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# Employment Law

## Alert

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## **New Jersey Supreme Court Limits Employers' Ability to Monitor Employee Emails**

**By James A. Kellar**

State courts increasingly grapple with the question of whether employees have protectable privacy interests in email communications sent or received on an employer's computer system. In its March 30, 2010 decision in *Stengart v. Loving Care Agency, et al.*, No. A-3506-08T1, the Supreme Court of New Jersey weighed in, holding that an employee's email communications with her attorney on her personal, password-protected email account are protected by the attorney-client privilege, notwithstanding the fact that the emails were sent and read from a laptop computer owned by the employer.

The facts at issue in *Stengart* are common to many workplaces in the technological age. Marina Stengart used her company-issued laptop computer and the company's email system to access her personal, password-protected Yahoo email account to send and receive personal messages, including several exchanges with her attorney about a discrimination action she was contemplating against her employer. Following her resignation of employment, Stengart returned the laptop to her employer and thereafter filed her discrimination claim. To secure evidence in defense of that action, the employer hired a computer forensic expert to recover all the files stored on Stengart's laptop computer, including the email communications between Stengart and her attorney. In response to the employer's attempt to utilize these communications in the discrimination suit, Stengart's counsel asserted that these email communications were protected by the attorney-client privilege and should not have been accessed or read by the employer. The employer disagreed, pointing to the company's computer-use policy that specifically reserved the employer's right to review, intercept, and access all matter on its media systems without notice to the employee.

Against those facts, the New Jersey Supreme Court was asked to determine if the attorney-client privilege protected the recovered email communications. The Court began its analysis by examining the language of the employer's computer-use policy to determine whether it applied to personal email accounts, such as Stengart's Yahoo account. Although the policy stated that it applied to all of the employer's "media systems and services," it did not define those terms, and personal email accounts were not explicitly referenced in the policy. Furthermore, the policy did not warn employees that the contents of personal (cont'd ➔)

email accounts were stored and accessible by the company. Moreover, while the policy stated that emails were business records that should not be considered private or personal, the policy also indicated occasional personal use of email was permitted. Thus, in evaluating the totality of the employer's computer-use policy, the Court found it ambiguous as to its application to employees' personal email accounts.

The Court then turned to an analysis of caselaw addressing the employee privacy rights implicated under these circumstances. The Court noted that a number of courts focused on the reasonableness of the employee's expectation of privacy in communications on the employer's computer systems, while others focused on the clarity provided in the employer's computer policy to effectively diminish any reasonable expectation of privacy in these communications. The Court stressed that these cases reveal a highly fact-sensitive inquiry where no single factor is dispositive.

Turning to the foregoing factors, the Court then determined that Stengart in fact possessed a reasonable expectation of privacy in her personal email communication with her attorney. In reaching its conclusion, the Court pointed to the fact that Stengart used her personal Yahoo email account and did not save the password on the company's computer. Moreover, the ambiguity in the employer's computer-use policy did not put Stengart on notice that her communications with her attorney on her personal, password-protected email account would be viewed by her employer. Lastly, the emails from Stengart's attorney contained a warning that the emails were confidential and protected by the attorney-client privilege. The Court reasoned that under such circumstances, Stengart could reasonably expect that her personal, password-protected email exchanges with her attorney would remain private.

The Court then went on to express several reservations about employer monitoring of employee emails. While recognizing that a clear company policy banning the use of all personal email accounts could diminish an employee's reasonable expectation of privacy, the Court observed that zero-tolerance policies may be "unworkable and unwelcome" in today's workplace and expressly discouraged the adoption

of such policies. Nevertheless, the Court stressed that employers have a right to monitor or regulate the use of workplace computers and are free to adopt reasonable policies that protect their legitimate business interests. In addition, while recognizing that employees can be disciplined for failure to adhere to such policies, the Court expressed skepticism about an employer's need to monitor the *contents* of personal email communications as a means to enforce its policies.

Finally, the Court held that even a policy banning all personal computer use that unambiguously warned employees that attorney-client privileged emails sent by way of the employee's personal, password-protected email account may be subject to review *would not* defeat the attorney-client privilege. While the employer might discipline the employee for violating its policy, the Court made it clear employers are precluded from viewing the content of private attorney-client communications.

In light of the *Stengart* decision, employers should review their personnel policy related to employees' personal use of workplace computers. The policies should strive for clarity and specifically address personal email accounts. Although this decision provides guidance to employers on how to craft their policies, it is our opinion that the holding is limited to attorney-client communications and should not be understood as a blanket prohibition against employers' accessing employee email communications. We anticipate that further court decisions will address the scope of permissible monitoring of personal employee emails sent or received on employer-owned computers through the use of a personal email account that do not implicate the attorney-client privilege.

Our firm is available to assist you in the review and revision, if necessary, of your personnel policies regarding employee use of workplace computers.



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