

# NJBIA

## AT ISSUE *By Dominick DiRocco, Esq.*

### Workplace Privacy: Technology Presents New Challenges for Employers

**E-mail. Google. Facebook. Yahoo. Laptops. Blackberries.** The list of electronic forms of communication continues to grow, and its proliferation has created new legal issues for employers in every sector of the economy. The latest example comes from a recent ruling by the New Jersey Supreme Court, and it provides an important lesson about keeping workplace policies up-to-date.

On March 30, the state's high court found that an employee had a reasonable expectation of privacy in e-mail messages sent to and received from her attorney, even though she used an employer-issued computer.

The case, *Stengart v. Loving Care Agency, Inc.*, involved Marina Stengart, who used her company-issued laptop computer to access her personal e-mail account through Yahoo to communicate with her attorney about a potential discrimination lawsuit against her employer, the Loving Care Agency. After terminating her employment, she returned her laptop to her employer and subsequently filed her discrimination suit.

During discovery, a review of Stengart's Internet browsing history on her employer-issued laptop revealed the communications between her and her lawyer. Stengart demanded the return of the communications on the grounds of attorney-client privilege, but the company refused, asserting that the e-mail messages were the property of the company.

In a unanimous ruling, the Supreme Court decided that, under the circumstances presented, Stengart had a reasonable expectation that these e-mail communications with her attorney would remain private and that sending and receiving such e-mails using her employer-issued laptop computer did not eliminate the protections afforded by the attorney-client privilege.

The Court explained that it was striving to strike a careful balance between an employer's ability to enforce reasonable rules concerning workplace activities and the long-standing, time-honored public policy considerations underlying the attorney-client privilege. In the end, it sided with attorney-client privilege.

So what does this mean for employers? More than anything, this case shows that employers should regularly revisit their company policies, particularly in the ever-changing area of electronic communication. The Stengart decision was driven in part by the fact that the company's

policy regarding computer usage did not address the use of personal, Web-based e-mail accounts and did not warn employees that the contents of such e-mails were retrievable by the company. Those omissions led the court to conclude that Stengart's expectation of privacy was reasonable.

While the Supreme Court's Stengart decision alters the landscape regarding electronic communications in the workplace, it does not eliminate an employer's authority to set and enforce policies concerning the use of company



>This case shows that **employers should closely scrutinize their company policies**, particularly in the ever-changing area of electronic communication.

computers. In fact, the Court explicitly re-affirmed the principle that private businesses have the power to monitor and regulate the use of workplace computers to protect the assets, reputation and productivity of the company. Furthermore, the Supreme Court's decision only prohibits access to employee e-mails that are protected by the attorney-client privilege. The decision does not necessarily protect other communications.

However, it is clear that New Jersey employers should closely scrutinize their company policies regarding the use of workplace computers and make certain that their regulations are clear, comprehensive and unambiguous. A well-drafted company policy on personal e-mails in the workplace will serve your company well.

No matter how much technology advances, the law will eventually catch up with it. Employers would do well to keep pace in their company policies. **NJB**