

## **BIG BROTHER IS WATCHING: CORPORATE MONITORING OF EMPLOYEE SOCIAL MEDIA IN THE WORKPLACE**

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*An employee of a company filed a discrimination lawsuit stating various allegations. However, one significant issue arising out of this case focused on the e-mails sent by the employee using a personal password-protected yahoo account on a company owned laptop. The laptop utilized certain software, unbeknownst to the employee, saved a copy of every email sent to the employee's lawyer. The determination of whether the company could use these emails in the lawsuit against the former employee went all the way to the New Jersey Supreme Court. This case garnered attention with media scrutiny due to the possible implications this case could have for the legal concept of attorney-client privilege and social media. The names of the parties have been changed in order to protect various individuals. This case is appropriate for graduate and undergraduate business law, business management, and human resource management classes.*

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### **THE BACKGROUND**

Over the past couple of decades, many persons and companies have incorporated the use of various types of technologies in their daily business undertakings. These technologies have helped improve the efficiency and effectiveness of the various organizations. These types of technologies have included, but are not limited to, personal computers, emails, and the internet. The rate that such equipment and devices have entered the market, as well as their upgrades, could be quite fast and overwhelming to business organizations.

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Employers often spend resources to ensure that the latest and most effective technology is available for the workplace. Accordingly, employees have to spend time ensuring a sound and complete understanding of this technology. These actions are necessary for the operation of an efficient workplace.

Ironically, employees will often use similar technologies in their personal lives with capabilities that are consistent or greater than the technologies used in the work environment. The personal use of these technologies by employees is not confined to the home. Employees will often use these technologies in a limited capacity at work. Some of these technologies are quite common and popular. For example, employees may make personal phone calls during work hours. The length and time that an employee spends on personal calls in the workplace as well as the nature of the phone call in the workplace may present a problem. As a result, employers have established policies to address these various concerns. However, these technologies may be created and implemented prior to an understanding of how its use will affect operations in the workplace. Due to this use of technologies, numerous concerns may arise within an organization upon implementation of such technologies in the workplace.

The social media is an example of an area that may present concerns for companies and require employers to implement policies to address these concerns. Employees may use the company's computer to access their personal and private social media sites such as Yahoo through the internet during work hours. However, this usage of personal technology in a work environment may present significant challenges due to the fact that the law regulating this technology may not have addressed this area yet.

In the current work environment, companies often monitor employee activities and communications during the work day. However, the issue can become complicated when the company monitoring the employee has to contend with personal social media sites. This is especially true when this concept runs up against a legal concept known as the attorney-client privilege. The attorney-client privilege allows communications between an attorney and the attorney's client to remain confidential.

### **THE CASE**

Tender Care Agency, Inc. (hereafter referred to as "TC") provided health care services and home-care nursing to children and adults. A New Jersey company located in Fort Louis, New Jersey, TC had a number of branches in various locations. In furtherance of providing these services, TC sought to attain and employ a well qualified workforce to achieve their corporate objectives.

Tatiana Stennart (hereafter referred to as Tatiana) began working for TC in 1994. Being a Jewish female of Russian heritage who spoke fluent Russian, she may have felt that the company afforded her an opportunity to demonstrate her abilities. She also may have felt that if she performed well, she could truly advance with this organization.

During her early tenure at TC, Tatiana's hopes and aspirations appeared to be on point with her initial beliefs. She was able to attain the position of Executive Director of Nursing for the entire TC locations. In addition, Tatiana also served as the Branch Manager at the Fort Louis workplace. In order to perform her job responsibilities for the company, TC provided Tatiana with a laptop computer. With the laptop computer, Tatiana had the capabilities to send emails using her work internet address. Further, she also had the capabilities to visit various websites utilizing the TC server. Thus, she could basically access a number of websites on her laptop computer.

Tatiana, in accordance with the work needs of the company, utilized the laptop computer to send work e-mails and perform other company business. The use of the laptop allowed her to respond effectively and efficiently to the demands of the company business. However, Tatiana also used her laptop to send personal e-mails through the internet as well as review other websites. These emails were sent during company work hours. Again, this task was accomplished using TC's server.

### **CONCERN FOR WORKPLACE CHANGE**

After a period of time of workplace progression, Tatiana became uncomfortable with her work environment due to certain actions she perceived occurred at work. She felt that she had been subjected to "shockingly offensive conduct" which was equivalent to a hostile work environment due to the fact that she was Jewish, of Russian heritage, and was a female. She alleged that certain offensive anti-Semitic statements were made to her. Further, she alleged that she was asked not to speak Russian in the workplace and that English was the language she was supposed to speak in the workplace. Tatiana also felt she had to endure emotional distress due to this type of treatment. She was so upset about these actions that she could no longer work at TC and she decided to plan to leave the company. As a part of this plan, Tatiana sought legal remedies for the alleged offenses.

### **SOCIAL MEDIA CHALLENGE IN THE WORKPLACE**

As part of her communication with her legal counsel prior to leaving the company, she used her laptop provided by TC to "access a personally, password-protected email account on Yahoo's website, through which she communicated with her attorney about her situation at work." While using the Yahoo account, Tatiana did not store her ID or private password on TC's laptop.

However, there was a very important unique feature with the browser software that Tatiana did not know about while she corresponded with her attorney. This browser software “automatically made a copy of each web page she viewed, which was then saved on the computer’s hard drive in a cache folder of temporary Internet files.” This data will remain there until it is deleted or new information was written over it. In essence, it made a copy of the correspondence between Tatiana and TC.

Tatiana subsequently left the company due to her alleged hostile environment claims and stated these actions were equivalent to a constructive discharge. She then returned the company laptop.

### **LEGAL DILEMMA**

In January 2008, she filed a lawsuit against TC and various others. Summarizing the previous statements, she alleged various claims against TC including “constructive discharge because of a hostile work environment, retaliation, and harassment based on gender, religion, and national origin.”

In preparation for the lawsuit, TC “created a forensic image of its hard drive in an effort to preserve evidence” through a third party expert organization. After examining this information, TC discovered e-mails between Tatiana and her attorney sent through the Yahoo account concerning the lawsuit. Some of this data proved useful to TC and the legal firm representing TC.

Of note, the e-mails sent from Tatiana’s lawyer provided a warning to its readers. The warning stated that this e-mail was comprised of information that was meant only for the desired person identified in the e-mail. It further stated that this e-mail was of a private nature between an attorney and a client. Accordingly, should a person receive this e-mail, that its “dissemination, distribution, or copying of the message is strictly prohibited.” As a consequence, the party receiving this e-mail should terminate the communication and immediately contact the appropriate persons.

The legal firm representing TC disclosed this information but argued Tatiana “had no reasonable expectation of privacy in files on a company-owned computer in light of the company’s policy on electronic communications.” TC’s legal firm asserted that its policy governing communications of this type contained in the company’s Employee Handbook was controlling in this matter.

The most pertinent parts of the policy noted that TC retains the entitlement to “review, audit, intercept, access, and disclose” every aspect of the media

organization as it determines necessary. Even so, the company reserves the right not to provide notice to anyone.

TC, through its policy, also views messages over the internet, as well as files on the computer, as part of the company's business and not held to be personal or private to the employee. Further, TC notes the major reason for e-mails is for work purposes. Most interestingly, the company does make allowances for employees to use the e-mail personally in a limited capacity. However, it does provide for certain limitations for its use. The policy states at its conclusion that the "abuse of electronic communications system may result in disciplinary action up to and including separation of employment."

Tatiana's legal representation was enraged. They felt it was wrong for TC's legal representation to have viewed the document, used the information contained in the document, as well as kept the information for so long prior to returning this information. Tatiana's legal representation sought assistance in the court to resolve this issue.

#### **LEGAL ACTION SUMMARY**

The case began in the New Jersey District Court. There was substantial interest in the case because the concept of social media and workplace privacy was being addressed. The courts are often reluctant to provide legal rulings in this area.

The initial New Jersey District Court trial did not result in Tatiana's favor. The New Jersey state Court of Appeals reversed the District court's ruling. As a result, the matter was appealed to the New Jersey State Supreme Court to obtain their ruling.

## **DISCUSSION QUESTIONS**

### **Legal Concerns**

1. Discuss the possible legal arguments utilizing the appropriate corresponding facts supporting Tatiana Stennart's position to obtain the e-mails and not allow Tender Care to use them.
2. Discuss the possible legal arguments/defenses utilizing the appropriate corresponding facts supporting Tender Care's position of using the e-mails.

### **Additional Concerns**

3. What are the implications for Human Resources as it relates to employees' using private social media sites at work.
4. What additional workplace concerns do you foresee with the use of private social media sites in the future?

## **EXHIBIT 1**

### **Attorney-Client Privilege**

Pertaining to the attorney-client privilege, the New Jersey State Supreme court stated that the particulars of this privilege is "to encourage free and full disclosure of information from the client to the attorney" as well as benefits society through "sound legal counsel" rooted in "full, candid, and confidential" information.

**Source:** 8 J.Wigmore, Evidence § 2290, at 542 (McNaughton rev. 1961).

### **Standard Confidential Statement on E-mails of Tatiana's Legal Counsel**

"THE INFORMATION CONTAINED IN THIS E-MAIL COMMUNICATION IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENT NAMED ABOVE. This message may be an Attorney-Client communication, and as such is privileged and confidential. If the reader of this message is not the intended recipient, you are hereby notified that you have received this communication in error, and that your review, dissemination, distribution, or copying of the message is strictly prohibited. If you have received this transmission in error, please destroy this transmission and notify us immediately by telephone and/or reply e-mail."

**Source:** <http://lawlibrary.rutgers.edu/courts/supreme/a-16-09.opn.html>

## **EXHIBIT 2**

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**Tender Care's Policy for Electronic Communication**

"The company reserves and will exercise the right to review, audit, intercept, access, and disclose all matters on the company's media systems and services at any time, with or without notice."

"E-mail and voice mail messages, internet use and communication and computer files are considered part of the company's business and client records. Such communications are not to be considered private or personal to any individual employee."

"The principle purpose of electronic mail (e-mail) is for company business communications. Occasional personal use is permitted; however, the system should not be used to solicit for outside business ventures, charitable organizations, or for any political or religious purpose, unless authorized by the Director of Human Resources."

**Source:** *Stengart v. Loving Care Agency*, 990 A. 2d 657 (N.J. 2010).

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