

“VIEWING” CHILD PORNOGRAPHY NOW A CRIME



The Pennsylvania General Assembly recently amended section 6312 of the Pennsylvania Crimes Code concerning child pornography in an attempt to clarify and reinforce the recent Pennsylvania Supreme Court decision in *Commonwealth v. Diodoro*. The amendment, signed into law by the Governor on July 14, 2009, now specifically states that any person who “intentionally views” or knowingly possesses or controls depictions of children under the age of 18 engaged in or simulating a “prohibited sexual act” commits a felony offense.

Previously under Pennsylvania’s Sexual Abuse of Children legislation, 18 PA CSA § 6312, a person had to “knowingly possess or control” the prohibited images to be subject to criminal prosecution. A legal defense developed in which it was argued that an alleged perpetrator does not in fact possess or control the prohibited image or material if the individual merely views the image.

In the Diodoro case, decided by the Pennsylvania Supreme Court on May 27, 2009, the defendant admitted that he had used his computer to search for and view pornographic images of children. While the images were found in the cache files on his computer’s hard drive, Diodoro did not otherwise download or save the images to his computer.

The defendant was charged and convicted of sexual abuse of children and criminal use of a communication facility, but the Pennsylvania Superior Court initially overturned the conviction based on Diodoro’s argument that merely viewing pornographic images does not rise to the level of possession and control of child pornography, as required by the law. After rehearing, however, the court reversed its decision and upheld Diodoro’s conviction. The Superior Court reasoned that Diodoro did exercise “control” over the pornographic images when he actively

searched the internet for such images and used his mouse to open the image files. On appeal, the Pennsylvania Supreme Court affirmed the conviction holding that an individual who accesses and views images of child pornography on the Internet exercises sufficient control over the pornography to support a conviction for sexual abuse of children. The Supreme Court reasoned that the very act of viewing such images victimizes the children depicted in the images in violation of the compelling state interest to protect children.

The newly amended statute defines “intentionally viewed” as “the deliberate, purposeful, voluntary viewing” of child pornography, but does not include the “accidental or inadvertent” viewing of such material. It also does not apply to any material that is viewed, possessed or controlled or presented for a bona fide educational, scientific, governmental or judicial purpose.

Questions now arise as to the impact of such legislation in the workplace. Given developments in technology most employers have adopted policies that regulate the use of computer equipment and use of the Internet in the workplace, or the use of company resources in connection with access to the Internet. In that regard, companies should already have a policy in place that establishes the proper use of such resources, as well as the consequences for using company time and resources for an illicit purpose. Also, policies calculated to prevent sexual harassment at work or the creation of a sexually hostile work environment may also apply to situations in which sexually suggestive or pornographic images or material is being accessed. Within that context an individual is typically prohibited from engaging in harassing behavior or the creation of a sexually hostile work environment when his or her display, access or

viewing of pornographic images is observed by others. Again, the disciplinary consequences for such offenses can be severe.

The fact that the images that are being viewed constitute “child pornography” as contemplated by the Pennsylvania Crimes Code may not significantly change the manner in which employers address such incidents. A full investigation of complaints raised by fellow employees or managerial staff should still be conducted in accordance with any existing complaint procedures. If the person or persons conducting an investigation of improper use of computer or internet, including the company’s Technology Specialist, should view such images as a result of that investigation, it seems that such viewing would be considered as accidental or inadvertent, and the law would not apply.

However, at least one appellate court has held that an employer has an affirmative duty to investigate and take appropriate steps to stop an employee’s viewing of child pornography in the workplace, **and to report such activity to proper authorities** if discovered. In *Doe v. XYZ Corp.*, a 2005 New Jersey Superior Court decision, an employee had been discovered accessing pornographic sites on the internet while at work, and had been doing so for a significant period of time. When confronted the employee indicated he would no longer access these sites. However, in 2001 he was again discovered accessing such web-sites, but no immediate action was taken and no report was made to the police. The employee was eventually arrested and a search of his work computer established that he had visited Internet sites containing child pornography and also stored and transmitted photographs of his ten year old stepdaughter engaging in sexual activity. The child’s mother filed a negligence action against the company claiming that her daughter had sustained irreparable harm because the company failed to

notify the police when it learned of its employee’s illegal conduct. The suit was ultimately resolved through a private settlement.

While people are generally not required to report suspected criminal activity to law officials, the *Doe* decision suggests that failure to do so may put otherwise law-abiding citizens at risk of being held accountable for injuries caused by another’s criminal activity. The amendments to the Pennsylvania Child Pornography law do not explicitly require such reporting. However, the *Doe* case opens the door for such accountability where injury occurs to victims of child pornography, and a causal connection can be established between that damage and the failure of a company to notify police when it has knowledge of such criminal activity.

Employers should review their policies to assure that proper steps are taken to address the improper use of company computer systems, including the reporting of suspected violations of the Pennsylvania Child Pornography law, so as to avoid the potential for liability.

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