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EMPLOYMENT/ONLINE PRIVACY ALERT
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In NJ Workplace, Employee Emails With Counsel Outweigh Employers' Computer Restrictions

When do employees have an expectation of privacy regarding personal emails they send using their employer's computer equipment and networks? A recent New Jersey case indicates that when employees' emails contain attorney-client communications, the resulting privilege overrides employers' policies restricting employee use of computer systems for personal email. This is especially true when an employer's policy has some wiggle room on personal emails sent from the workplace.

An earlier New York case, with a fact pattern that is similar at first blush but contains two significant differences, came out the other way, with the court upholding the employer's right to monitor an employee's emails with his attorneys, resulting in a waiver of attorney-client privilege.

The Case And The Decision

Following her resignation, the plaintiff sued her employer, alleging constructive discharge under the New Jersey Law Against Discrimination. During her employment, the employee had been provided a laptop computer and a work email address. The plaintiff used the laptop to communicate with her attorney, but did so through a personal web-based email account. After the plaintiff filed suit, her former employer extracted from the laptop a forensic image of the hard drive. In reviewing the plaintiff's Internet browsing history, the employer's attorneys found and read communications between her and her attorney.

The employer's attorneys claimed that plaintiff waived her attorney-client privilege because the company manual gave the employer "the right to review, audit, intercept, access, and disclose all matters on the company's media systems …with or without notice." The company manual also stated that "the principal purpose of electronic mail is for company business communications. **Occasional personal use is permitted**." [Emphasis added.] Her attorneys requested that the originals and copies be returned, but the employer's attorneys refused, leading her to apply for an order blocking use of those emails.

The court held that public policy regarding the attorney-client privilege prevailed over the employer's policy to have full access to all of an employee's emails that were sent through the company's laptop. The court focused on the portion of the company manual allowing "occasional personal use" and held that a reasonable person would take this rule to mean that permitted personal use falls outside the scope of emails to which the employer has access. Because the employer did not specify what kind of personal use was permitted, the court found, the nearly sacrosanct attorney-client privilege elevated her communications to a position outside where the company had a right to monitor.

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Caveat: The case featured a narrow fact pattern that raises as many questions as it answers, and we caution against drawing too many big-picture inferences from it.

Does New York Have A Differing Opinion?

In 2007, a trial court in New York examined a similar issue with several crucial differences. In that case, the employee used the company's computer, network and email address to exchange emails with his attorneys. That was in apparent violation of the company's policy that strictly prohibited personal use and specifically advised employees that they could expect no privacy rights attached to their personal emails sent from work. The employer argued that the emails were never protected by the attorney-client privilege because the plaintiff could not have used the employer's system in confidence, knowing it was in violation of the employer's email policy.

The New York court held that the plaintiff's attorney-client privilege was extinguished because the plaintiff knew of the company's policy against personal emails. It is unclear how the New Jersey court would have ruled if presented with the facts in the New York case, or vice versa.

What This Means To Employers

The New Jersey decision, narrowly applicable though it may be, highlights the principle that employers do not have absolute rights to usurp all privacy rights of their employees. Future litigation should define the state of the law and allow employers, employees and their attorneys to draw greater guidance.

For now, employers should review their employment manuals; decide whether to institute absolute prohibitions against employees' using workplace computers, servers and/or email accounts for personal use; make sure that their email policy is clearly enunciated; and consider mandating that employees expressly consent to such policies, both at the time of employment and possibly every time they log on or boot up.

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