



In the continuing struggle between an employee's privacy rights and the employer's right to access company provided computers and other electronic devices, the Illinois Court of Appeals recently weighed in with regard to a matter involving the alleged violation of the Stored Communications Act (SCA), 18 USC 2701, et seq.

In *Borchers v. Franciscan Tertiary Province of the Sacred Heart, Inc.*, 2011 Ill. App (2d) 101257, plaintiff, the employer's former food director, sued her former employer and two of its employees for "intentionally" accessing her personal email account and reviewing personal emails despite the fact that the account was accessed from the employer's computer. At the time in question, plaintiff was out on a disability leave related to sexual harassment claims she had previously made, and the employer, through its employees, accessed plaintiff's computer and her emails to ensure that no work-related emails and orders were going unaddressed.

In reviewing plaintiff's work computer, however, it was discovered she maintained a work-related account through Comcast, and a separate personal account through AOL, both of which were located on her work computer. The employee reviewing her emails admitted to reviewing both the work account and the personal account, and ended up printing out 36 emails that were personal in nature, and unrelated to work in any manner. She then shared these 36 emails with her supervisor. The deposition testimony of the employee defendant also revealed that no work emails were printed.

The employer, relying principally on its computer usage policy that clearly stated that employees had no expectation of privacy in its technology resources, argued that the employees at issue did not intentionally and without authorization access plaintiff's personal email account because they innocently came upon the personal emails while conducting a legitimate business search.

The appellate court disagreed. It found the fact that employees knew plaintiff's work account was Comcast and not AOL, the amount of time spent reviewing the personal emails, and the fact that personal emails were the only ones printed created a fact issue as to whether plaintiff's personal email account was intentionally accessed without authorization.

**Employer Takeaway:** This case shows that despite robust computer usage policies and disclaimers regarding expectations of privacy, employers still need to be careful in accessing and reviewing employee email. Conferring with counsel beforehand is advised when there is a question as to whether communications are personal or business in nature irrespective of the policies in place.



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