

Transcript:

Monitoring Employee Email After Stengart

Speaker: Kristen J. Mathews – Partner, Proskauer

(Words slide in from top): Monitoring Employee Email After Stengart

Mathews: So what is the law? So far I've been, I've been telling you about the problem, but what is the law? Well, we have a few cases, and we've seen cases for years. But a few recent cases that are pretty interesting. And one is called *Stengart vs. Loving Care Agency*, and this was in, um, New Jersey, this – just a few months ago. I believe it was July when we heard about it. It could have happened in June. In that case, an individual who worked for her company, while she was working for her company, had a company-issued laptop, and she, during that time of her employment, had used that laptop to access her personal e-mail account, her web-based personal e-mail account, which was password-protected. And she used that e-mail account to communicate with her own lawyer about an anticipated discrimination suit w– against her company.

Um, when the discrimination suit was filed, the company's outside lawyers did some forensics into her laptop, and they were able to, as I said, read these personal e-mails on her web-based account. And the issue before the court was, were these ish – were these e-mails privileged or not?

Um, the lower court judge found that the e-mails were not protected by the privilege because she had used a company laptop to u– to access the – her personal account, and the company's policy said that the company had the right to monitor anything that is done on the company's network.

The Appellate Court res– reversed this. And this came as a surprise to some people who have been relying on those corporate policies, those, those employee Internet use policies, for a long time. They said that the policy was overreaching because it didn't establish an – a legitimate business purpose for that company to be reading this individual's personal e-mails. Um, they said that the company was overstepping their boundaries. And I guess the, the bottom line point is that even in the electronic age, individuals, even in the US, for that matter, possess a reasonable expectation that their personal communications will remain private.

Some important points about this case. One, the ruling was not limited to e-mail, okay? And there's lots of ways that individuals communicate with the outside world using an employer's systems. For example, they may log in to a Facebook page, again with a password, and maybe their Facebook page is limited to only their friends. Um, and in – maybe they're tweeting. But whatever it may be, this case wasn't limited to e-mails. And in addition, it wasn't limited to, um, e-mails

between a – an employee and her lawyer, okay. So even if the attorney-client privilege wasn't an issue here, this case wasn't limited in that way.

So, and furthermore, one other thing to bring to note with regard to this case, was that that lawyer, that outside lawyer, who had reviewed her company laptop for whatever she had done on that laptop, sh– he may be subjected to discipline now because of a New Jersey ethics rule that would have precluded him from even reading the e-mail past the point where he could figure out what it, what it said. In other words, he was supposed to send it back to the other side as soon as he realized that he didn't have rights to it.

(Proskauer logo fades in.)