

## In an Age of New Technology, Be Wary of 'Textual' Harassment

January 22, 2010

[Brian J. Moore](#)

**\*As seen in the January 22nd issue of *The State Journal*.**

Welcome to 2010 (i.e., "the future"), where you no longer call someone to ask them out on a date -- you text message them using your cell phone, Blackberry, or other mobile device. And, maybe you couldn't quite tell from their response whether they are uninterested or simply playing hard to get, so you text them again. And again. And, maybe that person on the receiving end of your texts is your co-worker or subordinate. Before you know it, you and/or your company get hit with a sexual harassment lawsuit and that co-worker or subordinate is armed with pages of text messages as evidence.

While technology has certainly brought great advances in workplace productivity, it has also brought great advances in workplace slacking, and it has increased the potential for workplace harassment. In this new age of potential harassment claims, managers and business owners would be wise to keep abreast of the latest technologies and how they can impact the workplace. While texting has certainly been with us for a number of years, its use is now clearly widespread. Your employees may be texting at work without you ever knowing it. Maybe they are talking to each other silently via text -- chatting, flirting, and more. Perhaps they are even "sexting" each other (sending text messages containing sexually explicit words and/or photos). The dangers are fairly obvious. Unlike the spoken word, which is accompanied by tone of voice and nonverbal expressions, the written word is much more subject to differing interpretations. One person's innocent flirting may be interpreted by another as harassment, especially if the recipient is a subordinate who fears for his or her job. Moreover, when text messaging is used, there is a transcript that can be recovered. Should litigation arise, it is no longer "he said, she said," it is "let's review the transcript."

While the potential for an extensive document trail has been present for years with e-mail, the use of cell phones for texting is much more difficult to police, especially if the mobile device is owned by the employee and not the company. In addition, employees are likely to treat their texts even more casually than their e-mails, not stopping to think about what they are typing.

Text-heavy lawsuits have been on the rise recently and that trend is likely to continue. In late 2008, a former employee sued World Wrestling Entertainment ("WWE"), alleging that her boss harassed her via late night phone calls and text messages. In April of last year, Central Michigan University settled a sexual harassment case for \$450,000 where its women's soccer coach was accused of harassing two players by, among other things, text messaging them.

Of course, texting raises other issues beyond possible harassment claims. Soon, the U.S. Supreme Court will hear the case of *City of Ontario v. Quon*, where the plaintiff, Mr. Quon, claims that the City of Ontario, California violated his privacy rights by reviewing transcripts of the texts on his city-issued mobile device, and then firing him due to the sexually explicit nature of certain texts he exchanged with co-workers. The Ninth Circuit ruled in favor of Mr. Quon, based on a lower level supervisor's unofficial policy of not reviewing texts, which the Court found binding on the City. The trial court judge in the case, Stephen G. Larson, aptly summed up the difficult privacy issue facing employers and the courts: "What are the legal boundaries of an

employee's privacy in this interconnected, electronic-communication age, one in which thoughts and ideas that would have been spoken personally and privately in ages past are now instantly text-messaged to friends and family via hand-held, computer-assisted electronic devices?"

Hopefully, the *Quon* case will provide some much-needed guidance on the privacy issue. In any event, it is clear that the trend of technology outpacing expectations of normal workplace communications will continue. Fortunately, when it comes to harassment in the workplace, the solution is more old-fashioned. As with your health and car, preventive maintenance is the key. Update your workplace harassment policies to take into account the potential for harassment via texting, e-mail, instant messaging, etc. Ensure that your supervisors are aware of these issues. And, continue to conduct periodic harassment training for all employees, including training on what not to do with the latest, greatest technology.