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EMPLOYMENT LAW

Modern Communications in the Workplace: Court Establishes Bright-line Test for Attorney-Client Privileged E-mails

By Rosemary Alito

The Court's employment decisions this term kept it in the vanguard, addressing novel issues surrounding the use of electronic communications in the workplace, confirming the scope of the continuing violation doctrine and the discovery rule, and adopting a limited interpretation of an exception to the Law Against Discrimination.

The Court's decision in *Stengart v. Loving Care Agency, Inc.,* 201 N.J. 300 (2010), touched on the hot-button topics of employee computer use and abuse, employee privacy and employer rights to control their equipment and their workplaces, and may well have been the Court's most widely discussed opinion of the year. But while it answers some important questions regarding modern communications in the workplace, it leaves even more questions unanswered.

While employed by Loving Care Agency, Inc. ("Loving Care"), Maria Stengart was provided a laptop computer to conduct company business. The computer enabled her to send e-mails from the company's e-mail address and it also enabled her to access the Internet. In several occasions, Stengart used the company computer to access her own personal, password-protected Yahoo! account. As was later discovered, Stengart's use of the company laptop included e-mails to her attorneys, using the company laptop to log on to her Yahoo! account and then sending e-mails through that laptop.

After Stengart left employment and filed suit, Loving Care hired outside experts to create an image of the laptop's hard drive. The files retrieved included temporary Internet files containing seven or eight e-mails Stengart had exchanged with her lawyer via the Yahoo! account.

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The e-mails sent by Stengart's lawyer included a statement at the bottom "[t]hat they are privileged communications that should not be reviewed if received by unintended recipients."

Thereafter, lawyers for Loving Care reviewed the e-mails. When that was disclosed in response to interrogatories, Stengart demanded their return. Loving Care asserted that under applicable company policy on electronic communications Stengart did not have a reasonable expectation of privacy in the e-mails. That policy provided that (1) the company reserves and exercises the right to review and disclose all matters on the company's media systems and services at any time, with or without notice; (2) e-mails, Internet use and communication and computer files are considered part of a company's business and "are not to be considered private or personal to any individual employee;" and (3) the principal purpose of e-mail is for company business, but occasional personal use is permitted.

Stengart's attorney applied for an order to show cause seeking return of the e-mails and other relief. The trial court denied the application on the ground that the company's policy gave Stengart sufficient notice that her e-mails would not be considered personal property. The Appellate Division reversed, finding that the e-mail policy was not clear enough and that employees could reasonably believe that they retain an expectation of privacy in personal e-mails sent on company computers. Balancing Loving Care's business interests and the policies underlying the attorney-client privilege, the

Appellate Division found that the e-mails were protected by the privilege and that Loving Care's attorneys had violated RPC 4.4(b) by failing to tell Stengart's lawyers that they had the e-mails before reading them. The Supreme Court granted Loving Care's motion for leave to appeal and in a unanimous opinion affirmed.

The Court defined the issue before it as the reasonableness of an employee's expectation of privacy, which in turn was informed by the adequacy of the notice provided by the company policy and the public policy concerns raised by the attorney-client privilege. With respect to the Loving Care policy, the Court found it unclear whether the use of personal, password-protected web-based e-mail accounts via company equipment is covered. The Court's discussion suggests that employees should have been specifically advised that messages sent and received on such personal accounts were subject to monitoring, that the contents would be stored on the hard drive and subject to retrieval, and that although occasional personal use of the system was permitted, there should be no expectation of privacy in same.

After discussing decisions from other jurisdictions, the significance of policies banning all personal use versus permitting limited personal use, and the difference between using company e-mail for personal communications versus using a company computer to access a password protected personal account, the Court concluded that Stengart had a reasonable expectation of privacy in the e-mails she exchanged with her attorney. That conclusion was based on both the language of the policy and the nature of the communications. And because Stengart had an expectation of privacy, the attorney-client privileged applied. "The policy did not give Stengart, or a reasonable person in her position, cause to anticipate that Loving Care would be peering over her shoulder as she opened e-mails from her lawyer on her personal, password-protected Yahoo! account…" The language of the policy, the method of transmittal that Stengart selected, and the warning on the e-mails themselves all support that conclusion.

Despite this holding, the Court went on to make it clear that its decision:

> does not mean that employers cannot monitor or regulate the use of workplace computers. Companies can adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies. And employers can enforce such policies. They may discipline employees and, when appropriate, terminate them, for violating proper workplace rules that are not inconsistent with a clear mandate of public policy.

Yet, the Court continued, no policy, no matter how clear, will justify reading attorney-client communications. But having established a bright-line test with respect to attorney-client privileged e-mails, the Court did not specifically discuss the broader question of employer review of personal but unprivileged e-mails. The Court's expectation of privacy analysis and balancing test strongly support the conclusion, however, that where privilege is not involved, and the employer's policy is both detailed and clear, the employer's business interests will prevail.

Applying the Statute of Limitations under the LAD

The plaintiffs in *Roa v. Roa,* 200 N.J. 555 (2010), Fernando and Liliano, were employed by Gonzales and Tapanes Foods, Inc. ("G & T") and supervised by Marino Roa, Fernando's brother. Marino was allegedly involved romantically with two female employees and received a Valentine's Day gift from one. Marino's wife found the gift, and Marino asked Fernando to lie to help cover it up; to say the gift was for him; and to confirm to Marino's wife that Marino was not having an affair. While Fernando at first agreed to help, he later told Marino's wife the truth. It was alleged that thereafter, Marino began to harass both Fernando and Liliano, including threats of termination, making their work lives miserable. Fernando went to the owner and president of G & T, but he refused to take corrective action and the harassment only intensified.

Liliana was terminated on or about August 24, 2003. On September 15, 2003, Liliana received notice that she was ineligible for unemployment because G & T had reported that she was terminated for misconduct. Liliana appealed successfully and began to receive benefits in February 2004.

Fernando was terminated on or about October 3, 2003. Liliana had surgery the day before, which they expected would be covered by Fernando's health insurance. However, they were informed on November 11, 2003, that coverage would not be provided, because on October 27, 2003, G & T had purported to retroactively cancel his coverage effective September 30, 2003, while he was still employed. The retroactive termination of coverage was later reversed and the claim was paid around February 2004.

Plaintiffs claimed that they suffered injuries as a result of the delays in unemployment and coverage of their medical bills, including financial problems, damage to their credit rating and stress and anxiety.

On November 3, 2005, Fernando and Liliana filed a complaint alleging that G & T had engaged in unlawful retaliation in violation of the New Jersey Law Against Discrimination; that Marino had aided and abetted that unlawful conduct, that defendants had violated the public policy of the State of New Jersey, and that G & T had negligently supervised Marino. The trial court granted defendants' motion to dismiss the case as barred by the two-year statute of limitation, holding that (1) the retaliatory discharges were time-barred, (2) the post-employment actions with respect to unemployment and insurance coverage were not "employment actions," and (3) because the plaintiffs' terminations were in themselves discrete acts, the continuing violation doctrine was inapplicable.

The Appellate Division affirmed in part and reversed in part, holding that (1) Liliana's claim was barred because she knew of the alleged retaliation when she

was terminated and at the latest in October when she learned of the unemployment decision, (2) Fernando's post-discharge claim was actionable despite the fact that it did not relate to current or prospective employment, (3) Fernando's claim could be timely if he did not learn of it until November 11, 2003, and (4) the insurance cancellation could be the last of a series of retaliatory acts under the continuing violation doctrine.

The Supreme Court affirmed in part and reversed in part. With respect to the continuing violation theory, the Court confirmed what the United States Supreme Court had held in *National Railroad Passenger Corp. v Morgan,* 536 U.S. 101, 122 S.Ct. 2061 (2002) and the New Jersey Supreme Court adopted in *Shepherd v. Hunterdon Development Center,* 174 N.J. 1 (2002). The continuing violation doctrine is applicable when there is a series of separate acts that collectively constitute one unlawful employment practice. In that instance, the cause of action accrues on the date on which the last component act occurred. The continuing violation doctrine is not applicable to discrete acts such as termination, failure to promote, denial to transfer or refusal to hire. Each such incident constitutes a separate actionable employment practice, and for statute of limitations purposes, a discrete retaliatory or discriminatory act occurs on the day that it happens. The *Roa* Court described this ruling of *Morgan* as "a bright-line rule that individually actionable allegations cannot be aggregated." It also noted that it had adopted the *Morgan* analytical framework in *Shepherd.*

Applying that standard to the facts before it, the *Roa* Court concluded easily that Fernando's termination was a discrete act, barred by the statute of limitations, because it occurred more than two years before the complaint was filed. It rejected the plaintiffs' contention that the discharge was timely under the continuing violation doctrine, because that doctrine cannot be applied to sweep in an otherwise time-barred discrete act. The Court noted:

> As we have said, the continuing violation theory was developed to allow for the aggregation of acts, each of which, in itself, might not have alerted the employee to the existence of a claim, but which together show a pattern of discrimination. In those circumstances, the last act is said to sweep in otherwise untimely prior discrete acts. What the doctrine does not permit is the aggregation of discrete discriminatory acts for the purpose of reviving an untimely act of discrimination that the victim knew or should have known was actionable. Each such discrete discriminatory act starts a new clock ticking for filing charges alleging that act.

Having concluded that Fernando's termination claim was barred, the Court turned to his claims for post-termination retaliation in the form of cancellation of his insurance coverage. The benefits were cancelled on October 27, 2003, but he claimed that he did not become aware of that until November 11, 2003. Thus, if the limitations period began to run when the policy was secretly cancelled the claim would be time-barred. But if — as plaintiff claimed — it did not begin to run until he later became aware of the discriminatory action, the claim was timely. The Court resolved the issue by deciding that the "discovery rule" is applicable to appropriate claims under the LAD. See, e.g., *Lopez v Swyer*, 62 N.J. 267 (1973). "There is simply nothing about a LAD case that would militate against applying the equitable principles informing the discovery rule to allow pursuit of a claim of which the party was reasonably unaware." It therefore concluded that if Fernando could prove that he did not know and could not have reasonably known about the cancellation of his insurance at an earlier date.

Finally, the Court examined whether, if timely, the post-employment retaliation claim was substantively viable. In concluding that it was, the Court again looked to federal precedent, as well as the language of the LAD itself, for guidance. Like the United States Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v White,* 548 U.S. 53 (2006), the Court concluded that a retaliatory action does not need to be employment related to be actionable. It also rejected the defendants' contention that the cancellation of insurance did not rise to the level of an actionable claim. Again looking to *Burlington Northern* for guidance, the Court endorsed the standard that a "reasonable employee would have found the challenged action materially adverse, which in this context means it might well have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" It also endorsed the *Burlington Northern* Court's admonition that use of the term "material" meant to separate trivial from significant harms; that Title VII was not intended to create a general civility code for the American workplace; and that an employee's decision to report discriminatory behavior cannot immunize him from the petty slights or minor annoyances that often take place at work and that all employees experience. Applying that standard, and viewing the facts in the light most favorable to plaintiffs, the Court concluded that the cancellation of Fernando's insurance and alleged economic and psychological harm flowing therefrom were enough to satisfy the threshold for an independent cause of action under the LAD.

Nini v. Mercer County Community College

In *Nini v. Mercer County Community College*, 202 N.J. 98 (2010), the Court addressed a discrete question of statutory interpretation under the LAD — whether an exception that permits the refusal to "accept for employment" individuals over the age of 70 permits the refusal to renew the employment contract of an existing employee.

Plaintiff Rose Nini worked for Mercer County Community College for 26 years under a series of contracts. In June 2004, she received notice that her contract would not be renewed the following year. She filed a complaint alleging age discrimination in violation of the LAD. The college asserted that the nonrenewal was permitted by N.J.S.A. 10:5-12(a), which provides in relevant part that "nothing herein contained shall be construed to bar an employer from

refusing to accept for employment or to promote any person over 70 years of age." The trial court agreed, but the Appellate Division reversed and the Supreme Court granted certification. The case settled while pending, but the Court decided the issues presented nonetheless, over a vigorous dissent by Justice Rivera-Soto.

A six-to-one majority of the Supreme Court affirmed. The majority began its analysis of the statutory language with the familiar rubric that the LAD is remedial legislation that must be liberally construed and applied to the full extent of its coverage, with exceptions to be strictly but fairly construed. It then turned to the legislative history of the provision, which was admittedly silent regarding any specific interpretation of the over 70 exception. The majority nonetheless took from it "a broad and evolving interest on the part of the Legislature to protect our citizens from all forms of discrimination in employment and, in particular, to protect our older citizens from being forced out of the workplace based solely on age." With that framework established, the Court returned to the question of whether the nonrenewal of Nini's contract was like a termination, or whether, upon the conclusion of her contract, she was like any other job applicant and was simply not hired. Calling it "[n]ot an easy case," the majority held that the exception did not apply. The majority gave several reasons for this conclusion. First, it stated that including Nini in the exception would narrow coverage and expand the exception. Second, it thought that including nonrenewals in the over-70 exception would conflict with the prohibition on forced retirements. Third, it stated that permitting nonrenewals over 70 would conflict with the remedial purposed of the LAD and create "a loophole in the seamless coverage of the statute, permitting employers to place their aging employees under contract, thus precluding them from resorting to the salutary protections of the LAD." Fourth, it believed that permitting nonrenewals would create a two-tiered system on employment. The majority thus concluded that the "refusal to accept for employment" exception is limited to initial hires and inapplicable to employees whose contracts have not been renewed. It summarized its rationale as follows:

> That reading reconciles the over-seventy exception with the simultaneously enacted prohibition against forced retirement; harmonizes the 'refusing to accept for employment' language with the bar against termination; eliminates disparate treatment of at-will and contract employees; averts the creation of mischief, whereby an employer could place all employees on contract to avoid the age discrimination provisions of the LAD; and treats all employees who have pre-existing work relationships with the employer similarly.

Justice Rivera-Soto issued a strong dissent on both the merits and on the majority's decision to decide the issues after the parties had settled. Addressing the mootness issue first, and noting that the New Jersey Constitution does not limit jurisdiction to "cases or controversies" as the United States Constitution does, Rivera-Soto stated that it is nonetheless firmly established in New Jersey jurisprudence that controversies that have become moot or academic prior to judicial resolution ordinarily will be dismissed. That rule is deviated from only if the case presents an issue of great public importance compelling definitive resolution despite mootness. Rivera-Soto found the very limited question of statutory interpretation presented in *Nini* to fall short of that standard and the majority's justification of jurisdiction in a short footnote to be lacking. "Simply said, there has been no showing of some overwhelming avalanche of discriminatory firings or failures to rehire among those over the age of seventy so as to transform this rather exquisitely unique personnel dispute into a matter of great public importance, this despite the fact that the exemption provision at issue in this case was adopted twenty-five years ago."

Since the majority had addressed the merits of the dispute, Rivera-Soto did as well. His analysis began with a fact not mentioned in the majority — that Nini's employment had been required by law to be pursuant to a written contract. This highlights that the differences between an employee working under a contract and an employee working at will are very real. Employees under contract like Nini are entitled to damages if the contract is breached and, unlike at-will employees, they cannot be easily terminated during the contractual period. As a consequence, Rivera-Soto continued, no public policy required deviation from the clear statutory language, pursuant to which each new contract offered would be a decision to accept an individual employee for employment under the explicit terms of N.J.S.A. 10:5-12(a). "In these circumstances, it cannot be principled legal analysis to obligate defendants — for over more than a quarter of a century — to hire plaintiff only pursuant to a written contract and then deny defendants the miserly exception the LAD plainly authorizes, all because this Court, under the pious guise of the LAD being 'remedial social legislation[,]' is unwilling to acknowledge and apply longstanding principles of law. That is legally unjustifiable reasoning in which I will not join."

Broad Scope of Arbitrator's Power

Linden Board of Education v. Linden Education Association on behalf of John Mizichko, 202 N.J. 268 (2010), came before the court after a dissent in the Appellate Division on the question whether an arbitrator exceeded his powers in a discharge arbitration in imposing a lesser penalty.

John Mizichko worked as a custodian. One evening, while working the night shift at Linden High School, he entered a room where female students were changing for a dance recital. Despite the students' pleas for him to leave, he did not immediately do so. Mizichko admitted he had been given instructions about the changing, but contended he was unaware students were changing in the room in question. He also admitted that he did not immediately leave when a teacher asked him to and instead said "[W]hat's the big deal?"

After an investigation, the board ter-

minated Mizichko, and the union grieved. The parties were unable to agree on a resolution, so the matter was submitted to arbitration with the Public Employment Relations Commission ("PERC"). The question submitted was "Did the Board of Education have just cause to terminate the employment of John Mizichko? And, if not, what shall be the remedy?" The arbitrator concluded that the employee had knowingly violated a work rule and therefore was subject to discipline. However, he went on to conclude that in the circumstances presented, discharge was not the appropriate discipline. He explained that the penalty must "fit the infraction and not be disproportionate given the totality of the circumstances." The arbitrator also stated that he "considers progressive/corrective discipline to be an integral part of the just cause concept," and that termination of Mizichko for a first offense which was not egregious was not just. The arbitrator found that the appropriate discipline was a 10-day suspension without pay.

The Supreme Court began its analysis with the longstanding principles favoring arbitration, the finality of arbitration and the expectation the labor arbitrators will give meaning and content to the collective bargaining agreement. Although an arbitrator may not contradict the language of a contract, it is his role to fill in the gaps. At the same time, judicial review of the arbitrator's judgment is limited, and in the public sector an award will be confirmed "so long as the award is reasonably debatable." The New Jersey Arbitration Act, N.J.S.A. 2A:24-1 to -11, limits the situations in which a reviewing court may vacate arbitration awards to (a) corruption, fraud or undue means; (b) partiality or corruption in the arbitrators; (c) certain misconduct or misbehavior by the arbitrator; and (d) where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definitive award upon the subject matter submitted was not made."

Applying those principles to the case before it, the Court unanimously concluded that the arbitration award should stand, with Justice Rivera-Soto concurring. It agreed with the association that the arbitrator found there was not just cause to terminate and that once he did so he had authority to determine what the appropriate discipline should be. Central to that conclusion was the fact that the agreement did not define "just cause." As such, the majority concluded, it was up to the arbitrator to give meaning to the term. The majority distinguished its decision in *County College of Morris Staff Ass'n v. County College of Morris*, 100 N.J. 303 (1985), where it had held that an arbitrator finding just cause to terminate lacked authority to impose a lesser discipline. Among other things, the majority noted, the collective agreement in that case included a definition of "just cause" and the arbitrator found that it had been met. Neither of those factors, the majority continued, was present in the case before it now. Rather, the majority stated, this case was more similar to *Local No. 153, Office and Professional Employees International Union v. The Trust Company of NJ,* 105 N.J. 442 (1987), where just cause was not defined, the arbitrator did not find just cause, and the Court had found the arbitrator free to fashion a remedy.

In the absence of a just cause definition, the Court concluded, the arbitrator was free to fill in the gap, to find progressive discipline required, and to impose a lesser discipline. "The arbitrator's decision in that regard satisfied the reasonably debatable standard and did not exceed the limits of his authority."

Justice Rivera-Soto issued a short concurrence, based on the obvious fact that both parties, in defining the question to the arbitrator, had delegated to him authority to determine what alternate discipline was appropriate if he found there was not "just cause" for termination. ("Did the Board of Education have just cause to terminate John Mizichko? If not, what shall be the remedy?") Having agreed to this question, Justice Rivera Soto concluded, the Board of Education waived the very question it was pursuing on appeal. ■