn., 117 Lab. Arb. Rep. (BNA) 1569, 1573 (2002) (Neigh, Arb.).

<sup>209</sup> Union-Scioto Local Bd. of Educ., 119 Lab. Arb. Rep. (BNA) 1071 (2004) (Cohen, Arb.).

<sup>210</sup> *Id.* at 1075-76.

employees. The issue does not yet appear to be a critical issue for many arbitrators,<sup>211</sup> but there are several relevant cases.<sup>212</sup>

In one case, an employee told his supervisor he would be hunting over Thanksgiving week.<sup>213</sup> When he called in to use FMLA leave during that week with the excuse that he had to care for his sick wife, the employer hired a private investigator whose surveillance films revealed the employee loading a truck and otherwise preparing to go hunting.<sup>214</sup> The arbitrator reasoned that surreptitious off-duty surveillance based on a reasonable suspicion of misconduct is appropriate when the surveillance takes place “outdoors and in the open.”<sup>215</sup> Thus, the arbitrator relied on the film to uphold the employee’s discharge.<sup>216</sup>

In another case, the arbitrator expressed no concern about monitoring without any reasonable suspicion. An employee used 255.33 hours of Family Medical Leave Act leave in less than a 12-month period, so the executive vice president of the employer decided to have an investigative firm conduct surveillance of the employee’s activities.<sup>217</sup> The vice president decided to terminate the grievant based on the private investigator’s report, without reviewing the video that had been taken.<sup>218</sup> The arbitrator concluded that the video of the grievant performing yard work demonstrated that the grievant “had an obvious impairment” and would have

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<sup>211</sup> Levinson, *supra* note 4, at 681.

<sup>212</sup> See e.g., City of Dayton, 124 Lab. Arb. Rep. (BNA) 1655 (2008) (Bell, Arb.) In this case, grievant, a police officer, received pornographic communications on a non-employer issued laptop from another officer over the employer’s e-mail system. *Id.* at 1658. The officer was attempting to one-up the grievant. *Id.* The grievance was sustained, and the three-day suspension was reduced to one day because she had not intended to use the employer’s property at all to transmit pornography. *Id.* at 1662. A related issue also likely to continue to grow in salience is use of surveillance by a third party to prove an employee’s off-duty misconduct. For instance, in Lincoln Electric System, 125 Lab. Arb. Rep. (BNA) 1185, 1190 (2008) (Gaba, Arb.), the employer relied on video taken by Home Depot to prove that an employee who claimed he was unable to perform light duty work would have been able to do so.

<sup>213</sup> Interstate Brands Corp., 121 Lab. Arb. Rep. (BNA) 1580, 1581 (2005) (Skulina, Arb.).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1582.

<sup>216</sup> *Id.*

<sup>217</sup> Bud Indus., Inc., 124 Lab. Arb. Rep. (BNA) 908, 910 (Miles, Arb.).

<sup>218</sup> *Id.*

been unable to work for all but the last hour and a half of his shift.<sup>219</sup> The arbitrator overturned the termination.<sup>220</sup>

*E. Monitoring Employer's Property on the Employee's Property*

As advancing technology creates more opportunity for employees to work away from the workplace, legal issues created by use of employer property away from the workplace and while at home arise.<sup>221</sup> For instance, one arbitration decision involved not only first-hand observation but also GPS reports disclosing that an employer-owned vehicle was parked at an employee's home during work time.<sup>222</sup> The arbitrator, while reasoning that the first-hand observation carried more weight, did not preclude the use of the GPS reports at the arbitration hearing.<sup>223</sup> The arbitrator did, however, reduce the discipline, in part because the GPS system was installed without notice to the employees.<sup>224</sup>

*F. Bargaining Over Employer Technological Monitoring*

Another issue that may certainly arise is whether evidence resulting from technological monitoring over which the union had no opportunity to bargain is admissible.<sup>225</sup> In one case involving a unique fact pattern, the union tried to suppress photographs captured by an infrared camera (a camera that stores pictures to a computer) by arguing that the employer had not bargained with the union prior to installing the camera.<sup>226</sup> The grievant was terminated for unauthorized use of the IT Room to masturbate.<sup>227</sup> The employer discovered the grievant's conduct because the

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<sup>219</sup> *Id.* at 914.

<sup>220</sup> *Id.* at 915.

<sup>221</sup> Levinson, *supra* note 4, at 685.

<sup>222</sup> Beverage Mktg., Inc., 120 Lab. Arb. Rep. (BNA) 1388, 1389, 1391 (2005) (Fagan, Arb.).

<sup>223</sup> *Id.* at 1389.

<sup>224</sup> *Id.* at 1391-92.

<sup>225</sup> One survey respondent reported involvement in a case challenging the use of a webcam when the collective bargaining agreement included a provision "banning management from using cameras without first advising the" union.

<sup>226</sup> Bluffton Motor Works, 125 Lab. Arb. Rep. (BNA) 1596, 1599-1600 (2008) (Lalka, Arb.).

<sup>227</sup> *Id.* at 1598.

IT Manager was testing the camera and left it in the IT Room.<sup>228</sup> It was activated by a movement sensor and taped the grievant's conduct.<sup>229</sup> The arbitrator reasoned that the camera "was not monitoring employees as they went about their daily tasks in the workplace. Nor was the camera monitoring employees in the restroom or break room."<sup>230</sup> Rather because it was in "a secure area that was off limits to production employees," the employer could use it without first bargaining with the union.<sup>231</sup> The arbitrator, thus, admitted the recording and held that "[b]reaking and entering into an unauthorized area as critical to company operations as its IT Room destroys all trust a company must have in an employee to continue the employment relationship."<sup>232</sup>

## V.        **CASES GRIEVED UNDER PROVISIONS OTHER THAN JUST CAUSE PROVISION**

A number of other issues related to new technology have arisen in contexts other than a grievance challenging discipline. This section discusses those issues and some related just cause cases. It addresses the following types of cases: union requests for negotiation over the impact of technological change; union requests for extra pay or prohibition of extra duties arising because of advancing technology; disputes about telecommuting policies; disputes involving employer prohibition of personal electronic devices on employer property; disputes over whether the employer or employee should control information stored on employer-issued computers; and union requests for greater data security.

### *A.        Impact of Technological Change*

Disputes may arise not only over a failure to negotiate about employer surveillance of employees but also over the impact of technological changes. For instance, in one case, the union agreed to implementation of a new computerized system for completing and filing paperwork that had previously been contained in

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<sup>228</sup> *Id.* at 1597.

<sup>229</sup> *Id.* at 1597-98.

<sup>230</sup> *Id.* at 1600.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 1599-1600.

paper files.<sup>233</sup> Thereafter, without negotiating with the union, the employer required that the documents be entered into the computerized system with document names required by a newly promulgated “Naming Convention,” and the union grieved such unilateral implementation.<sup>234</sup> The Convention was designed to address a failure of the new computerized system—it did not permit creation of subfolders rendering it difficult to locate documents.<sup>235</sup> The arbitrator outlined the relevant provisions of the governing collective bargaining agreement and the federal statutory law. They required mid-term bargaining of terms and conditions as well as impact and implementation bargaining over changes within management’s right to implement.<sup>236</sup> The arbitrator, however, noted that *de minimis* changes – those with no real impact – are exempt from bargaining.<sup>237</sup> The arbitrator concluded that “the impact of the Naming Convention on working conditions, assuming it was frustrating for some, has faded with time.”<sup>238</sup> Additionally, it was intended only as a temporary solution to a problem with the computerized system, and no evidence showed it impacted any employees’ performance appraisals.<sup>239</sup> Therefore, the arbitrator denied the grievance, holding that the employer was not required to bargain with the union before implementing the Naming Convention.<sup>240</sup>

#### B. *Bargaining over Overtime Pay and Off-Duty Availability*

In several cases, the issue of pay for the extra work engendered by technology arose. In one, the employees were hospital anesthesia technicians.<sup>241</sup> On a rotating basis, one of them was required to carry a Spectralink telephone, “a portable device that essentially operates in the same fashion as a cellular telephone.”<sup>242</sup> That person had the responsibility to hand off the Spectralink and

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<sup>233</sup> Internal Revenue Serv., 126 Lab. Arb. Rep. (BNA) 265, 266 (2009) (Abrams, Arb.).

<sup>234</sup> *Id.* at 267.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 271.

<sup>237</sup> *Id.* at 272.

<sup>238</sup> *Id.* at 273.

<sup>239</sup> *Id.* at 274-75.

<sup>240</sup> *Id.* at 275.

<sup>241</sup> Stanford Hosp. & Clinics, 123 Lab. Arb. Rep. (BNA) 1697, 1697 (2007) (Staudohar, Arb.).

<sup>242</sup> *Id.*

report on the status of the cases to the designated anesthesia technicians on the next shift.<sup>243</sup> The anesthesia technicians were paid “additional pay of five percent of base pay.”<sup>244</sup> When a new manager started, the additional pay was discontinued, and the union filed a grievance.<sup>245</sup> The arbitrator reasoned that the past practice of paying additional pay “survived the negotiation of the current agreement and remained in existence, at least for a short time before repudiation by the Employer.”<sup>246</sup> The arbitrator also reasoned that, based on the testimony, the anesthesia technicians carrying the phones had an increased workload. The arbitrator ordered the employer to restore the additional pay and make the employees whole for the loss of wages.<sup>247</sup>

In another case, employees, including electricians, high voltage electricians, plumbers, maintenance mechanic/workers and air conditioning mechanics, were expected to respond to pages or cell phone calls when off duty.<sup>248</sup> They were only paid if the call required them to report to work, but were not paid for time spent giving advice while off-duty.<sup>249</sup> The union grieved, seeking payment for the time spent giving advice when “on-call” but “off-premise.”<sup>250</sup> The arbitrator reasoned that the contract was silent and that the past practice was not to pay employees for providing advice when called to give advice.<sup>251</sup> The arbitrator denied the grievance stating that “[y]ou cannot obtain by arbitration that which is lost by way of negotiation.”<sup>252</sup>

In another case, the union protested when the employer unilaterally implemented a pager policy requiring certain employees to remain available for work when off-duty.<sup>253</sup> The arbitrator held that the Collective Bargaining Agreement (“CBA”) prohibited the employer from unilaterally implementing a system under

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 1698.

<sup>246</sup> *Id.* at 1701.

<sup>247</sup> *Id.* at 1702.

<sup>248</sup> *Agric. Research Serv.*, 122 Lab. Arb. Rep. (BNA) 1469, 1471 (2006) (Feldman, Arb.).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 1472.

<sup>252</sup> *Id.* at 1472.

<sup>253</sup> *Lyondell Citgo Ref.*, 120 Lab. Arb. Rep. (BNA) 360, 362 (2004) (Moreland, Arb.).



which all maintenance employees must wear pagers, respond within 15 minutes of being called, and report to work within one hour.<sup>254</sup> The CBA required that only two employees of a specified title must remain on call at all times.<sup>255</sup> The arbitrator reasoned that the new policy infringes employees “peaceable enjoyment of life and privacy during self-governed hours.”<sup>256</sup> The arbitrator ordered that employees who had been disciplined for violating the policy must be “made whole in all respects.”<sup>257</sup>

### C. *Telecommuting*

One case nicely illustrates the types of issues that can arise in the boundary-less workplace created by new technologies. The grievant was an inspector whose duties required him to inspect various sites away from his office.<sup>258</sup> The employer issued him a laptop computer on which he could work and enter his daily diaries summarizing his activities.<sup>259</sup> He was assigned to an office in the east of his work area, and no policy dictated when or how often inspectors should be at the assigned office.<sup>260</sup> The grievant’s prior supervisor indicated that he could do paperwork at his home, which was in the south of his designated area.<sup>261</sup> The grievant understood that he was permitted to work from home whenever it was beneficial to his employer and did so for four years.<sup>262</sup> The grievant’s prior supervisor stated, in an e-mail presented at the hearing, that he assigned employees to work close to their homes to save fuel and time. The grievant did not inform his new supervisor of the arrangement, assuming it was common knowledge.<sup>263</sup> When contractors complained that they had trouble reaching the grievant, the employer hired a private investigator to monitor his activities for 16 days.<sup>264</sup> The reports disclosed that he was at his home

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<sup>254</sup> *Id.* at 364-65.

<sup>255</sup> *Id.* at 363.

<sup>256</sup> *Id.* at 364.

<sup>257</sup> *Id.* at 365.

<sup>258</sup> County of Sacramento, 125 Lab. Arb. Rep. (BNA) 1500, 1501 (2008) (Bogue, Arb.).

<sup>259</sup> *Id.* at 1501.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 1502.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

during various times of the work day, and the reports identified that the grievant stopped briefly three times at his mother-in-law's home.<sup>265</sup> The grievant had asked permission of his supervisor to check on a roofing job at his mother-in-law's home, and he did not think it was necessary to seek permission anew on each particular day he stopped there.<sup>266</sup> The grievant was disciplined for falsifying time sheets and telecommuting without an official telecommuting plan.<sup>267</sup> He was suspended for three days.<sup>268</sup>

As to stopping at his mother-in-law's house, the arbitrator ruled that he had the appropriate permission to do so and was not required to record each stop as a break in light of the independence with which he worked.<sup>269</sup> As to the charge of working at home in violation of official policy and without his supervisor's knowledge, the arbitrator reasoned that the grievant did have the permission of his prior supervisor to work at home whenever the job site was closer to his home than to his assigned office.<sup>270</sup> The arbitrator further reasoned that the grievant did not know that a formal policy was required for telecommuting.<sup>271</sup> The arbitrator, nevertheless, found that two of the three jobs to which the grievant was assigned during the relevant time period were closer to the assigned office than to grievant's home, and, thus, he should not have been working as much as he was at home.<sup>272</sup> The arbitrator concluded that "his laxity in following the limitations in [his prior supervisor's] instructions was a product of the independence he had been granted, and did not stem from 'willful disobedience.'"<sup>273</sup> The arbitrator reduced the suspension to a written warning.<sup>274</sup>

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<sup>265</sup> *Id.* at 1503.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 1504.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 1505.

<sup>270</sup> *Id.* at 1506.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 1507.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 1508.

D. *Prohibiting Personal Electronic Devices on Employer's Property*

Several cases have addressed the issue of whether employers can prohibit carrying or using personal electronic devices, particularly cell phones, and whether employers can discipline employees accordingly.<sup>275</sup>

For example, in one case, the employer employed truckers who had a communication device installed in their company-issued trucks where dispatch could contact them in the event of an emergency.<sup>276</sup> The employer issued a policy prohibiting carrying cell phone and other personal communication devices.<sup>277</sup> The union filed a grievance protesting the policy and requesting permission for the truckers to carry cell phones for emergency use only.<sup>278</sup> The CBA explicitly granted the employer the right to “adopt reasonable safety and work rules not inconsistent” with the CBA.<sup>279</sup> The arbitrator upheld the prohibition, reasoning that prohibiting use of cell phones while on duty is reasonable for myriad reasons, including safety and image conveyed to customers.<sup>280</sup> The arbitrator further reasoned that a complete ban on carrying cell phones is a reasonable method of enforcement for several reasons. The employees work away from the company, and cell phone use cannot be easily monitored.<sup>281</sup> The employer had also tried using a rule prohibiting cell phone use, but it had not worked well.<sup>282</sup> Moreover, rarely would there be an emergency when the communication device installed in the truck had also failed.<sup>283</sup> The arbitrator also considered the reality that the employer had granted several employees, such as those with a pregnant wife in the last trimester or an ill family member, permission to carry a cell phone for a certain time period.<sup>284</sup>

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<sup>275</sup> See e.g., *Winston-Salem Transit*, 123 Lab. Arb. Rep. (BNA) 1185 (2006) (Bendixsen, Arb.) (employer failed to prove that bus operator had made a non-business related cell phone call while operating a bus).

<sup>276</sup> *Ozinga Ill. RMC, Inc.*, 123 Lab. Arb. Rep. 198, 200 (BNA) (2006) (Simon, Arb.).

<sup>277</sup> *Id.* at 199.

<sup>278</sup> *Id.* at 200.

<sup>279</sup> *Id.* at 201.

<sup>280</sup> *Id.* at 206.

<sup>281</sup> *Id.* at 205.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 206.

Several cases challenging just cause for termination in a prison setting also uphold the reasonableness of a rule prohibiting cell phones on the premises.<sup>285</sup> In one, a corrections officer was subject to a last chance agreement.<sup>286</sup> A rule prohibited bringing cell phones into the jail.<sup>287</sup> The officer was terminated for refusing to hand over his cell phone, which he had in a work area, to a supervisor.<sup>288</sup> The arbitrator upheld the termination, reasoning that the grievant's conduct in refusing to hand over the phone was "contrary to the well accepted 'obey now-grieve later' doctrine."<sup>289</sup>

In another case, an employee was discharged for use of a cell phone, among other things.<sup>290</sup> The employer manufactured products requiring the use of flammable chemicals, and it placed great weight on safety.<sup>291</sup> The safety rules included one prohibiting "the use of cell phones while operating a forklift."<sup>292</sup> Management observed the grievant using his cell phone while operating the forklift and shortly thereafter, outside of the forklift, during a non-break time.<sup>293</sup> The grievant received a phone call from his son's mother while in the forklift and told her he would call her right back.<sup>294</sup> He terminated the call, left the forklift, and called her back because his son had been suspended from school and his mother lived in a different state, necessitating his attention to the problem.<sup>295</sup> The plant practice was to permit employees to use cell phones outside of the working area, even during non-break times.<sup>296</sup> The arbitrator upheld the grievance, reasoning that the grievant was singled

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<sup>285</sup> See e.g., V.I. Dep't of Justice, 125 Lab. Arb. Rep. (BNA) 626, 632 (Henner, Arb.) (2008). ("The fact is still that the Grievant violated general conduct rules in providing a cell phone to an inmate, and then lying about that fact.")

<sup>286</sup> Multi-County Corr. Ctr., 124 Lab. Arb. Rep. (BNA) 1519, 1520 (2007) (Bordone, Arb.).

<sup>287</sup> *Id.* at 1521.

<sup>288</sup> *Id.* at 1522-23.

<sup>289</sup> *Id.* at 1524.

<sup>290</sup> Tremco, Inc., 124 Lab. Arb. Rep. (BNA) 229 (2007) (Lalka, Arb.).

<sup>291</sup> *Id.* at 230.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 231.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 232.

out for discipline, including the discipline for the brief phone call in the forklift.<sup>297</sup> The arbitrator further reasoned that the practice was to permit the use of cell phones in “safe areas” and that the son’s difficulties provided a legitimate reason for the grievant to use the phone.<sup>298</sup>

On the other hand, one case dealing with use of private property while on break but at the workplace upholds an employer’s right to discipline an employee for use of such technology in violation of employer rules.<sup>299</sup> The employee used his cell phone to take photographs of the sunset during his break period while in a smoking area.<sup>300</sup> Taking photos violated an employer rule prohibiting the use of recording devices on plant property.<sup>301</sup> The employer, thus, requested that the employee disclose the photos on his phone.<sup>302</sup> When the employee refused, the employer discharged him.<sup>303</sup>

#### *E. Control of Information Stored on the Computer*

Several cases raise the issue of whether the employer or the employee should have control over information stored on an employer-issued computer. In one case an employee was terminated for installing and failing to remove a password that prohibited management from using the computer.<sup>304</sup> The arbitrator concluded that the company owned the computers and had a management right to prohibit installation of such passwords.<sup>305</sup>

In another case, the union proposed during negotiations that employees perform routine maintenance on assigned computers. But the interest arbitrator

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<sup>297</sup> *Id.* at 239.

<sup>298</sup> *Id.*

<sup>299</sup> *Trane Co.*, 124 Lab. Arb. Rep. (BNA) 673, 677 (2007) (Heekin, Arb.).

<sup>300</sup> *Id.* at 674.

<sup>301</sup> *Id.* at 673-74.

<sup>302</sup> *Id.* at 676-77.

<sup>303</sup> *Id.* at 674.

<sup>304</sup> *Saint Gobain Norpro*, 116 Lab. Arb. Rep. (BNA) 960 (2001) (Fullmer, Arb.).

<sup>305</sup> *Id.* at 967 (the grievant was, however, reinstated because the employer had not provided adequate notice of the policy prohibiting personal passwords).

chose the employer's proposal that the computers be sent to an appropriate location for the employer to perform the necessary maintenance.<sup>306</sup>

#### F.      *Data Security*

One issue often raised by new technologies is that of confidentiality and security of personal information. While the issue has not yet frequently arisen in the arbitration decisions, at least one case raises the issue.<sup>307</sup> The employer hired an accounting firm to perform a financial audit, and two laptop computers containing the names and social security numbers of the unit members were stolen from the accounting firm.<sup>308</sup> The employer did not possess or operate these computers. The computers were, however, stolen from the employer's headquarters.<sup>309</sup> The employer provided the grievants "with credit protection via Internet and mail with three recognized credit bureaus for a period of 12 to 24 months with an option to renew, automatic fraud alert on credit files, and \$20,000 in identify theft insurance."<sup>310</sup> The union grieved under the contract clause requiring health and safety of the employees, seeking greater credit protection and identity theft insurance and implementation of a policy to adequately secure employees' confidential information.<sup>311</sup> The arbitrator held that while the issue was an important one, he lacked jurisdiction to hear the case because the provision requiring health and safety could not be read to extend to securing confidential employee information.<sup>312</sup>

### VI.      CONCLUSION

New technologies in the workplace give rise to disputes about blurred boundaries between work and private life and the ease of dissemination of confidential and proprietary information. They arguably increase the likelihood that employees will engage in non-work and inappropriate activity at the workplace during work time and increase the ease with which employers can monitor

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<sup>306</sup> Ark. Educ. Ass'n, 118 Lab. Arb. Rep. (BNA) 1540 (2003) (Moore, Arb.).

<sup>307</sup> Chicago Bd. of Educ., 125 Lab. Arb. Rep. (BNA) 1168 (2008) (Goldstein, Arb.).

<sup>308</sup> *Id.* at 1169.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 1173-74, 1177.

<sup>312</sup> *Id.* at 1179.

employees' private lives. This article surveys arbitration decisions dealing with such disputes. It describes cases where employees grieved discipline for allegedly inappropriate conduct involving technology as without just cause. It discusses arbitrators' approaches to insuring appropriate safeguards are in place when employers technologically monitor their employees. And it highlights some of the issues involving new technology that unions desire to bargain over, such as policies prohibiting carrying or use of personal devices on employer property, additional pay for or prohibition of requirements to remain on-call while off-duty, and data security for employees' personal information.

Most of the non-union private sector moves along with no comprehensive law governing the introduction of new technology into the workplace. In the union setting, however, arbitrators are using age-old principles, like just cause and unilateral change, to systematically grapple with the difficult issues raised by new technology. The arbitrators follow contract provisions and past precedents. But they also lead us forward toward the long-term goal of finding an appropriate accommodation of the interests of employers and employees.

## Appendix

### Initial Report

Last Modified: 12/30/2009

33. Have you been involved in any grievances or arbitrations (labor or employment) about the use of any modern technology such as pagers, GPS, electronic mail, Internet, cell phones or handheld instruments, blogs, Twitter or social networking sites?

#	Answer	Response	%
1	Yes	18	53%
2	No	16	47%
	Total	34	100%

Statistic	Value
Mean	1.47
Variance	0.26
Standard Deviation	0.51
Total Responses	34

34. What technology was involved?

Text Response
Computer
Emails
electronic imaging
GPS
Internet websites and email
e-mail
email and recordings, dash board cameras
smart phone
camera on a computer



desk top computer - internet
Employer-provided e-mail
GPS, social networking, email, blogging

Statistic	Value
Total Responses	12

### 35. What was the issue or what were the issues?

Text Response
alleged misuse by accessing pornography or making Google queries with sexually explicit words and phrases
Union requested hard copies of relevant e-mails
Did the grievant, a truck driver, deviate from his route?
Inappropriate access, sexual harassment, proof of romantic relationship undermining credibility of supporting witness, proof of many elements in discrimination and employment contract cases.
Just cause was the issue. The particular question with regard to technology was whether the grievant's use of the (school system) e-mail to solicit comments about the employer was protected speech under Ohio law.
almost all cases have some form of email issues. Most Police cases have radio, dash board camera and tape recording. Admission, is a common issue
termination
Whether the employee was discharged for just cause for viewing porno sites during working time when no supervision was in the plant.
Case 1: Discharge for accessing porn Case 2: Same
Monitoring by P's first-line manager of e-mail content.
various

Statistic	Value
Total Responses	11

36. What provision or provisions of the collective bargaining agreement were relied on by the claimant?

Text Response
arbitration clause
Just cause.
just cause
The CBA provided that union members could “use e-mail with no prior approval rights, but no expectation of privacy or security.” Under Ohio law - mirroring Section 7 of the NLRA - use of Er e-mail systems, when permitted by the employer, constitutes a concerted activity.
None
alleged that termination violated the "just cause" standard in the cba
Provision banning management from using cameras without first advising the Union.
Just cause discharge standard
N/A
just cause, privacy

Statistic	Value
Total Responses	10

38. What was the outcome?

Text Response
ULP for failure to allow employee to have requested representative during interrogation by Air Force Office of Special Investigation
Arbitrator held that Company had to provide the Union the hard copies of the e-mails.
Discipline upheld
Various
defense award
Grievant prevailed.
Case 1: Union withdrew grievance. Case 2: pending

Ongoing
various

Statistic	Value
Total Responses	9