



EMPLOYMENT ALERT: May 24, 2010

RECENT DEVELOPMENTS REGARDING WORKPLACE PRIVACY RIGHTS

New Jersey Supreme Court Upholds Privacy of Employee Personal E-mails Accessed on Work Computer

On March 30, 2010, the New Jersey Supreme Court issued a decision in *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 990 A.2d 650 (2010), holding that an employee had a reasonable expectation of privacy in e-mail communications she had with her attorney through her personal, password-protected, web-based e-mail account using her employer's laptop computer. Before the employee resigned from her position with employer, the employee used her work-issued computer to access her personal e-mail account on Yahoo's website, through which she communicated with her attorney about her situation at work. After the employee resigned, she filed an employment discrimination lawsuit against her former employer.

During discovery, the employer accessed the hard drive of the employee's company issued laptop, which included the contents of the e-mail communications the employee had exchanged with her lawyer via her Yahoo account. When it was revealed that the employer had accessed this information, the employee's attorney argued that the e-mails were protected by the attorney-client privilege.

The trial court held that the e-mails were not protected because the employee had no reasonable expectation of privacy in the e-mails due to the language of the employer's personnel policy regarding electronic communications. The employer's policy permitted employees occasional personal use of its electronic systems, but provided that the employer could at any time access and review all information on its electronic systems. The policy also stated that all e-mails and Internet communications "are not to be considered private or personal" to employees. The trial court found that this language was sufficient to put the employee on notice that all data stored on the employer's computer systems (including e-mails sent from an employee's personal account) was the employer's property which the employer had the right to access.

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The New Jersey Appellate Division reversed the trial court, finding that the employee had a reasonable expectation of privacy in the e-mails with her attorney, in part because the employer's policy was ambiguous as to whether the employer had the right to retrieve the e-mails and data from the employee's personal e-mail account.

In a unanimous ruling, the New Jersey Supreme Court agreed with the Appellate Division in holding that under the circumstances, the employee could reasonably expect that her e-mail communications with her lawyer through her personal, web-based e-mail account would remain private, and that sending and receiving the e-mails using a company laptop did not waive or negate the attorney-client privilege. The court noted that the ambiguous language of the employer's personnel policy regarding electronic communications was insufficient to put the employee on notice that she did not have a reasonable expectation of privacy in the e-mails. Specifically, the court found that the employer's policy failed to "give express notice to employees that messages exchanged on a personal, password-protected, web-based e-mail account are subject to monitoring if company equipment is used," and "failed to warn employees that the contents of personal, web-based e-mails are stored on a hard drive and can be forensically retrieved and read."

Impact on Oregon Employers

The Stengart decision is part of a recent line of court decisions addressing privacy and confidentiality issues that can arise from an employee's personal use of an employer's electronic systems. While this New Jersey decision is not binding on courts in Oregon, the Stengart decision provides guidance regarding what employers should do in order to avoid problems arising from this developing topic:

- Employers should consult with their legal counsel to ensure that their electronic systems personnel policies clearly address what is permissible and non-permissible use of their computers, e-mail, and other electronic systems.
- The policies should contain explicit language outlining the employer's right to access, monitor, or review information or communications created, sent, received, or stored on the employer's electronic systems. The policies should expressly address the employer's right to retrieve, access, or monitor the content of both work and personal communications.
- Employers should consider adding express language to their electronic systems policies which notify employees that the employer may access and monitor any information on the employer's computers, including e-mail messages exchanged on an employee's personal, password-protected, web based e-mail account, if company equipment is used by the employee to access those accounts.
- If an employer permits personal use of the employer's electronic systems, the employer should clearly define what constitutes "personal use" and the circumstances under which the employer may retrieve, access, or monitor an employee's personal or non-work communications.

With the increased and expanding use of e-mail, text messaging and social networking sites, it is important for employers to implement policies to define and address what is appropriate use and what is inappropriate use by employees of employer computers, e-mail and other electronic systems.

Employers with questions about whether their current electronic systems personnel policies are structured to provide the best protections against employee privacy complaints should contact their legal counsel.

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