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Appellate Division Reverses Trial Court and Holds that Employee Did Not Waive Attorney/Client Privilege by Using Web-Based Email on a Company Computer

Posted at 3:01 PM on July 27, 2009 by Randi W. Kochman

On April 22, 2009, we wrote about [Stengart v. Loving Care Agency, Inc.](#), a case in which the New Jersey Superior Court held that an employee who used her personal web-based Yahoo email account on the company's computer to communicate with her attorney waived her attorney-client privilege. In a sharp rebuke of the trial court, on June 26, 2009, the Appellate Division reversed the lower court's decision and held that, "the policies undergirding the attorney-client privilege substantially outweigh the employer's interest in enforcement of its unilaterally imposed regulation..." In so holding, the court first recognized the ambiguities in the employer's handbook policies. While some policies clearly indicated that employees could not hold an expectation of privacy in their email communications, whether on the company computer or their web-based email accounts, other provisions conflicted and provided for occasional personal use. Notwithstanding these ambiguities, the court went on to find that the attorney-client privilege outweighs the "company's claimed interest in ownership of or access to those communications based on its electronic

communications policy.” Thus, although the Appellate Division’s decision confirms the importance of properly drafting handbook policies to protect a company’s interests, it leaves open the question of whether a company’s electronic communications policy could ever trump the attorney-client privilege.

Finally, the court went on to remand the matter for a hearing as to whether Loving Care’s attorneys should be disqualified as counsel given their review of Ms. Stengart’s emails to her attorneys.

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