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D.C. employees waste time ferreting out erotic website surfers.

Computer hard drive. (Image from Pacific Northwest Laboratory's website). With employee Internet access came another way for employees (and employers) to waste time, where the traditional method before inexpensive cellphones and widespread web access was too many personal calls, too many smoke breaks, and MS solitaire. (Our law firm's approach is to require full time and attention to staffmembers' work, and not allowing personal surfing, email, and phone time to be included as payable time on staff timesheets, except for when it's done during payable break time.) Speaking of wasted employee time, one is left to wonder how many thousands of District of Columbia government employee hours are being spent ferreting out employees wasting worktime surfing erotic websites. Last week, D.C. Mayor Adrian Fenty very publicly announced the firing of nine government employees found to have heavily visited "pornographic" websites, and ongoing policing efforts to include firing and lesser sanctions. Unfortunately, in firing employees for wasting time surfing erotic websites -- rather than doing so for wasting time surfing any website (including the ever-popular EBay, Amway, and Safeway) -- Mayor Fenty is treading the dangerous path of defining the indefinable. It appears that no court has defined pornography, because it cannot be done. The Supreme Court has been unable to sufficiently define obscenity, because it is cannot be done. The federal and state legislatures have tried -- underline tried -- to define child pornography, with the Supreme Court setting limits on that definition just six years ago. Pornography remains legally indefinable. In 2006, the Second Circuit astutely observed how a parole board's broad definition of pornography would cover "a photograph of Michelangelo's David or a lingerie catalog." *Farrell v. Burke*, 449 F.3d 470 (2d Cir. 2006). The news reports on the nine fired D.C. websurfers of erotic pages show that Fenty and his webpolice are relying on WebSense software to define pornography. That is dangerous, not only because pornography is indefinable, but also because WebSense has a particularly nonsensical definition of such material. The Washington Examiner reports that "pornography, as defined by WebSense includes sites that display full or partial nudity in a sexual context, that show erotica or sexual paraphernalia, that support sex-oriented businesses, or that depict [consequently, it appears that Mayor Fenty is clamping down on erotic text, and not only on erotic images] or graphically describe sexual acts." Who knows if the reporter got that right, or was fed inaccurate information, considering that my careful review of WebSense's website found no definition of "pornography", but instead found this entirely imprecise definition of "adult" material: "Adult humor [was not Bob Hope an adult dispensing humor?], erotic stories [is Romeo and Juliet not an erotic story?], cartoons [are some elegant Valentine's day images not erotic?] and animation or erotic chat; Adult products [is Preparation-H not an adult product?] including sex toys, CD-ROMs and videos [what is an adult video? - One by Dr. Weil, for instance]; Child Pornography; Depictions or images of sexual acts [do not some of the greatest pieces of literature describe sexual acts, including Romeo and Juliet?], including sadism, bestiality or any form of fetish; Sexually exploitative [exploit is a rather overbroad term to use here; for instance, in capitalism and communism, those in power exploit those not in power] or sexually violent text or graphics; Sexually oriented or erotic full or partial nudity [does this not describe plenty of pages in Cosmopolitan, beer advertisements, and movie ads?]." With such an unworkable definition of pornography and adult material, how on earth can WebSense software developers and the software itself be accurate about what is and is not pornography? It cannot be done. It appears that only recently did D.C. turn to WebSense software to filter out so-called pornographic websites in the first place. Of course, installing webfiltering software can hinder government employees from reaching such "legitimate" sites as our law firm's. The Fenty administration's own news release on this story reveals that this whole websurfing crackdown is content-based on erotic material, rather than being focused on wasted government employee websurfing time, thus implicating the First Amendment. Fenty's firings of the websurfers of erotic sites was executed after an investigation began just last month, hasty, and ill-advised. Haste makes waste and, in this instance, poor decision. ADDENDUM I: Thanks to a fellow listserv member for bringing this story to my attention through this City Paper blog entry. ADDENDUM II: The website of WebSense -- which sells D.C. its websurfer tracking software -- has a press release claiming: "More men than women view online pornography at work. Whether it was by accident or on purpose, 16 percent of men who access the internet at work said they had visited a porn site while at work, while only 8 percent of women had done so. Of those that admitted to viewing pornography sites at work, 6 percent of the men and 5 percent of the women admitted it was intentional." Moving beyond the reality that each person has his or her unique definition of pornography, this points out that mayor Fenty's government will have a never-ending task to ferret out surfers of erotic sites, unless he switches to a focus on people who waste worktime on all websites, regardless of the content. Alternatively, those whose jobs do not require web access can have their computers and passwords unplugged from Internet access. ADDENDUM III: If mayor Fenty has a concern about sexual harassment in clamping down on "pornographic" websurfing, his news release is silent on the matter. Eliminating erotic websurfing barely begins to deal with sexual harassment, and Fenty's current erotic webpolicing barely overlaps with a comprehensive and effective approach against sexual harassment.

Posted by Jon Katz in Constitutional Law at 19:00