Employment Law Alert

MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

JANUARY 25, 2011

Favorable Ruling for California Employers—Employers, However, Must Ensure Their Computer Use and Electronic Communications Policies Are Up-to-Date

BY MICHA "MITCH" DANZIG AND BRANDON T. WILLENBERG

From the employers' perspective, favorable court of appeal rulings are relatively rare, but the California Court of Appeal recently issued such a ruling in *Holmes v. Petrovich Development Company, LLC, et al.* 2011 WL 117230 (Jan. 13, 2011) regarding employee privacy rights with respect to the use of the employer's computer and e-mail systems.

In *Holmes v. Petrovich Development Company*, the court found that an employee's exchange of e-mail communications with her attorney were not confidential because (1) the e-mails were sent from her company work computer, and (2) the company maintained a policy (which the employee was aware of and acknowledged) that e-mails from company computers were not private communications and could be monitored and reviewed by the company.

The court's ruling certainly highlights the importance of employers maintaining a comprehensive e-mail and computer-use policy that clearly establishes employees' reasonable expectations regarding the privacy or lack of privacy that attaches to information kept on or sent to and from their work computers.

The Facts Leading Up to the Lawsuit

The Plaintiff (employee) was an executive assistant for the Defendant (Paul Petrovich of Petrovich Development Company). When she began her employment, she read and signed the company's employee handbook, which contained policies regarding the use of the company's computers and e-mail. Those policies expressly warned employees who use the company's technology resources that "personal information or messages have no right of privacy with respect to that information or message," "[e]-mail is not private communication, because others may be able to read or access the message…," and that the company monitors computers and may "inspect all files and messages… at any time for any reason at its discretion."

Shortly after being hired, the Plaintiff informed her boss, Mr. Petrovich, that she was pregnant and intended to go on maternity leave for six (6) weeks after the birth of her child. The Plaintiff and Mr. Petrovich exchanged several e-mails regarding her replacement during her leave, and the timing and length of her leave. Those exchanges became somewhat combative and disagreements ensued with respect to changes in the timing of the leave, how long the leave would be, and who was qualified to cover for the Plaintiff in her absence.

During these exchanges, the Plaintiff was defensive and explained details of her pregnancy and past medical issues regarding prior pregnancies and miscarriages. She also suggested that maybe she should no longer work for Mr. Petrovich, i.e., that she should quit or that Mr. Petrovich wanted her to

quit.

Because Mr. Petrovich was concerned that she was going to quit, he forwarded the e-mails to three company employees who handled personnel matters as well as the company's in-house counsel. A few days later, the e-mail dialog between the Plaintiff and Mr. Petrovich ended amicably. That same day, however, the Plaintiff learned that Mr. Petrovich forwarded their e-mail exchanges (including the information about her pregnancy) to these other employees.

Also on that same day, she then used her company computer to e-mail an attorney, informing her that given her e-mail exchanges with Mr. Petrovich and his forwarding them to other employees, she was being subjected to a hostile work environment, being treated differently because of her pregnancy, and being made to feel like an outcast. The following day, after meeting with her attorney, The Plaintiff e-mailed Mr. Petrovich and informed him that he left her no choice but to quit.

The Lawsuit, Trial, and Verdict

The Plaintiff sued the company and Mr. Petrovich for wrongful termination, harassment, retaliation, violation of privacy rights, and intentional infliction of emotional distress.

The trial court granted the Defendants' motion for summary adjudication on the discrimination, retaliation, and wrongful termination claims. The remaining claims for privacy and intentional infliction of emotional distress were tried by a jury.

The company sought to use at trial the e-mail communications it discovered on the Plaintiff's work computer between the Plaintiff and her attorney. The Plaintiff argued that the e-mails were privileged and confidential and could not be used. The trial court disagreed and allowed the e-mails to be shown to the jury at trial. The jury found in favor of the Defendants.

The Appeal and Ruling

The Plaintiff appealed the issue (among others) of whether the e-mails with her attorney should have been admitted into evidence. She argued the e-mails to her attorney were privileged and should not have been admitted into evidence.

The California Court of Appeal affirmed that the attorney e-mails were properly admitted into evidence. The court decided that the e-mails between the Plaintiff and her attorney were not confidential communications, and not subject to attorney-client privilege protection, because the Plaintiff was aware of, acknowledged, and agreed to the company's computer and e-mail policies that expressly warned that employees had no privacy rights in the information sent to and from their work computers, and that the company monitors computers and may inspect all files and messages. The e-mails, therefore, could not be considered confidential communications.

According to the court, under the facts of the case, the Plaintiff's sending of e-mails to her attorney on the company's computer was "akin to consulting her lawyer in one of defendant's conference rooms, in a loud voice, with the door open," yet expecting the conversation to be confidential.

The court rejected several of the Plaintiff's arguments to show that she had a reasonable expectation of privacy, noting that the company's policies regarding computer use and e-mail communications (which the Plaintiff was aware of and agreed to) made it clear there could be no reasonable expectation of privacy in any information sent to or from a company work computer.

Notably, in *Stengart v. Loving Care Agency (Stengart)* the New Jersey Supreme Court held that an employee had a legitimate expectation of privacy in e-mail communications that she sent to her attorney through her personal web-based e-mail account using her employer's laptop computer because the employer in *Stengart* failed to provide an adequate warning to its employees through its handbook or policies that personal e-mails may be recovered—and read—if they are sent through the employer's electronic system.

What Does This Mean for California Employers?

Unfortunately, some employers do not regularly review and revise their employee handbooks and/or company policies to ensure they are accurate, up-to-date and compliant with local, state, and federal laws—or worse, they do not have in place any of the key policies (including those related to the use of computers and technology in the workplace).

The lesson from *Holmes v. Petrovich Development Company* is clear—company policies can be a critical piece of evidence in an employment-related lawsuit, evidence that could help an employer win a lawsuit or an appeal. It is, therefore, very important for employers to regularly review their handbooks, revise them, and keep them up-to-date as necessary to be compliant with local, state, and federal laws.

With respect to computer, Internet, and e-mail policies, it is important to ensure that those policies expressly advise employees exactly what they can or cannot do on the company's computer, Internet, and e-mail systems, and how information that is kept on or sent to or from company computers is monitored, reviewed, or may be accessed by the company.

Finally, it is important that the employer maintain an acknowledgement form that can be signed by all employees, which confirms that each employee has read the handbook/policy (or applicable revisions), understands its terms, and agrees to comply with all company policies. And depending on the company, it may be a good idea to have separate employee acknowledgement forms for specific company policies such as the nonharassment/discrimination policy or the computer/Internet/e-mail policy.

Again, as the *Holmes v. Petrovich Development Company* case teaches, the adequacy or thoroughness of a company's policies could mean the difference between a win and a loss at trial or on appeal.

Click here to view Mintz Levin's Employment, Labor and Benefits attorneys.

0887-0111-NAT-ELB