

Court Rejects Employer's Claimed Right to "Rummage Through" Employee's Private Emails Sent to Her Attorney via Company Laptop

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Rejecting a company's claim that it had the right to review and use an employee's personal emails sent from a work laptop to her attorney in a discrimination case, a New Jersey appellate court ruled that "the company had no greater interest in those communications than it would if it had engaged in the highly impermissible conduct of electronically eavesdropping on a conversation between plaintiff and her attorney while she was on a lunch break." In *Stengart v. Loving Care Agency, Inc.*, No. A-3506-08T1 (N.J. App. Div. June 26, 2009) the issue was whether a company handbook which stated that employee email communications on company computers were "not to be considered private or personal to any individual" resulted in a waiver of the attorney-client privilege. In a lengthy opinion, the *Stengart* court concluded that the employee's right to privacy was not lost because of her use of a company owned computer, stating emphatically that "property rights are no less offended when an employer

emails to and from her attorney using her company laptop. Stengart used a web-based personal email account with Yahoo which was password protected to communicate with her lawyer. After her resignation, the company forensically imaged Stengart's laptop and obtained copies of the emails to and from her attorney which were then provided to defense counsel. Neither the company nor its lawyer disclosed the fact that the emails had been obtained from her company laptop until many months later when defense counsel included some of the emails in response to interrogatories. Stengart's attorney immediately requested the return of all the emails, and when the company refused, sought a restraining order from the trial court. The trial court denied the motion finding that the "emails were not protected by the attorney-client privilege because the company's electronic communications policy put the plaintiff on sufficient notice that her emails would be viewed as company property."

"The Stengart court stated that 'the company had no greater interest in those communications than it would if it had engaged in the highly impermissible conduct of electronically eavesdropping on a conversation between plaintiff and her attorney while she as on a lunch break.'"

examines documents stored on a computer as when an employer rifles through a folder containing an employee's private papers or reaches in and examines the contents of an employee's pockets...." The *Stengart* ruling is contrary to a recent New York decision in *Scott v. Beth Israel Medical Center, Inc.*, 847 N.Y.S.2d 436 (2007) where the court held that "the effect" of such an employer email policy "is to have the employer looking over your shoulder each time you send an email" resulting in a waiver of the attorney-client privilege. (See, "When Company Policy Prohibits Personal Email Use: Looking Over and Employee's Shoulder" December 2007 issue of qubit.)

In this case prior to her resignation and before filing a lawsuit for violations of New Jersey's Law Against Discrimination, N.J.S.A., Marina Stengart sent and received numerous

Although the company's email policy contained in its handbook permitted "occasional personal use," other provisions stated that the company had the "right to review, audit, intercept, access" employee email communications and that these emails were "not to be considered private or personal" by employees. Noting that these provisions created various ambiguities, the court characterized the issue before it as whether the company could enforce a policy "which purports to transform private emails or other electronic communications between an employee and the employee's attorney into company property." To answer this question, the court stated that it "requires a

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balancing of the company's right to create and obtain enforcement of "reasonable rules for conduct in the work place against the public policies underlying the attorney-client privilege."

Noting that courts were reluctant previously to enforce "unilateral expressions of company policy" contained in handbooks, such provisions "must be reasonable to be enforced" and must "further the legitimate business of the employer." The principal argument advanced by the company was its ownership of the computer and that "anything flowing from that use becomes subject to the company's claimed ownership right." The court vigor-

The *Stengart* next court weighed the company's claimed ownership interest in the email against the "important societal considerations that undergird the attorney-client privilege" noting that the trial court "exhibited inadequate respect for the attorney-client privilege" in this case. The appellate court rejected the trial court's conclusion that the employee "took a risk of disclosure of her communications and a risk of waiving the privacy she expected" and concluded that there was no waiver of the attorney-client privilege. Accordingly, the court directed that all of the email communications between Stengart and her attorney be returned to her.

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ously rejected this argument, however, stating that "a policy imposed by an employer, purporting to transform all private communications into company property – merely because the company owned the computer used to make private communications or used to access such private information during work hours – furthers no legitimate business interest." According to the court, the company's legitimate business interest is the fact that an "employee is engaging in business other than the company's business." And while a company may discipline or terminate an employee for engaging in personal matters during work hours, this right "does not extend to the confiscation of the employee's personal communications." The court further stated that:

We thus reject the philosophy buttressing the trial judge's ruling that, because the employer buys the employee's energies and talents during a certain portion of each workday, anything that the employee does during those hours becomes company property....the employer's interest enforcing its unilateral regulations wanes when the employer attempts to reach into purely private matters that have no bearing on the employer's legitimate interests.

Last, the court examined the actions of the company's attorney in reviewing the employee's emails with counsel and his failure to notify her lawyer that they had been obtained by the company. The court concluded that his conduct was "inconsistent" with the obligations imposed by New Jersey statute RPC 4.4(b) which requires that a lawyer "who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender." The court therefore remanded the case for a hearing to determine whether counsel should be "disqualified or, if not whether any other appropriate sanction should be imposed...."

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For questions or comments regarding this issue of qubit, please contact Susan Ardisson at Susan.Ardisson@bit-x-bit.com.

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