

California Court of Appeal Holds Privilege Waived When Employee E-Mails Attorney on Employer's System

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Holmes v. Petrovich Development Company, LLC, 2011 WL 117230 (Cal. App. 3d Dist. Jan. 13, 2011)

Brief Summary

The California Court of Appeal held that an employee's use of her employer's communications system to send e-mails discussing legal issues with her employment lawyer waives attorney-client privilege. Because the employee had been told in advance that such e-mails were subject to periodic monitoring, that e-mails were not private, and that e-mails were only to be used for company business, she could not later claim a reasonable expectation of privacy in her e-mail communications, even with counsel.

Complete Summary

An administrative assistant was given a handbook containing an electronic communications policy when she was hired. The policy put her on notice that employees' e-mails were not private, could be monitored, and were to be used for business purposes only. Shortly thereafter, the administrative assistant e-mailed her lawyer regarding a potential employment claim.

During the discovery process on that claim, the employer's counsel asked the administrative assistant about those e-mail communications. Her attorney objected on the basis of privilege and demanded a return of the e-mails. The defense refused, saying that the administrative assistant knowingly waived privilege when she sent the e-mails on the employer's e-mail service after acknowledging that she knew that the e-mails were not private. The employer argued that the administrative assistant could not have had a reasonable expectation of privacy given her acknowledgment that such e-mails could be monitored.

The California Court of Appeal, Third District, affirming a superior court decision, held that the privilege had been waived. The court found that the administrative assistant's decision to e-mail her attorney from work (where the communications were subject to retention, monitoring and review) rather than from home (where she could have controlled and limited the access) waived her privilege. The court likened her communications to consulting an attorney "in one of defendants' conference rooms, in a loud voice, with the door open."

Significance of Opinion

This California Court of Appeal's decision adds to the growing number of cases addressing not only employers' rights to monitor and access their employees' e-mails on work computers but also employers' ability to use those e-mails in litigation, even if the communications were between an employee and her lawyer. The fact-specific nature of the attorney-client privilege analysis, which hinges in part upon whether the client had a reasonable expectation of privacy in maintaining the confidentiality of the communication, often focuses on facts akin to those in this case, including whether the employer has a written policy; whether and how the employee received and acknowledged the policy; whether the employer claims the right to monitor e-mails; whether the employer not only claims the right to monitor e-mail but also periodically exercises that right; whether the employer's policy advises employees that personal e-mails on work computers are not private; and similar considerations.

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