



Management Alert

Emails Sent By Employee To Attorney From Company Computer May Not Be Privileged

On January 13, 2011, in *Holmes v. Petrovich Development Company, LLC*, a California Court of Appeal ruled that emails sent by an employee to her attorney from a company computer were not privileged. Based on this ruling, the court affirmed a jury verdict for the employer on Holmes's claims for invasion of privacy and intentional infliction of emotional distress. The court also affirmed the trial court's ruling summarily adjudicating claims for hostile work environment harassment, constructive discharge, and retaliation in favor of the employer.

Case Background

Plaintiff Gina Holmes started working for Petrovich Development Company in June 2004. One month later, she told her supervisor Paul Petrovich she was pregnant, with a due date in December 2004. Holmes also told Petrovich she planned to work through her due date and then take maternity leave for six weeks. In August, Holmes revised her starting leave date to November 15. She also sent Petrovich an email informing him that her leave may last up to four months. In his response to Holmes, Petrovich expressed frustration that Holmes had not been completely honest with him when she first told him of her pregnancy and the expected duration of her leave. Petrovich also told Holmes it would cause an extreme hardship on his business to find adequate coverage for such a long period of time.

Holmes, emailing in response, expressed her own frustration, explaining she did not tell Petrovich more about her pregnancy at the outset because there was some uncertainty about whether she would continue with the pregnancy. In her email, Holmes wondered whether Petrovich wanted her gone, "because that is how it feels."

After reviewing this response, Petrovich became concerned that Holmes might be quitting her job, so he forwarded the email to the company human resources and payroll departments, as well as the company's in-house attorney. Holmes and Petrovich exchanged a few more emails in which they expressed a willingness to reach common ground. When Holmes later learned that Petrovich had forwarded one of her emails about her pregnancy to other employees, Holmes felt she was being harassed and that her privacy rights had been violated.

Holmes then emailed her attorney by using a company computer, which she also used to forward several of Petrovich's emails. Thereafter, Holmes, acting on the advice of her attorney, deleted these attorney-client communications from her work computer.

Holmes had known about the company's policy on employee use of company computers, which provided: (1) company computers were for company business only, not personal use; (2) the company would periodically monitor its computers to make sure users were complying with the policy; and (3) employees who used company computers for personal business, such as storing information or sending messages, had "no right of privacy with respect to that information or message."

The day after emailing her attorney, Holmes quit her job. She sued the company a year later, alleging claims for hostile work environment harassment, constructive discharge, violation of the right to privacy, retaliation and intentional infliction of emotional distress. The trial court granted the company's motion for summary adjudication against the claims for hostile work environment, retaliation and constructive discharge, but the case went to trial on the privacy and emotional distress claims. The central issue at trial was whether Petrovich's forwarding of Holmes's email invaded her privacy rights and constituted intentional infliction of emotional distress. The jury returned a defense verdict on both claims.

The Appeal

No Right to Privacy in Emails Sent from Company Computer. In the course of investigating Holmes's case, the company located the emails that Holmes had sent to her attorney. Petrovich used the emails at trial to show that she had not suffered emotional distress, and had filed the lawsuit only because of her attorney's advice. Holmes argued on appeal that the emails should not have been allowed into evidence because they were privileged communications between her and her attorney. The Court of Appeal disagreed.

The court concluded that the attorney-client privilege did not apply, because Holmes could not reasonably expect that the communications with her attorney would remain private given the company's policy regarding use of company computers for personal business. By acknowledging the policy, Holmes in essence agreed that emails sent from the company computer were not private, and therefore were not privileged. The court found that her communications with her attorney on the company computer were "akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him." For these reasons, the court held that the jury correctly found there was no invasion of privacy and no intentional infliction of emotional distress.

Summarily Adjudicated Claims. The court also affirmed summary adjudication of Holmes's claims for hostile work environment harassment, constructive discharge, and retaliation.

With respect to the claims for harassment and constructive discharge, the court reasoned that no reasonable jury could conclude that the complained-of conduct – Petrovich's tone in the emails and the forwarding of Holmes's email to other employees – was severe enough to alter Holmes's work conditions. The court stated that "[w]hen viewed in context, the emails ... show nothing more than that Petrovich made some critical comments due to the stress of being a small business owner who must accommodate a pregnant woman's right to maternity leave." Because Holmes could point to no evidence of egregious conduct that was severe or pervasive enough to constitute harassment, the court affirmed the grant of summary adjudication.

The claim for retaliation failed because she could not establish that an adverse employment action had been taken against her. She claimed that Petrovich's forwarding of the email constituted retaliatory conduct, but the court disagreed because it did not materially alter the terms, conditions, or privileges of her employment. Her salary was not reduced, she was not demoted, and Petrovich stated that he would work her to honor her rights. Because there was no material change in her employment, the retaliation claim failed.

What *Holmes* Means for Employers

This case reminds employers of the importance of having a strongly worded and clearly written policy on employee use of employer-provided technology such as computers, email systems and voice mail systems for personal reasons. These policies also should specify that employees have no expectation of privacy in their non-work communications and that all employer-provided technology is subject to monitoring, even if it is password-protected.

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