

NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

MARIA STENGART,

Plaintiff,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

-vs.-

Docket No. BER-L-858-08

LOVING CARE AGENCY, INC.,
STEVE VELLA, ROBERT CREAMER,
LORENA LOCKEY, ROBERT FUSCO,
LCA HOLDING, INC., a Delaware
Company, John Does 1-10, and
Board of Directors 1-10,

CIVIL ACTION

DECISION PURSUANT TO MOTION

Defendants.

Argued January 9, 2009
Decided February 5, 2009

Peter Frazza, Esq. appearing on behalf of plaintiff Marina Stengart (Budd Lerner, PC)

Lynne Anne Anderson, Esq. appearing on behalf of defendants Loving Care Agency, Inc., Robert Creamer, Lorena Lockey, Robert Fusco, and LCA Holding, Inc. (Sills Cummis & Gross, PC)

John Ridley, Esq. appearing on behalf of defendant Steve Vella (Drinker Biddle & Reath)

De La Cruz, J.S.C.

I. Presentment

Plaintiff Marina Stengart ("plaintiff") filed an Order to Show Cause on November 7, 2008. The Order to Show Cause alleged that Sills Cummis & Gross, PC ("Sills Cummis"), attorneys for defendants the Loving Care Agency, Inc., Robert Creamer, Lorena Lockey, Robert Fusco, and LCA Holding, Inc. (collectively "defendants" or "Loving Care") had breached the attorney client privilege of plaintiff when Loving Care recovered and retained E-mail correspondence made between plaintiff and her counsel which had been sent from plaintiff's personal, password protected, web-

based E mail account but on Loving Care's computer and network server. The E mail correspondence was eventually furnished to plaintiff by defendants pursuant to plaintiff's discovery requests.

The Order to Show Cause seeks, among other things, the removal and disqualification of Sills Cummis as Loving Care's attorneys and seeks to restrain Sills Cummis and Loving Care from further use of the E mails, including trial. By Order of this Court, filed November 12, 2008, the Order to Show Cause was converted to a motion returnable November 21, 2008. The motion was adjourned three times and included calendaring difficulties involved with holiday season conflicts. Oral argument was heard on January 9, 2009 and the Court reserved decision. This is the decision on this motion pursuant to Rule 1:7 4(a).

II. Background

A. The Parties

Defendant the Loving Care Agency is in the business of providing home care services for children and adults. Defendant Steve Vella is the Chief Financial Officer of the Loving Care Agency. Defendant Robert Creamer is the Chief Executive Officer of the Loving Care Agency. Defendant Lorena Lockey is the head of Human Resources of the Loving Care Agency. Defendant Robert Fusco is a member of the Board of Directors of the Loving Care Agency. Defendant LCA Holding, Inc. is the Delaware company which owns the Loving Care Agency. Plaintiff was the Director of Nursing for all Loving Care branches as well as the Branch

Manager at Loving Care Agency's Fort Lee office. She was one of the first two employees when the defendant company started up in 1994.

B. Factual Background Relevant to Current Dispute

Plaintiff resigned from Loving Care on or about December 2007 and filed the instant law suit in February 2008 alleging that the hostile work environment at Loving Care had led to her constructive discharge. Thereafter, in order to preserve the electronic information contained on plaintiff's employer issued laptop computer, for e discovery purposes, in April 2008, Sills Cummis, as Loving Care's counsel in this matter, caused to have made an image of that laptop computer's hard drive. Thereafter, the hard drive was sent to a company that could restore and recover deleted information that was located on the hard drive. This forensic recovery process uncovered temporary internet files that contained the contents of E mail sent from plaintiff's Yahoo account to her attorney which is the subject of this motion.

On or about October 22, 2008, Loving Care served on plaintiff its Answers and Objections to plaintiff's First Interrogatories. Loving Care's response to question nine stated that it had obtained information contained in "E mail correspondence from [plaintiff's] office computer on December 12, 2007 at 2:25 p.m." between plaintiff and her counsel, Peter Frazza, Esq.

Based on this answer, plaintiff demanded that any and all E mails between plaintiff and her counsel held by Sills Cummis be returned or destroyed as such E mails were protected by the

attorney client privilege and that Sills Cummis' retention of such E mails constituted violation of R.P.C. 4.4 and R. 4:10 2(e)(2). Sills Cummis refused to comply with plaintiff's demand, arguing that the content of such E mails were not protected by the attorney client privilege because plaintiff waived any such privilege by utilizing Loving Care's computer and server during business hours to make the communication. This caused plaintiff to file the instant application requesting the disqualification of Sills Cummis and other sanctions.

Loving Care maintains an employee handbook which is physically distributed to its employees and which is also electronically accessible on Loving Care's servers. The motion record shows that during plaintiff's tenure as Director of Nursing and Branch Manager, she assisted in the creation and distribution of the employee handbook. The employee handbook contains a section entitled "Electronic Communication" which governs employee's use of Loving Care's technology resources. The electronic communication policy provides:

- Technology resources are considered company assets and must be protected from unauthorized access, modification, destruction and/or disclosure.
- 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 principal 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 . . . ;
- Certain uses of the e-mail system are specifically prohibited, including but not limited to: . . . Job searches or other employment activities outside the scope of company business. . . .

[Employee Handbook, annexed to the Certification of Jiri Janko in Support of Defendant's Opposition, dated November 14, 2008, as Ex. A]

During her employment by Loving Care, plaintiff was provided with a company issued laptop computer and assigned a Loving Care E mail account for business use. In addition to her Loving Care E mail account, plaintiff also maintained a personal web based E mail account through Yahoo. Plaintiff could access her Yahoo account through any computer that has an internet connection. Once on the internet, plaintiff can view and write E mails through her Yahoo account by entering her personal Yahoo ID or E mail address and password which is known only by her in a personal capacity on Yahoo's E mail website. Plaintiff occasionally accessed her Yahoo account to write E mails during work hours on her company issued laptop computer and this activity, argues plaintiff, was permitted by the employee handbook and condoned by defendants.

III. Discussion

Computers play an important role in the function of companies in today's world. Access to the internet and the ability to communicate by E mail facilitates efficient business practices and provides instant access to information that may otherwise have been time consuming to obtain. However, the benefits of computer and internet use pose complex and novel questions for both employers and employees with respect to the legal ramifications of such use.

The law recognizes the need for an employer to monitor the computer and internet usage of its employees for the purpose of protecting its business rights and to control its equipment. Indeed, nothing prohibits an employer from setting policy that notices employees that its technology resources are considered company assets or that E mail messages and internet use and communication and computer files are considered a part of the company's business and client records or that E mail communications using the company's technology resources are not to be considered private or personal to an individual.

However, the law also recognizes that an employee who uses computers in the workplace should be afforded a reasonable expectation of privacy. Indeed, if an E mail is a communication between a lawyer and client, it is initially presumed protected by the attorney client privilege. The privilege is one of the oldest recognized privileges for confidential communications. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998). Generally, the attorney client privilege functions to protect communications made between a lawyer and their client in the course of their professional relationship. N.J.S.A. 2A:84A 20. The privilege allows clients to candidly discuss matters with their attorneys in reliance that their statements will be kept in the highest confidence and not revealed to third parties. The privilege, however, is not absolute, and is subject to waiver when "without coercion and with knowledge of his right or privilege, [a person] ma[kes] disclosure of any part of the privileged matter or consent[s] to such a disclosure made by

Stengart v. Loving Care, et al.
BER-L-858-08

anyone." N.J.S.A. 2A:84A 29. Thus when a communication is made with knowledge that a third party is present or could be privy to the information, the attorney client privilege is waived.

Like any other form of communication, E mails carry a risk of unauthorized disclosure to a third party. Despite this risk, lawyers and clients may communicate confidential information through E mail with a reasonable expectation of privacy. See ABA Formal Opinion 99 413, dated March 10, 1999 (annexed to the Certification of Allen L. Harris as Ex. H). Further, the fact that these transmissions between attorney and client are sent through unencrypted E mail does not alone cause the privilege to be destroyed. For example, a private E mail written to an attorney over a web based E mail account from a personal computer is generally considered protected by the attorney client privilege despite the fact that the communication may be intercepted or viewed during transmission. Ibid.

However, when an employee sends an E mail to their attorney through an E mail account issued by their employer over their employer's servers, several courts have found that such correspondence is generally not protected by the attorney client privilege if the employer maintains a policy warning its employees that E mail correspondence from company issued E mail accounts are subject to review. See Kaufman v. SunGard Invest. Sys., 2006 U.S. Dist. LEXIS 28149 (D.N.J. May 9, 2006); Scott v. Beth Israel Medical Center, 847 N.Y.S.2d 436 (Sup. Ct. 2007); In re Asia Global Crossing, 322 B.R. 247 (Bankr. S.D.N.Y. 2005). The issue similar to the one here has been considered by two courts,

Stengart v. Loving Care, et al.
BER-L-858-08

Long v. Marubeni Am. Corp., 2006 U.S. Dist. LEXIS 76594 (S.D.N.Y. 2006) and National Economic Research Associates v. Evans, 21 Mass. L. Rep. 337 (Sup. Ct. 2006), but never expressly by the courts in the State of New Jersey.

The question posited is whether communication between an employee and her attorney through a personal, password protected, web based E mail account, but made on the employer's computer, using and over the employer's server, during business hours, is protected by the attorney client privilege, given employer's provisions governing use of electronic communications with company issued equipment, resources and time. The Court finds that when an employee has knowledge of the employer's electronic communication policy which adequately warns that any and all internet use and communication conducted on the employer's computer is not private to the employee and warns that 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 protected by such attorney client privilege and are then not to be considered private or personal to any individual employee.

To answer this question, the Court is guided by the aforementioned cases which relied on the employer's electronic communication policy to determine whether the employee had a reasonable expectation of privacy in such communications to assert the privilege. The Court is further guided by Kaufman v. SunGard Invest. Sys., 2006 U.S. Dist. LEXIS 28149 (D.N.J. May 9, 2006), an unpublished decision by the Federal District Court of

New Jersey which reviewed a magistrate judge's application of New Jersey's attorney client privilege law to E mail sent from an employee to her attorney through her employer's E mail system. Consistent with the analysis in Long and Evans, the court considered the employer's electronic communication policy to determine whether the employee had a reasonable expectation of privacy. The Kaufman court reasoned that any privilege that may have attached to the subject E mail was waived because Kaufman had used her employer's network with knowledge of her employer's policy which stated that "[c]ompany property' included, for instance, 'information stored on computers' and 'E mail.'" Id. at *11. Accordingly, the court held that all information stored on the employer's computer systems were the property of the employer and not protected by the attorney client privilege. Ibid.

Accordingly, the question of whether an employee has a reasonable expectation of privacy in a communication made on a work issued computer is based on the degree of notice the employer has provided to its employee regarding their right to privacy in electronic communications. Here, Loving Care's Employee Handbook warns that:

- Technology resources are considered company assets and must be protected from unauthorized access, modification, destruction and/or disclosure.
- 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.**

[Employee Handbook, annexed to the Certification of Jiri Janko in Support of Defendant's Opposition, dated November 14, 2008, as Ex. A (emphasis added)]

The policy specifically places plaintiff on notice that all of her internet based communications are not to be considered private or personal. In addition, Loving Care's policy put employees on notice that the technology resources made available to employees were to be used for work related purposes, particularly during business hours. Specifically, the policy prohibited the use of its E mail systems to conduct "[j]ob searches or other employment activities outside the scope of company business." Ibid. This restrictive electronic communications policy adequately warns employees that there is no reasonable *expectation* of privacy, not outright prohibition of use, with respect to any communication made on company issued laptop computers and server, regardless of whether the E mail was sent from plaintiff's work E mail account or personal web based E mail account. It is the employer's technology resources, laptop computer and time that plaintiff used to make her communications.

Plaintiff contends that she was unaware of the policy concerning the use of E mail and internet on the company laptop and using company's server at the time she communicated with her attorney. Plaintiff's contention is not persuasive and is contrasted with her tenure as Director of Nursing and Branch Manager. She was one of the first employees of this company in its infancy and given her "seniority" with the company and her title, she assisted in the creation, drafting and distribution of the employee handbook that included Loving Care's policy concerning electronic communications. As an administrator who

Stengart v. Loving Care, et al.
BER-L-858-08

had sufficiently high level awareness of the company policy with distribution responsibilities for it, plaintiff is deemed to have had, at a minimum, constructive knowledge of this policy. To rule otherwise in light of the factual record now before this Court would not be rational. See Long v. Marubeni Am. Corp., 2006 U.S. Dist. LEXIS 76594 (S.D.N.Y. 2006).

Consequently, when plaintiff decided to use company time, equipment and resources to communicate with her attorney regarding the terms of her resignation from Loving Care, she proceeded with knowledge that such computer use and communications would not be private or personal to her. Plaintiff took a risk of disclosure of her communications and a risk of waiving the privacy she expected by way of the method she chose to communicate with her attorney. Communication in this format was voluntary on plaintiff's part. It was chosen over other methods of communication that would not pose the risk of view that plaintiff allowed the employer to have when she used its server and technology. This constitutes a waiver of the attorney client privilege. See Long v. Marubeni Am. Corp., 2006 U.S. Dist. LEXIS 76594 (S.D.N.Y. 2006) (holding that the attorney client privilege was waived when employees used their personal password protected E mail accounts to communicate with their attorneys while at work on the employer's computer with knowledge that personal use of company computers was prohibited and that there was no expectation of privacy in any communications made over the employer's computers). Contra National Economic Research Associates v. Evans, 21 Mass. L. Rep. 337 (Sup. Ct. 2006) (finding

that attorney client privilege does apply when employer's electronic communication policy does not plainly explain that communication via web based E mail accounts are recoverable because they are saved on the computer's hard drive as temporary internet files).

Plaintiff further maintains that even if she was aware of the electronic communications policy contained in the Employee Handbook, she was not subject to it because the policy only applied to administrative and office staff and she was a director. However, the Court finds this argument to be implausible. Plaintiff cannot coherently argue that she assumed that while other employees of Loving Care would be subject to the communications policy, she, nonetheless was exempt from the terms of Loving Care's Employee Handbook by virtue of her status as Director of Nursing. Nothing in the Handbook exempts Directors or those similarly situated from the policies set forth therein. Regardless of title, plaintiff was an employee of Loving Care and she should have expected that any policies governing the terms and conditions of employment would be applicable to her. In addition, Robert Creamer, the Chief Executive Officer of Loving Care, states in his Certification in Opposition that the Handbook applied to all office and administrative employees as well as management and executive employees. See Certification of Robert Creamer in Support of Defendant's Opposition, dated November 17, 2008, ¶ 11. Nothing in the motion record refutes this except if one were to accept plaintiff's personal assumptions. The Court concludes that plaintiff's argument is untenable because a

reasonable executive employed by a company would consider themselves to be subject to terms and conditions contained in their own employee manual. Accordingly, plaintiff is deemed to have waived her expectation of privacy by making the subject communication to her attorney on her company computer with knowledge of the electronic communications policy.

B. Sanctions

Plaintiff also argues that Sills Cummis should be sanctioned for violating the Rules of Professional Conduct which govern the practice of law New Jersey. Plaintiff argues that Sills Cummis should not have reviewed the E mails recovered from Loving Care's hard drive without first notifying plaintiff that it was in possession of such sensitive material. Further, plaintiff argues that the subject E mails were obtained surreptitiously from plaintiff and cannot be used for purposes of trial against plaintiff. In support of this contention, plaintiff relies on R.P.C. 4.4, entitled "Respect for rights of third persons," which provides:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.

[R.P.C. 4.4.]

The Court finds that this matter is not a situation where plaintiff made an inadvertent transmission to Sills Cummis of an E mail that was intended for her attorney. Nor is it a situation where the employer clandestinely probed or sneaked out the information from a source that was confidential to plaintiff. Instead, plaintiff here used her work computer to send communication to her attorney which he correctly received. Loving Care's possession of the E mail was not through plaintiff's inadvertent disclosure, but through its own discovery of plaintiff's use of her work computer for her own personal communication, and was found only after litigation commenced in defendant's effort to comply with the rules governing preservation of discovery. Sills Cummis discovered the information through routine imaging and recovery of Loving Care's computer's hard drive in preparation for litigation. Thereafter, in reliance of Loving Care's electronic communication policy, Sills Cummis reviewed the recovered documents as being property of Loving Care, its client, unencumbered by any privileges.

The Court does not find that Sills Cummis had an affirmative duty to alert plaintiff that it was in possession of the subject E mail before reading it because Sills Cummis believed in good faith, based on Loving Care's policy, that the E mail was not protected by any privilege. Plaintiff argues that Sills Cummis inappropriately acted as judge and jury by making such a determination unilaterally and should have, at the very least, submitted the E mail for in camera review. However, when an employer disseminates a carefully drafted electronic

communication policy that purposely removes the expectation of privacy in its employee's internet use and communication when conducted on company issued computers and server, the employer should be allowed the benefit of relying on its policy in good faith without having to seek judicial intervention. If an issue arises, as it did here, the aggrieved party may seek judicial intervention at that time. The employer should not be burdened with the duty of seeking judicial intervention on matters for which it has expended time and resources to implement internal policies in an effort to avoid the same. Had the defendant come forth earlier to disclose the finding either directly to plaintiff or to the Court, it is probable that the emergent and agonized tenor of these applications and course of discovery would have been alleviated. On the other hand, the ruling here is that the defendant committed no violation by not having done so under the specific facts of the instant matter.

Here, Sills Cummis has not acted maliciously in recovering the data or failing to disclose its existence to plaintiff before reviewing it. Rather, Sills Cummis first preserved the data for discovery purposes and thereafter was forthcoming with the information and included it in Loving Care's Answers and Objections to plaintiff's First Interrogatories, and in fact, that disclosure gave rise to the instant dispute. Accordingly, the Court finds that Sills Cummis justifiably and reasonably deemed the recovered E mails to be not privileged and there was no duty to advise plaintiff that it was in possession of the subject E mail.

IV. Conclusion

Based on all of the foregoing reasons, the Court finds that Sills Cummis did not violate the attorney client privilege by recovering and reading E mail communication sent by plaintiff to her attorney that had been saved as a temporary internet file on her company issued laptop computer. Loving Care's electronic communication policy put plaintiff on sufficient notice that electronic communications, whether made from her company E mail address or an internet based E mail address would be subject to review as company property. Accordingly, the Court denies plaintiff's motion to disqualify Sills Cummis as Loving Care's counsel. In addition, plaintiff's request for sanctions as against Sills Cummis are also denied.

Honorable Estela M. De La Cruz, J.S.C.

OPPOSED