

Labor & Employment Advisory

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New Jersey Court Holds Attorney-Client Privilege Not Applicable To Personal Email Sent From Company Computer

By Jeffrey Klamut

A recent decision by the New Jersey Superior Court, Law Division, may have important implications for employers attempting to maximize the use of information recovered from company computer systems used by employees. In a case of first impression, the court held that the attorney-client privilege did not apply to a plaintiff's correspondence with her attorney through a personal, web-based email account she accessed from her former employer's laptop computer. *Stengart v. Loving Care Ag. Inc.*, No. BER-L-858-08 (N.J. Super. Ct. L. Div. Feb. 5, 2009). As a result, the court permitted the former employer to use correspondence recovered from the laptop in its defense of the plaintiff's discrimination claim.

In holding that the plaintiff's emails were not protected by the attorney-client privilege, the court cited the employer's "Electronic Communications" policy. The court explained that the policy "adequately warns employees that there is no reasonable expectation of privacy ... with respect to any communication made on company issued laptop computers and server, regardless of whether the [e]mail was sent from plaintiff's work [e]mail account or personal web-based [e]mail account." The court also explained that the former employee must have been aware of the policy because it was included in an employee handbook that she helped create, draft and distribute.

In further support of its decision, the court cited a New York federal court case in which employees with knowledge of a similar company policy were deemed to have waived the attorney-client privilege by using their personal, password protected email accounts to communicate with their attorneys while at work on their employer's computers. The court also distinguished these facts from those underlying a Massachusetts decision holding that the attorney-client privilege did apply where an employer's electronic communication policy failed to plainly explain that communications via web-based email accounts were recoverable because they are saved on a computer's hard drive as temporary Internet files.

In light of the court's recent decision, employers should review their electronic communications policies to ensure that employees are aware there is no reasonable expectation of privacy as to any electronic communications sent via company resources, including communications sent from personal email accounts.

For more information, email the author(s) at leadvisory@bipc.com.

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