Alerts and Updates

NEW JERSEY APPELLATE COURT PROVIDES GUIDANCE ON HOW COMPANY EMAIL POLICIES SHOULD BE CRAFTED

September 21, 2009

In light of a recent New Jersey appellate court decision, employers may want to review and update company email policies to ensure that employees are properly made aware that employers have the right to access and review certain private emails that may be generated through a company-sponsored computer system. In *Stengart v. Loving Care Agency, Inc.*,[1] the New Jersey Superior Court, Appellate Division, clarified how an employer should craft email policies to ensure that employees understand that, while they may consider certain emails to be private, the employer nonetheless retains the right to access the materials by virtue of the employee's use of company technology.

The *Stengart* case appears to highlight the old adage that "bad facts make bad law." In this case, the court ruled that the plaintiff's former employer had no right to access private emails that the plaintiff, a former executive, had exchanged with her lawyer through the use of a company-issued computer—that were actually *exchanged through the plaintiff's personal email account*. The decision could be read as a mere reaffirmation of the well-established privilege of confidentiality of attorney-client communications that has been held as inviolate in New Jersey. However, a closer examination of the court's opinion may provide employers with a wake-up call to craft email policies carefully, so employees are aware that, regardless from which account emails may be generated, the employer may retain the right to review such materials—and possibly claim a proprietary interest to such emails—after an employee has left the company's employment.

Case Summary

The plaintiff, Marina Stengart, was executive director of nursing for Loving Care, a home healthcare provider, until she resigned her employment in January 2008. Shortly after her resignation, she filed a state court lawsuit, alleging violations of the New Jersey Law Against Discrimination ("NJLAD"). In her complaint, she claimed that she was the victim of sexual harassment and was constructively discharged by her former employer.

During her employment, the plaintiff was provided with the use of a company-owned laptop and a work email address. Before leaving her job at Loving Care, she communicated with her attorneys about her anticipated lawsuit against the

company. In doing so, she used the company-issued laptop to communicate with her lawyers, but all messages were sent through her personal Yahoo Internet email account, which was password-protected.

Subsequent to the filing of the plaintiff's lawsuit, Loving Care created a "forensic image" of the hard drive of the plaintiff's former laptop. In reviewing these materials, an attorney representing the company in the sexual harassment lawsuit discovered the numerous communications between the plaintiff and her attorneys. Eventually, the plaintiff learned that not only did her former employer have access to such emails, but such emails were also in fact reviewed by the former employer's counsel in the course of responding to discovery requests from the plaintiff in her ongoing sexual harassment case. Plaintiff's counsel demanded the immediate return of all copies of the emails, which plaintiff argued were protected attorney-client communications.

The New Jersey Appellate Division rigorously examined the former employer's electronic communications policy, and found it to be ambiguous in how it advised employees that the company was retaining a right to claim a proprietary interest in the emails circulated using its computer equipment. The appellate court cited language in the company's electronic communications policy—included in the company's handbook—alerting employees that emails on company computers were considered "part of the company's business and client records," and not "private or personal" to an employee. However, a key to the court's decision was a policy provision that "occasional personal use is permitted." The court in its opinion concluded that the occasional allowance of the use of personal emails could have lead an employee to reasonably believe that not every message was considered to be company property by the employer. The court also said there was further ambiguity in the policy because the policy referenced the email system as the company "email system," which the court concluded could have reasonably been interpreted by employees to refer only to the company's work-based system and not to an employee's private email account that was password-protected but accessible through company computers. Because of such language, the court felt that the policy as written did not make it unreasonable for employees to believe that they still retained some expectation of privacy in such emails.

What This Means for New Jersey Employers

The *Stengart* case is significant. It is the first occasion when a New Jersey appellate court has provided guidance on how electronic communications policies should be drafted. One lesson from *Stengart* is that employers should carefully craft their electronic communications policies in a nonambiguous fashion to alert employees that, even with the allowance of some private usage, the employer retains the right to monitor these emails and potentially claim them to be their property if a

legitimate business interest can be established for the need to obtain such an interest. It is also important to note that even after *Stengart*, employers have the right to implement such policies to ensure that employees do not abuse computer systems through excessive use that interferes with the employee's duties of performing the job during work hours. Thus, the decision may leave open the possibility, where a business interest can be established, that an employer may still retain the ability to claim a proprietary interest in emails. However, after *Stengart*, employers can no longer presume that such materials will be their property simply because they were generated through the company's computer system. Now is the time for employers to reassess their electronic communications policies, so that such policies are not subject to the same claims of ambiguity that befell the employer's policy in *Stengart*.

For Further Information

If you have any questions regarding this case, please contact any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.

Note

1. *Stengart v. Loving Care Agency, Inc.*, 973 A.2d 390 (N.J. Super. Ct. App. Div. 2009).