

Husband Waived Marital Privilege By Using Workplace Computer

The marital communications privilege does not cover emails sent by a husband to his wife using his workplace computer.

A federal appeals court affirmed the conviction of a former member of the Virginia House of Delegates for bribery and extortion for securing state funding for Old Dominion University in exchange for employment by the university. The evidence in the case included emails from the defendant to his wife that were sent from and to the defendant's workplace.

The defendant argued that the admission of the emails violated the marital communications privilege, which protects communications between a husband and wife. Prosecutors argued that the defendant waived the privilege by communicating with his wife using his workplace computer, through his work email account, and failing to safeguard the emails.

At the time some of the emails were sent, the defendant's employer had no computer usage policy but later adopted a policy before the criminal investigation. The policy expressly provided that users had "no expectation of privacy in their use of the Computer System" and "all information created, sent[,] received, accessed, or stored in the . . . Computer System is subject to inspection and monitoring at any time."

The trial court found that while a person "may generally have a reasonable expectation of privacy in email," the expectation may be extinguished when a policy is adopted allowing a third party to view the emails. In this case, the trial court found that after the policy was adopted, the defendant took no steps to protect the emails, thereby waiving any marital privilege. The appellate court found that after a person is "on notice that the allegedly privileged material is subject to search may waive the privilege when he makes no efforts to protect it."

United States v. Phillip A. Hamilton, Fourth Cir. No. 11-4847, issued December 13, 2012.