

## The Fig Leaf Precedent Set by *Stengart v. Loving Care Agency, Inc.*

*Contributed by Brent A. Cossrow, Fisher & Phillips LLP*

On March 30, 2010, the New Jersey Supreme Court affirmed the intermediate appellate court's decision in *Stengart v. Loving Care Agency, Inc.*<sup>1</sup>, a widely followed workplace privacy case with national implications. In a unanimous opinion, the Supreme Court held that an employee had a reasonable expectation of privacy in her e-mail communications exchanged with her personal attorney through her web-based, password-protected Yahoo! e-mail account using her employer's computer.

This decision is significant because it was generally understood that an employer has unfettered access to, if it does not own, the data residing on computers it issues to its employees. In one of the first state supreme court decisions to address employee cyber-privacy rights, the justices held that the e-mail communications were protected by attorney-client privilege. In an employee-centric opinion, the New Jersey Supreme Court criticized the employer's electronic communications policy for its ambiguity and not stating that web-based, password-protected e-mail communications were subject to employer review. The Supreme Court also directed the trial court to hold hearings to determine the appropriate sanction for the failure of the employer's attorney to promptly notify the court or the employee's attorney when the nature of the e-mail communications became clear.

While the opinion bears the hallmarks of a landmark employee privacy rights decision, there is much more to *Stengart v. Loving Care* than its vindication of the employee's privacy claims. A closer look at the Supreme Court's opinion and, notably, its disagreements with the intermediate appellate decision it affirmed, reveals a precedent that is not as threatening to employers as it might appear.

### *The Facts in Stengart v. Loving Care*

Marina Stengart was a director-level employee of Loving Care, which provided home care services for children and adults. Stengart resigned from Loving Care in December 2007, and within two months filed a gender discrimination lawsuit against Loving Care. After Stengart resigned, Loving Care took custody of Stengart's work-issued computer and created a forensic image of its hard drive in an effort to preserve evidence. An investigation of the forensic image found that Stengart used her employer's computer to send and receive e-mails to and from her attorney

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regarding Stengart's lawsuit against Loving Care. These e-mails were sent through Stengart's Yahoo! account.

During the litigation, Loving Care refused to turn over and destroy its copies of the e-mail communications. Stengart filed a motion to recover the e-mails and direct Loving Care to destroy all of the copies. The trial court's denial of Stengart's motion was appealed, and resulted in the Supreme Court's opinion in favor of Stengart.

According to the Supreme Court, the appellate court correctly concluded that the e-mail communications were protected by the privilege. The justices reasoned that Stengart had a subjectively and objectively reasonable expectation of privacy in her e-mails with her attorney, which "are conversations between a lawyer and client about confidential legal matters . . . historically cloaked in privacy."<sup>2</sup> According to the Supreme Court, Stengart's use of the Yahoo! account was meant "to protect the privacy of those e-mails and shield them from her employer."<sup>3</sup>

Although not mentioned by the trial or intermediate appellate court, Stengart certified that she did not know that the browser software on her computer automatically copied each web page she viewed and that these copies were saved on the computer's hard drive as temporary Internet files. This factor was important to the Supreme Court, which held Stengart could not have knowingly waived the privilege or abandoned the e-mails that she did not know would reside in plain view on her employer's computer.

The Supreme Court further noted that Loving Care's employment policies could have, but did not, explain the creation and retention of temporary Internet files and the browser software. In addition, Loving Care's policy permitted the occasional use of workplace computers for personal matters by employees, and stated that Loving Care reserved the right to review and access "all matters on the company's media systems and services at any time."<sup>4</sup> Citing this language, the Supreme Court held that the phrase "media systems" was too vague and did not inform Stengart that using her workplace computer to access her Yahoo! account would expose personal e-mail communications to employer monitoring.<sup>5</sup>

### *An Employer-Friendly Win by An Employee*

Although *Stengart v. Loving Care* represents a win for employees, there are three reasons why employers can take comfort in the Supreme Court's opinion:

*The Precedent is Narrow.* The holding of *Stengart v. Loving Care* relied on the attorney-client privilege, Stengart's lack of understanding of computer systems, and Loving Care's unclear electronic communications policy. Of these three factors, the sanctity of the attorney-client privilege was paramount. And while the privilege confers powerful legal protection, most employers will never find evidence of privileged communications during an investigation of an employee's use of a workplace computer. It is a rare occurrence. The majority of personal use of workplace computers by employees does not involve privileged communications, and these uses were not addressed by the Supreme Court, which limited its analysis to the privileged e-mail communications. As a result, *Stengart v. Loving Care* is a fig

leaf precedent: it provides slight but valuable protection of something superlatively private and leaves everything else exposed.

*Stengart v. Loving Care Is One of the Only State Supreme Court Opinions to Review and Approve of the Practice of Creating and Investigating a Forensic Image of a Hard Drive Used by a Departing Employee.* Enlisting consultants to create forensic images of computers and other electronic devices is an increasingly common practice in employment litigation, and is frequently used to conduct pre-litigation investigations in employee defection matters. But this practice was subjected to judicial scrutiny in *Stengart v. Loving Care*, and ultimately was approved by the New Jersey Supreme Court. It concluded that in creating the forensic image, Loving Care was "legitimately attempting to preserve evidence."<sup>6</sup> Significantly, the justices also noted there was nothing on the record "to suggest any bad faith" by Loving Care.<sup>7</sup> Its attorney's "error was in not setting aside the arguably privileged [e-mail] messages once it realized they were attorney-client communications, and failing to either notify its adversary or seek court permission before reading further."<sup>8</sup>

These conclusions are noteworthy because they disagree with the intermediate appellate court, which sharply criticized Loving Care's handling and investigation of the forensic image of Stengart's work-issued computer. The appellate court characterized Loving Care's tactics as an attempt to:

. . . rummage through and retain the employee's e-mails to her attorney . . . pry into and retain plaintiff's [Stengart's] communications with her attorney . . . reach into an employee's private life . . . and prying into an employee's private affairs . . . we reject the employer's claimed right to rummage through and retain the employee's e-mails to her attorney.<sup>9</sup>

These descriptions were refuted explicitly by the Supreme Court. "To be clear," the justices noted, "[Loving Care and its attorneys] did not hack into plaintiff's personal account or maliciously seek out attorney-client documents in a clandestine way. Nor did [they] rummage through an employee's personal files out of idle curiosity."<sup>10</sup> Such pointed disagreement is unique, particularly where the appellate court's holdings were affirmed. However, this was necessary because the appellate court's descriptions were too far removed from the actual conduct reflected in the trial court's record for such a consequential opinion.

This clarification of Loving Care's conduct is not the only substantive difference between the appellate and Supreme Court opinions that inures to the benefit of employers. Unlike the appellate court, the Supreme Court explained how temporary Internet files containing the contents of e-mails sent through Stengart's Yahoo! account came to reside on her workplace computer, when Stengart neither saved nor copied them there. Rather than offer the explanation the Supreme Court did, the appellate court's opinion created a misimpression that Loving Care obtained the actual e-mails. Correcting this misimpression buttressed the Supreme Court's conclusions that Loving Care's forensic imaging practices were legitimate and that there was no evidence of "bad faith" in the handling and investigation of the forensic image.<sup>11</sup>

*Highlighting the Importance of Stengart's Misunderstanding of Computer Technology Ultimately Will Benefit Employers.* The crux of the Supreme Court's holding that Stengart did not waive the privilege or abandon her Yahoo! e-mails (thereby forfeiting the legal protection conferred by the privilege) was Stengart's certification that she did not understand the operation of temporary Internet files. Like many people, Stengart was not aware the Internet browser software installed on her computer created copies of each web page she viewed or that this software saved these copies as temporary Internet files. Although not expressly stated, the implication from the Supreme Court's opinion was that if Stengart had better understood this aspect of the computer and the browser software, then it might have resulted in a waiver of the privilege or abandonment of the e-mails. In such a scenario, Stengart would have known that tapping her Yahoo! account from her workplace computer would have left copies of her privileged e-mails on a computer owned by the company against which she was planning to initiate litigation.

This "gap" in Stengart's understanding of computers was not filled by explanations in Loving Care's electronic communications policy, as the Supreme Court observed in a passage likely to be embraced by employers.<sup>12</sup> The Supreme Court suggested employers could reduce their employees' subjective expectations of privacy in their use of workplace computers if the policy were to explain that web-based, personal e-mail accounts may be monitored, how temporary Internet files are created and retained, and that the employer reserves the right to forensically image and review its hard drives. One take-away from *Stengart v. Loving Care* is that if an employee were to sign an acknowledgement of receiving, reading and understanding such a policy, then that employee's attorney would have a harder time arguing a lack of understanding. This would reduce the employee's subjective and objective expectation of privacy in his or her use of a personal, password-protected, Internet-based e-mail account on a workplace computer.

These factors will continue to decide the extent to which employees have a reasonable expectation of privacy in their personal use of workplace computers and Internet systems, and this is one of the most important legal issues in the American workplace. *Stengart v. Loving Care* answered this question in part with a robust defense of an employee's reasonable expectation of privacy in his or her communications with a personal attorney. This represents a miniscule percentage of the myriad personal uses of workplace computers by employees. Subsequent litigation will define the legacy of *Stengart v. Loving Care*, but this legacy probably will be more favorable to employers than they would expect from a pro-employee decision.

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<sup>1</sup> *Stengart v. Loving Care Agency, Inc.*, No. A-16 September Term 2009, 2010 BL 69532 (N.J. Mar. 30, 2010).

<sup>2</sup> *Id.* at. 24–25.

<sup>3</sup> *Id.* at. 24.

<sup>4</sup> *Id.* at. 8.

<sup>5</sup> *Id.* at. 13.

<sup>6</sup> *Id.* at. 30.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Stengart v. Loving Care Agency, Inc.*, 408 N.J. Super 54, 59, 973 A.2d 390 (Super. Ct. App. Div. 2009).

<sup>10</sup> *Stengart*, 2010 BL 69532 at 30.

<sup>11</sup> *Id.* at. 30.

<sup>12</sup> *Id.* at. 27.