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LEGAL ALERT

Legal Alert: Computer Usage Policy Trumps California Employee's Attorney-Client Privilege

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What happens when an employee e-mails her attorney from her company e-mail account about suing her employer? According to a recent California Court of Appeal opinion, *Holmes v. Petrovich Development Co., LLC*, [1] it is likely that the e-mail will not be protected by the attorney-client privilege and will be admissible at trial. According to the opinion, when the employer has an express policy that reduces any expectation of privacy, e-mail communications between an employee and her attorney may be equivalent to "consulting her lawyer in her employer's conference room, in a loud voice, with the door open."

The plaintiff, Gina M. Holmes, worked as an executive assistant for the defendants Paul Petrovich and Petrovich Development Company, LLC. After Holmes was hired, she read and signed the company's express computer technology resource policy that governed her usage of the company computer and e-mail account. It stated that: (1) her computer and e-mail account should be used only for company business; (2) she was prohibited from sending or receiving personal e-mails; (3) she had no right to privacy with respect to any personal information or messages created on her computer or e-mail account; (4) e-mails are not private and should be regarded as a "postcard rather than as a sealed letter;" (5) the company may inspect all files or messages at any time for any reason at its discretion; and (6) the company would periodically monitor her computer and e-mail account for her compliance with its policy.

In July 2004, approximately one month after Holmes was hired, she told Petrovich she was pregnant and wanted to take a six-week maternity leave in December. She later revised her request to a four-month maternity leave beginning in November. This prompted Petrovich to send the following e-mail to Holmes, "I need some honesty. How pregnant were you when you interviewed with me and what happened to six weeks? . . . That is an extreme hardship on me, my business and everyone else in the company. You have rights for sure and I am not going to do anything to violate any laws, but I feel taken advantage of and deceived for sure." Holmes was offended and e-mailed a response that explained she did not tell him about her pregnancy earlier, in part, because she had two miscarriages in the past and did not want to disclose the pregnancy until it appeared likely that she would carry the baby to term. Because Petrovich was concerned that Holmes may be quitting, he forwarded Holmes' e-mail to human resources and in-house counsel.

When Holmes learned that Petrovich forwarded her e-mails to others, she was upset and sought legal advice concerning a claim for pregnancy discrimination. Holmes exchanged several e-mails with her attorney from her company e-mail account where she stated, "I know that there are laws that protect pregnant women from being treated differently due to their pregnancy, and now that I am officially working in a hostile environment, I feel I need to find out what rights, if any, and what options I have. I don't want to quit my job; but how do I make the situation better."

Shortly thereafter, Holmes quit her job and later filed a lawsuit against the defendants for sexual harassment, retaliation, wrongful termination, violation of the right to privacy and intentional infliction of emotional distress. During the course of litigation, Holmes challenged the admissibility of the company e-mails she exchanged with her attorney. The trial court found that Holmes waived the attorney-client privilege and admitted the e-mails during trial.

The Court of Appeal agreed with the trial court's ruling because the employer's computer policy made clear that Holmes had no legitimate reason to believe that communications from her company e-mail account were private, regardless of whether the employer actually monitored her e-mail. Thus, Holmes knowingly disclosed her attorney-client communications to her employer and waived the privilege.

Beware Of An "Operational Reality" that Contradicts The Written Policy

Holmes argued that she had a reasonable expectation that her e-mails to her attorney were private because of the "operational reality" that the company did not audit employee computers during her employment. The Court of Appeal rejected this argument because there was no evidence that the company had an informal policy that contradicted its express, written policy.

However, it is important to note that an informal policy that contradicts the company's written policy may support a finding that such communications are private. The "operational reality" test is used in the Ninth Circuit and is discussed in a 2008 opinion, Quon v. Arch Wireless Operating Co.[2] In *Quon*, the plaintiff had a reasonable expectation of privacy of his personal text messages sent from his company pager because of an informal policy that contradicted the written policy. The plaintiff's supervisor made clear that text messages would not be audited if employees paid any applicable overage charges even though the employer's policy prohibited the personal use of pagers. In other words, the "operational reality" was that the plaintiff had a reasonable expectation that his personal text messages would be kept private. Thus, in some states, an informal policy may effectively void the written policy.

An Unanswered Question: Does *Holmes* Extend To Personal, Password Protected, Web-Based E-mail?

Holmes also argued that she had a reasonable expectation of privacy because she used a private password for her company e-mail account and deleted the e-mails after they were sent. The Court rejected this argument because Holmes utilized her company e-mail account, not her personal e-mail account.

The Court of Appeal distinguished a 2010 New Jersey Supreme Court

decision, Stengart v. Loving Care Agency, Inc.,[3] that held an employee has a reasonable expectation of privacy on a personal, password protected, web-based e-mail account accessed from an employer's computer. In *Stengart*, the plaintiff used her company issued laptop to access her Yahoo account to e-mail her attorney about bringing an employment discrimination lawsuit against her employer. The Court ruled that the plaintiff did not waive the attorney-client privilege because the scope of the company's computer policy was not clear; it did not expressly reference personal, password-protected, web-based e-mail accounts accessed via a company computer. Moreover, the Court noted that a policy that provided notice that an employer could retrieve and read an employee's attorney-client communications accessed on a personal, password-protected e-mail account would not be enforceable because it would be void as a matter of public policy in New Jersey.

Thus, in some states, an over-inclusive policy that monitors an employee's personal, password protected, web-based e-mail account may be void as a matter of law especially where attorney-client communications are at issue.

The Impact Of *Holmes*

Holmes is a good reminder for all employers to review their current computer and e-mail usage policy and make sure that it adequately notifies employees that that their workplace computer and company e-mail account are not private, may be used only for business purposes and may be subject to monitoring by the company. Additionally, the Ninth Circuit's holding in *Quon* stresses the importance for employers to make sure that their supervisors are not communicating a contradictory informal policy that leads employees to believe that the "operational reality" of the workplace is different from the written policy. Finally, although not directly addressed in *Holmes*, the New Jersey Supreme Court decision in *Stengart* suggests that employees may have a reasonable expectation that their personal, password protected, web-based e-mail accounts are private and, therefore, not subject to monitoring. However, despite this, an employer may implement a policy whereby it may discipline an employee who spends a significant amount of time on his/her personal e-mail account that disrupts business operations.

If you have any questions regarding the issues addressed in this Alert, please contact the author, Michelle Brauer Abidoye, an associate in our Los Angeles office, at mabidoye@fordharrison.com, or Curtis A. Graham, a partner in our Los Angeles office, at cgraham@fordharrison.com..

[1] *See Holmes v. Petrovich Development Co., LLC* , 2011 Cal. App. LEXIS 33 (Cal. Ct. App. Jan. 13, 2011).

[2] The Ninth Circuit's holding in *Quon v. Arch Wireless Operating Co*., 529 F.3d 892 (9th Cir. 2008), was later reversed, in part, by the U.S. Supreme Court on Fourth Amendment grounds; however, that opinion did not address the "operational reality" test. *See City of Ontario v. Quon,* 130 S. Ct. 2619 (2010).

[3] *See Stengart v. Loving Care Agency, Inc.,* 990 A.2d 650 (N.J. 2010).