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Employer Computer Use Policy Nails Down Conviction Of Former Virginia Legislator

By Todd M. Ratshin, Esq.
Littler Mendelson PC

Many employers maintain some form of computer use policy notifying employees that their use of the employer's electronic equipment and networks will, or may, be subject to monitoring by the employer. Many policies further advise that all communications sent or received by an employee using the employer's equipment or networks are the property of the employer.

Employer computer use policies usually include an express warning to employees that they should have no expectation of privacy whatsoever in their use of the employer's electronic equipment and servers, including any messages or communications transmitted using the employer's equipment and servers.

Despite these express warnings, employees quite often ignore or forget the cautionary instruction set forth in these policies that someone is, or very easily may be, monitoring their computer activity. Such was the case of Phillip Hamilton, a former legislator in the Virginia House of Delegates, whose bribery and extortion convictions were recently affirmed by the 4th U.S. Circuit Court of Appeals, in large part based on evidence elicited from Hamilton's emails with his wife using his work computer and work email address.[1]

THE CASE OF PHILLIP HAMILTON

Phillip Hamilton was a member of the Virginia House of Delegates from 1988 to 2009, and he ultimately served as the vice chairman of the appropriations committee. During this time, he also worked as an administrator and later as a part-time consultant for the Newport News public school system.

In 2006 he began meeting with officials from Old Dominion University to discuss state funding for the university's proposed new Center for Teacher Quality and Educational Leadership. Before meeting with university officials, Hamilton and his wife exchanged emails about their hope that he would obtain employment with the new center, as well as his desired salary demands if any such offer were made to him.

After an initial meeting with Old Dominion officials, Hamilton emailed his wife about the meeting and his prospective salary expectations. He also emailed the dean of the College of Education at Old Dominion, explaining how best to secure state funding for the new center and further advising him to "keep this under the radar." Hamilton proposed in the email that, if funding for the center was not included in the governor's budget, "on my own, I will initiate legislation and/or a budget amendment to create such a center."

Several months later, Hamilton emailed officials at Old Dominion to remind them of his interest in employment with the center. He also stated in this email that he had proposed a budget amendment to secure $1 million in funding for the new center because the governor's budget did not include funding. Hamilton then officially introduced legislation to obtain funding for the center, and the legislation passed.

Thereafter, the center formally announced an opening for the director position. The center received three applications. Hamilton did not submit an application. None of the three applicants was interviewed, and Hamilton was selected for the director position for the new center.

One Old Dominion official later candidly admitted that Hamilton would not have been offered the position but for his legislative assistance in securing funding.

After an investigation, Hamilton ultimately was charged with bribery concerning federal program funds and extortion under color of official right. A jury convicted him on both counts.

The marital communications privilege does not apply to correspondence via work email, the 4th Circuit said.

The emails described above provided the bulk of the evidence against Hamilton. All of the emails were transmitted with the use of Hamilton's work email address through the Newport News public school system, and he sent and received the emails using his school workplace computer.

THE COMPUTER USE POLICY

During 2006 and 2007, the timeframe in which Hamilton was emailing his wife and Old Dominion officials regarding the new center, Hamilton's employer — the Newport News school system — did not have in place any computer use policy.

However, the school subsequently did implement such a policy. This policy was in place before both the 2009 investigation into Hamilton's activities and the charges ultimately brought against him in 2011.

That policy expressly provided that users have "no expectation of privacy in their use of the computer system," and further that "[a]ll information created, sent[,] received[,] accessed, or stored in the ... computer system is subject to inspection and monitoring at any time."

Hamilton had signed electronically the employer's form accepting the policy. Like all other employees subject to the policy, Hamilton also was required to acknowledge the policy each time he logged onto his work computer.

THE MARITAL COMMUNICATIONS PRIVILEGE

On appeal after his conviction, Hamilton argued that the emails between him and his wife were privileged under the marital communications privilege and should not have been admitted into evidence at trial.

By way of background, two forms of marital privilege are recognized under federal common law.[2] One, the privilege against adverse spousal testimony, allows a spouse to refuse to testify against his or her spouse in a criminal proceeding. The other, the marital communications privilege, protects against the disclosure of confidential communications between spouses in the marital relationship.

Recognizing the importance of the marital relationship and the effect of the privileges in allowing the withholding of evidence, the U.S. Supreme Court explained in *Wolfle v. United States*: "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of the justice which the privilege entails."[3]

Thus, under the marital communications privilege, "[c]ommunications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged."[4] However, as is often the case with other recognized privileges, "wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication."[5]

Thus, a communication between spouses made in the presence of a third party is generally not entitled to protection by the privilege because it is not made in confidence.

Courts recognize that privacy expectations will yield where an employer maintains a policy notifying employees that their use of the employer's computers is subject to monitoring.

NO PRIVILEGED STATUS

Relying primarily on the Supreme Court's decision in *Wolfle*, the 4th Circuit rejected Hamilton's argument that admission of the emails violated the marital communications privilege.[6]

In *Wolfle*, a husband dictated a letter to his wife with the assistance of a stenographer. The court rejected the husband's claim of privilege and determined that the disclosure of the communication to a third party — the stenographer — rendered the privilege inapplicable because it was not made in confidence.[7]

"Normally husband and wife may con-veniently communicate without steno-graphic aid and the privilege of holding their confidences immune from proof in court may be reasonably enjoyed and preserved without embracing within it the testimony of third persons to whom such communications have been voluntarily revealed," the court explained.[8]

The 4th Circuit in *Hamilton* reasoned that "email has become the modern stenographer." Although the court recognized that emails are normally considered a confidential means of communication insofar as the risk of interception by a third party is relatively low, the court followed the Supreme Court's opinion in *Wolfle* that "just as spouses can 'conveniently communicate without' use of a stenographer, they can also 'conveniently communicate without' using a work email account on an office computer."[9]

Nevertheless, Hamilton claimed that his emails with his wife were confidential and privileged because, at the time they were made, his employer did not have any computer use policy in place. According to Hamilton, he had no reason to believe the emails were not privileged when he sent or received them.

In rejecting this contention, the appeals court relied upon the express language of the computer use policy implemented by Hamilton's school employer and emphasized that the policy encompassed the monitoring of all information stored in the computer system, which all of the emails were.[10]

The court thus did not disturb the District Court's finding that Hamilton took no steps to protect any of the emails, even after he was put on notice of the employer's policy permitting inspection of emails stored on its computer system.

THE IMPACT OF HAMILTON'S CASE

Although *Hamilton* did not arise in the context of employment litigation, the 4th Circuit's opinion nevertheless highlights the significance of employer computer use policies, including how those policies can shape and affect the privacy expectations of individuals in the workplace.

The scope of such policies, and the oversight, monitoring and inspection activities contemplated by them, undeniably would infringe on the typical privacy expectations of most people concerning their email and other electronic communications with the use of their own electronic resources.

Hamilton serves to remind employers and employees alike of the significance of computer use policies in the workplace today.

However, courts recognize that, in the context of the workplace, the scope and legitimacy of such privacy expectations will yield where an employer maintains a policy notifying employees that their activities and use of the employer's computers and networks are subject to monitoring and inspection.[11] In fact, some courts have found that an employee has no expectation of privacy in his or her use of an employer's computers and email even without such a policy.[12]

In addressing whether emails sent with the use of an employer's equipment or server are entitled to some form of privilege or privacy interest, courts confronted with such issues typically have been presented with facts in which the communications were sent when a computer use policy already was in place.

For instance, in *Holmes v. Petrovich Development Co.*, a California appellate court held that emails between the plaintiff and her attorney with the use of the plaintiff's work computer (the employer-defendant's computer) were not protected by the attorney-client privilege. In fact, the court in *Holmes* reasoned that "the emails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him.[13]

Likewise, in *Alamar Ranch v. County of Boise*, the court found that emails between an attorney and one of his clients to and from the client's work email address were not privileged.[14] In finding that the client's email address clearly was his work email address, the court recognized that "[e]mployer monitoring of work-based emails is so ubiquitous that [the attorney] should have been aware that the [employer] would be monitoring, accessing, and retrieving emails sent to that address."

Other courts addressing the issue similarly have described the use of employer equipment or networks to communicate as constituting a voluntary disclosure of the communication to a third party — *i.e.*, the employer — such that there can be no expectation of privacy in the communication and no privilege will attach.[15]

Conversely, in situations in which an employer does not maintain a computer use policy or communicate such a policy to employees, at least some courts have ruled that an employee's email does not lose protection simply because it was transmitted with the use of the employer's equipment or network.

In another case involving assertion of the marital communications privilege in emails sent from an employer's computer system, the court in *Sprenger v. Rector and Board of Visitors of Virginia Tech* refused to find a waiver of the privilege when there was no evidence to show that the employer's computer use policy was communicated to the employee or that employees were even aware of it.

Thus, on the "exceedingly thin" record before it, the court refused to rely upon the policy identified by the employer (which, the court noted, did allow for personal use by employees) to support a finding that the emails lost their privileged status.[16]

The 4th Circuit's decision in *Hamilton* is particularly noteworthy because the emails at issue were all sent or received when there was no policy in place. Nevertheless, and despite the fact the communications were all transmitted *before* implementation of any use policy, the court still found the emails not privileged because they remained "stored" on the employer's computer system *after* implementation and notice to Hamilton of the policy.

The court's conclusion on this issue does follow the express language of the policy. However, the seemingly "retroactive" waiver — as Hamilton argued and as some probably would call it — in what otherwise may be privileged communications sets *Hamilton* apart from other cases considering the scope of employee privacy expectations under employer computer use policies.

Thus, although it is not a civil or employment law case, the 4th Circuit's decision in *Hamilton* expands on the developing law in this area with respect to balancing employer computer use policies and employee privacy expectations. It also serves to remind employers and employees alike of the significance of computer use policies in the workplace today, including the scope of information subject to such policies.

NOTES

1 *United States v. Hamilton,* 701 F.3d 404 (4th Cir. 2012).

2 *SEC v. Lavin,* 111 F.3d 921, 925 (D.C. Cir. 1997).

3 *Wolfle v. United States,* 291 U.S. 7, 14 (1934).

4 *Id.*

5 *Id.*

6 *Hamilton*, 701 F.3d at 407-08.

7 *Wolfle*, 291 U.S. at 14.

8 *Id.* at 16-17.

9 *Hamilton*, 701 F.3d at 408.

10 *Id.*

11 *See City of Ontario v. Quon,* 130 S. Ct. 2619, 2630 (2010) (recognizing that "employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated"); *Holmes v. Petrovich Dev. Co.,* 191 Cal. App. 4th 1047, 1069 (Cal. Ct. App., 3d Dist. 2011).

12 *See, e.g., Fazio v. Temporary Excellence Inc.,* 2012 WL 300634 (N.J. Super. Ct. App. Div. Feb. 2, 2012).

[13] *Holmes*, 191 Cal. App. 4th at 1051.

[14] 2009 WL 3669741, at *4 (D. Idaho Nov. 2, 2009).

[15] *Scott v. Beth Israel Med. Ctr.,* 847 N.Y.S.2d 436, 440 (N.Y. Sup. Ct., N.Y. County 2007) (stating that "the effect of an employer email policy ... is to have the employer looking over your shoulder each time you send an email"); *Long v. Marubeni Am. Corp.,* 2006 WL 2998671, at *4 (S.D.N.Y. Oct. 19, 2006) (plaintiffs' use of employer's computers and networks effectively constituted knowing disclosure of the communication to all employees authorized to monitor and police use of employer's systems).

[16] *Sprenger v. Rector & Bd. of Visitors of Va. Tech.*, 2008 WL 2465236, at *4 (W.D. Va. June 17, 2008).

Todd M. Ratshin, an associate attorney in the Sacramento, Calif., office of **Littler Mendelson PC**, represents and advises employers on a broad range of labor and employment law matters, including unfair-competition and trade secret issues. He can be contacted at tratshin@littler.com.