Cyber Privacy Wars: The Employer Strikes Back

Insights
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Distinguishing *Stengart v. Loving Care Agency,* a California Appellate Court Holds That An Employee's E-mails With Her Personal Attorney Sent Through The Employer's Workplace Computer Are Not Protected By The Attorney-Client Privilege

In a widely discussed decision issued last year, Stengart v. Loving Care Agency, the New Jersey 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.

Recently, inHolmes v. Petrovich Development Co., LLC, a California appellate court ruled that e-mails sent by an employee to her attorney from a company computer were not privileged. According to the appellate court's opinion, plaintiff Gina Holmes started working for Petrovich Development Company in June 2004. Ms. Holmes later told her supervisor, Paul Petrovich, that she was pregnant. Ms. Holmes' subsequent communications with Mr. Petrovich regarding her pregnancy left her feeling as though her position was in jeopardy. Mr. Petrovich shared his communications with Ms. Holmes with his colleagues, and when Ms. Holmes learned this she felt as though her rights were violated.

Ms. Holmes then e-mailed her personal attorney using her employer's email system and computer. After sending these emails, she deleted them from her work computer. She then quit her job and sued the company, alleging claims for hostile work environment harassment, constructive discharge, violation of her privacy rights, retaliation and intentional infliction of emotional distress. The trial court granted the company's motion for summary adjudication against the claims for hostile work environment, retaliation and constructive discharge.

The trial addressed whether Petrovich invaded Ms. Holmes' privacy rights and constituted intentional infliction of emotional distress. Petrovich offered the e-mails between Ms. Holmes and her attorney to show she had not suffered emotional distress and, instead, filed the lawsuit on her attorney's advice.

The jury returned a defense verdict, which was affirmed by the appellate court. It rejected several arguments made by Ms. Holmes that the e-mails should not have been allowed into evidence because they were privileged communications. First, Ms. Holmes argued that she believed that she protected her communications by deleting the e-mails after they were sent. Second, even though Petrovich had policies stating that (1) company computers were for company business only, (2) the

Petrovich had policies stating that (1) company computers were for company business only, (2) the company would periodically monitor its computers to make sure users were complying with the policy; and (3) employees had "no right of privacy " with respect to any personal use of company computers, Ms. Holmes argued that Petrovich did not access or audit employee use.

In rejecting these arguments, the appellate court held that Ms. Holmes' "belief was unreasonable because she was warned that Petrovich would monitor e-mail to ensure employees were complying with Petrovich's policies, which informed Ms. Holmes she had no expectation of privacy in any messages she sent through Petrovich's computer." Distinguishing Stengart v. Loving Care, the appellate court held :

When Holmes e-mailed her attorney, she did not use her home computer to which some unknown persons involved in the delivery, facilitation, or storage may have access. Had she done so, that would have been a privileged communication unless Holmes allowed others to have access to her e-mails and disclosed their content. Instead, she used defendants' computer, after being expressly advised this was a means that was not private and was accessible by Petrovich, the very person about whom Holmes contacted her lawyer and whom Holmes sued. This is akin to consulting her attorney in one of defendants' conference rooms, in a loud voice, with the door open, yet unreasonably expecting that the conversation overheard by Petrovich would be privileged.

The conclusion in Holmes can be harmonized with Stengart, which is good news for employers. The key difference between these two cases is that Stengart involved the employee's personal, internet-based and password protected e-mail account. In contrast, the e-mail account at issue here was the employer's e-mail account and system. Consequently, while there may arguably be a greater expectation of privacy in the use of a personal e-mail account, there is a lesser expectation of privacy where the employee uses the employer's e-mail account.

When employees resign to join competitors, it is not uncommon for employers to review the former employees' workplace computers to determine whether trade secrets have been taken, restrictive covenants have been breached, or whether statutes like the Computer Fraud & Abuse Act have been violated. Although these issues were not squarely reviewed by the the California Appellate Court, the decision is notable with these issues in mind.

Brent Cossrow is a member of Fisher Phillips' Employee Defection & Trade Secrets Practice Group. Mr. Cossrow's practice focuses on e-discovery and other electronically stored information issues. As always, please feel free to share your thoughts and questions in the comment space below.

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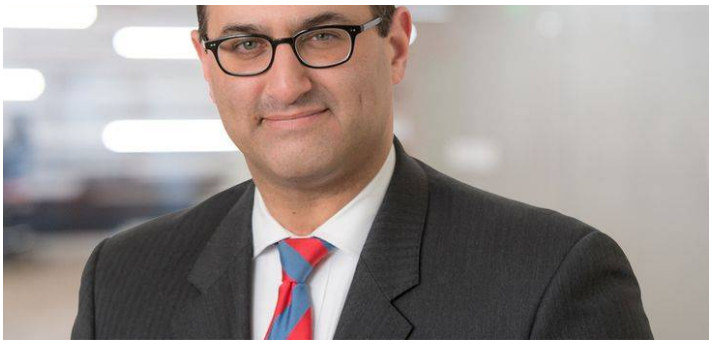

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