



LITIGATION DEPARTMENT

ALERT

EMPLOYEE PRIVACY AND THE ATTORNEY-CLIENT PRIVILEGE

Stengart v. Loving Care Agency Inc.

(NJ Supreme Court, March 30, 2010)

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This week, the Supreme Court of New Jersey unanimously ruled on a novel issue of privacy law, holding that an employee has a reasonable expectation of privacy in e-mail communications with her attorney sent and received through a personal, web-based e-mail account even though the account is accessed on an employer-issued computer. In making its decision, the court recognized that (a) the employer's policy did not specifically give notice that messages sent or received on a personal, web-based e-mail account were subject to monitoring if accessed on company equipment and (b) the policies underlying the attorney-client privilege support the preservation of confidentiality in these circumstances. The court stated that analysis of the issue was inherently fact-specific, and that employees have a greater expectation of privacy when using a personal, web-based e-mail account (as opposed to a company e-mail system). Other relevant factors considered by the court were (a) the fact that the account's password was not saved on the employee's computer and (b) the fact that the e-mails contained a legend warning the reader that the communication may be attorney-client privileged. While no one fact was found to be outcome-determinative, the totality of the circumstances created a reasonable expectation of privacy, with no waiver of the privilege.

The court also clarified that its ruling was not meant to prevent employers from regulating or monitoring the use of workplace computers, but rather was a holding that reading the contents of attorney-client communications was not necessary to do so. In fact, the court held that even a policy that provided unambiguous notice that a company could read such communications would be unenforceable.

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