



A L E R T

April 2010

WORKPLACE POLICIES MAY NOT CONVERT AN EMPLOYEE'S PERSONAL E-MAIL COMMUNICATIONS SENT AND/OR RECEIVED ON COMPANY ISSUED COMPUTERS INTO COMPANY PROPERTY

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The New Jersey Supreme Court has decided¹ that although an employer has a right to regulate its employees' conduct and electronic communications in the workplace through lawful electronic communications policies, an employer may not access or read employees' private, privileged communications with their attorneys, in order to enforce those policies. The Court's decision represents a significant departure from prior case law that permitted an employer virtually unfettered access to information that was stored or accessed on a company-issued computer, and the employer had an electronic communications policy putting its employees on notice that such information was considered the employer's property.

In *Stengart v. Loving Care Agency, Inc.*, Plaintiff Marina Stengart (Stengart) was the Executive Director of Nursing at Loving Care Agency, Inc. (Company) until her voluntary resignation. Prior to her resignation, Stengart communicated through e-mail with her attorneys regarding an anticipated lawsuit against the Company. These communications were exchanged from Stengart's laptop computer, which was provided to her by the Company as part of the employment relationship; however, the communications were sent and received through Stengart's personal, password-protected Yahoo account.

After Stengart filed suit against the Company, and in order to preserve electronic evidence for discovery, the Company hired a computer forensic expert to create an image of the hard drive from Stengart's computer. In reviewing Stengart's Internet browsing history, the Company's attorneys discovered, and read, a number of communications between Stengart and her attorneys that took place prior to her resignation from the Company. The Company's attorneys did not alert Stengart's attorneys to the discovery of these e-mails, but instead, in responding to Stengart's first set of interrogatories, referenced information from the e-mail correspondence. Upon receiving the responses, Stengart's attorneys immediately demanded the return of all such communications, arguing they were protected from discovery by the attorney client privilege. The Company refused to return the communications, and Stengart sought a temporary restraining order.

The trial judge denied Stengart's application, holding that the emails were not protected by the attorney client privilege because the Company had an electronic communications policy that put Stengart on notice that her e-mails would be considered Company property.

On appeal, the Appellate Division rejected the notion that an employer's ownership of a computer was the sole determinative factor in deciding whether an employee's personal e-mails may become company property, because employees have a reasonable expectation that their communications will remain private regardless of where or how those communications occur. In so doing, the Appellate Division acknowledged a company's right to disseminate company policies and rules through handbooks, and to impose the contents of those handbooks upon employees, in order to ensure a cooperative workforce with a clear understanding of the employer's expectations. The court cautioned, however, that a company's policies must be reasonable in order to be enforced, and that there must be some "nexus" between the policies and the company's legitimate business interests.

¹ *Stengart v. Loving Care Agency, Inc.*--- A.2d ---, 2010 WL 1189458 (N.J.).



The Company appealed to the New Jersey Supreme Court, arguing that its employees could have no reasonable expectation of privacy due to the Company's electronic communications policy; and further, that by accessing e-mails on a personal account through the Company's computer and server, Stengart either prevented any attorney-client privilege from attaching to those communications or waived the privilege by voluntarily subjecting the communications to Company scrutiny. In evaluating the Company's electronic communications policy, the Court found the policy was unclear as to whether the use of personal, password protected email accounts, accessed through company equipment, was covered. Moreover, the policy failed to adequately warn employees that the contents of their emails would be stored on a hard drive or that their emails may be subject to monitoring by the Company.

Accordingly, based upon the steps Stengart took to protect the privacy of her e-mail communications, including her use of a personal e-mail account instead of her company e-mail account, the fact that Stengart did not save her personal e-mail account's password on her company issued computer and the ambiguous language used in the Company's electronic communications policy, the Court held that Stengart had a reasonable expectation of privacy in the e-mail communications she exchanged with her attorneys. The Company's arguments regarding Stengart's waiver of the attorney client privilege were also rejected.

The Court was careful to note that its holding was not intended to prohibit employers from monitoring or regulating the use of workplace computers through lawful policies pertaining to computer usage, in order to protect a company's "assets, reputation, and productivity" and to "ensure compliance with legitimate corporate policies." The Court reasoned that an employee who spends long stretches of the workday obtaining personal, confidential legal advice from a private lawyer may be disciplined for violating a policy permitting only occasional personal use of the Internet; however, because of the important public policy concerns underlying the attorney client privilege, employers have no basis to read the specific contents of such communications in order to enforce corporate policy.

WHAT DOES THIS MEAN FOR EMPLOYERS?

- Employers should review all workplace policies and procedures to ensure that they are clear and unambiguous, and to ensure that none of the policies and/or procedures are conflicting;
- Employers should ensure that they receive and maintain signed acknowledgement forms from all levels of their workforce, conforming that employees received, read and understood the contents of the employer's policies, procedures and/or handbooks;
- Employers should have clearly drafted electronic communications policies that explain to employees what is expected of them with respect to their personal use of company issued equipment, including whether personal e-mail communications may be saved on a company hard drive and whether personal e-mail communications are subject to monitoring by the employer;
- Employers should review all of their workplace policies to ensure that they are reasonable and designed to further a legitimate business interest;
- If an employer creates an image of an employee's hard drive and comes across documents and/or communications that appear to be between an employee and his or her attorney, the employer should not read or disseminate them. The employer should promptly contact counsel and inquire as to how it should properly proceed.

WHAT'S NEXT?

The United States Supreme Court has heard arguments on a case challenging whether a public employee had a reasonable expectation of privacy in text messages sent on a city issued cell phone. The decision will likely not issue for several months.

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