IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS COMPUTER RESEARCH, LLC., *Plaintiff and Counterclaim Defendant*, v. FISH & RICHARDSON P.C., *Defendant, Counterclaimant and Third-Party Plaintiff*, v. SCOTT C. HARRIS, *Third-Party Defendant and Counterclaimant*, v. FISH & RICHARDSON P.C., Defendant, Counterclaimant, Third-Party Plaintiff and Counterclaim Defendant.	Case No. 07 C 5081 Judge Rebecca R. Pallmeyer Mag. Judge Maria Valdez

SCOTT HARRIS' REPLY IN SUPPORT OF HIS MOTION FOR PROTECTIVE ORDER REGARDNIG PRIVILEGED E-MAIL

I. THE LANGUGAGE OF FISH'S E-MAIL POLICY DOES NOT PERMIT FISH TO DELIBERATELY ACCESS MR. HARRIS' E-MAILS IN ORDER TO CAPTURE HIS COMMUNICATIONS WITH HIS ATTORNEYS

For purposes of this motion, there are two key aspects of Fish's e-mail policy which undermine its contention that it was allowed to access his password-protected e-mail to search for and capture Scott Harris' communications with his attorneys: (1) the policy expressly allows personal use of e-mail (and acknowledges a "user's right to privacy"), and (2) the policy confines the right to search e-mail to legitimate business purposes.

A. The Policy Expressly Allows Personal Use of E-mail

In its policy, Fish expressly acknowledged that its employees can in fact use email for personal purposes. The policy itself states in pertinent part:

> It is the policy of Fish & Richardson P.C. to support Internet Service access and E-Mail access policies of its suppliers of Internet and E-Mail connectively and the Firm will enforce those policies to the best of its ability. ***The Firm also supports those elements of Internet and E-Mail policies that demand network etiquette and due consideration for user's rights to privacy***.
>
> * * *
>
> The Firm's Internet or E-Mail services may not be used for any purposes which violate U.S. or state laws and regulations. Access which is not expressly allowed is considered to be denied.
>
> * * *
>
> The firm encourages exploration of the Internet and E-Mail usage, but ***if it is for personal purposes, it should be done on personal, not company time. Use of computing resources for these personal purposes is permissible so long as it does not:***
>
> a) consume more than a trivial amount of personal and system resources;
>
> b) interfere with worker productivity; or
>
> c) pre-empt any business activity;

(Exhibit D to Scott Harris' Motion for Protective Order; emphasis added).

Courts considering this issue have deemed a ban on personal use of e-mail significant. See, e.g., In re Asia Global Crossing, Ltd., 322 B.R. 247, 259 (Bankr. S.D.N.Y. 2005) (whether corporation maintained a personal use ban); People v. Jiang, 31 Ca.Rptr. 227, 2005 Cal.App. LEXIS 1095 (6th Dist. 2005) (defendant's belief in the confidentiality of his attorney-client information objectively reasonable; "nothing in the Cadence agreement barred employees from using their employer-issued computers for personal matters."). Here, the Fish policy expressly contemplates personal usage, as

well as a "user's right to privacy".

Fish's reliance on Scott v. Beth Israel Med. Ctr. Inc., 2007 WL 3053351 (N.Y. Sup. Ct. Oct. 17, 2007), highlights the importance of the personal use allowance. In that case, Beth Israel's e-mail policy explicitly prohibited personal use of the employer owned systems, stating "[a]ll Medical Center computer systems, telephone systems, voice mail systems, facsimile equipment, electronic mail systems, Internet access systems, related technology systems, and the wired or wireless networks that connect them …. **should be used for business purposes only**." Scott, 2007 WL 3053351 at *2. The prohibition against personal use was critical to the court's holding that the e-mail communications between Scott and his attorney, which were stored on the hospitals e-mail server, were not confidential for purposes of attorney client privilege. Id. at *4. In fact, the Scott court held that People v. Jiang, a case cited to by Dr. Scott, was not persuasive because the "e-mail policy in Jiang [which did not prohibit personal use] is **significantly different** than that policy here which prohibits personal use." Id., citing People v. Jiang, 131 Cal.App. 4th 1027 (2005). The Scott court also looked to the factors outlined In Re Asia Global Crossing for guidance, the first factor being "(a)…the corporation maintain[s] a policy banning personal or other objectionable use[.]" Id. citing In Re Asia Global Crossing Ltd., 322 B.R. 247 (S.D.N.Y. 2005). The Scott court held that the first factor was "clearly satisfie[d]" given Beth Israel's e-mail policy prohibiting personal use. Id.

Here, in stark contrast, the Fish policy expressly contemplates personal use, and a "user's right to privacy".

B. Fish's Policy Confines Access To E-mail For Legitimate Business Purposes

The second key provision is Fish's statement of the circumstances under which the policy addresses access to e-mail:

> Fish & Richardson P.C. reserves the right, at its discretion, to view, capture and use Internet and/or E-Mail correspondence, personal file directories and other information stored on its computers as it deems necessary for business-related purposes including, but not limited to, operational, maintenance, auditing, security and investigative activities and to comply with subpoenas and orders of courts and administrative agencies.

(Exhibit D to motion). Mr. Harris submits that there was no legitimate business-related purpose here: instead, Fish intentionally accessed the e-mail for the purpose of invading Mr. Harris' communications with his attorneys. That is not allowed:

> ***Once an employer realizes she is poking into an employee's private communications, the law dictates she should immediately cease.*** This is true even if the employer issued a policy stating that company equipment may be monitored at any time and that the employee should have no expectation of privacy.

Baroni, Michael, "Feature: Employee Privacy in the High-Tech World," 48 Orange County Lawyer 18, *22 (May 2006 (emphasis added)). See also, Gergacz, John, "Employees' Use of Employer Computers to Communicate with Their Own Attorneys And The Attorney-Client Privilege," 10 Comp. L. Rev. & Tech. J. 269, Southern Methodist University:

> Jiang's analysis properly distinguished between the employee's work relationship with an employer and the employee-client's privilege relationship with counsel, thus, keeping the attorney-client privilege from being inadvertently smothered by workplace practices or regulations. Separating the two also permitted a clear focus on the attorney-client privilege's elements (e.g., communication confidentiality), which although possibly affected by workplace events, are nonetheless independent of them.

Id. at *285.[1]

Fish's contention that Harris has not adequately described what is protected is not well taken: Fish should be required to return, and be precluded from relying upon, all of Mr. Harris' communications with the Niro Firm and with Foley & Lardner. There was no confusion on Fish's part; as addressed above, Fish accessed Mr. Harris' e-mail for the very purpose of learning what was being said to and from his counsel. And it did so many months after learning (in March of 2007) that Mr. Harris was being represented by the Niro Firm in a lawsuit against a purported firm client, Dell Computer. Having put Mr. Harris in an untenable position, Fish should not complain that Mr. Harris needs to plead his case on an e-mail by e-mail basis. In any event, should the Court request, Mr. Harris will submit all of the e-mails accessed by Fish for an in camera inspection.

II. FISH'S RELIANCE ON *MUICK* IS MISPLACED

Fish's contention that Muick v. Glenayre Elec., 280 F.3d 741 (7th Cir. 2002) is "controlling" is misplaced. That case involves a primary claim under the Fourth Amendment and not the confidentiality of e-mail communications with an attorney:

> All of these cases [e.g., Muick], however, arise in the context of an employee asserting a right to privacy claim, either under the *Fourth*

[1] Fish's personal use allowance, acknowledgement of a "users right to privacy", and confinement of access to legitimate business purposes also distinguish this situation from the other two cases on which Fish relies, Long v. Marunbeni, 2006 WL 2998671 (S.D.N.Y. Oct 19, 2006) and Kaufman v. SunGard Inv. Sys., 2006 WL 1307882 (D.N.J. May 10, 2006). In Kaufman, SunGard's policy stated "The Company has the right to access and inspect all electronic systems….Employees should not expect that any items created with, stored on, or stored within Company property will remain private." Kaufman, 2006 WL 1307882 at * 4. Based on the dissemination of that policy, the court held that Kaufman "had no reasonable expectation of privacy" with respect to her e-mails. Id. In Long, the court relied on the Employee Handbook section that stated employees "have no right of personal privacy in any matter stored in, created, received, or send over the e-mail …. systems." Long, 2006 WL 2998671 at *1.

> *Amendment* or common law. While these cases may be analogous, ***they are not controlling as they do not address the confidentiality of employee's e-mails and personal computer files with regard to the attorney-client privilege or attorney work product immunity.***

Curto v. Medical World Communications, Inc., et al., 2006 U.S. Dist. LEXIS 29387, *16 (E.D.N.Y. 2006 (emphasis added)). See also, Gergacz, supra, 10 Comp. L.Rev. & Tech.J. at 274-75 ("Privacy seems to be a more limited concept and narrower in its relation to confidentiality than what the attorney-client privilege requires of confidentiality").

Moreover, under the law of California (where Scott Harris worked and communicated by e-mail), attorney-client communications are strictly protected even in the face of policies that, on their face, would suggest the employer has a right to gain access to such communications. Cal. Evid. Code. § 917(b) ("A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication").

While Fish argues that the California statute is inapplicable, Comment d to Section 139 of the Restatement (Second) of Conflicts states:

> The state which has the most significant relationship with the communication has a substantial interest in determining whether the evidence of the communication should be privileged.
>
> * * *
>
> The forum will also be more included to give effect to a privilege which, although different, is generally similar to one or more privileges found in its local law than to a privilege which is entirely different from any found in the state of the form.

Here, contrary to Fish's argument, this case presents no "mix of federal and state

legal issues". (Fish Br. at 12). Further, Fish can point to no contrary Illinois law, having acknowledged a dearth of Illinois authority on this issue. (Fish Br. at 12-13). Finally, it would be an odd result indeed if Fish could avoid the application of the California statute by suing Mr. Harris in Illinois, where neither party is located.

III. FISH'S "CRIME FRAUD" ARGUMENT IS MISPLACED

This Fish argument places the cart before the horse, resting as it does on the proposition that Fish's clients were licensed to infringe Scott Harris' patents. As addressed elsewhere, there is no authority for this proposition; it is also contradicted by the established law of employee inventorship. Additionally, Fish's continued allegations that Mr. Harris was a "principal" of Fish are expressly contradicted by Fish's written agreement with Mr. Harris, which mandates that he was an "employee" at all times.

Here, Fish engaged in "self help" and intentionally sought to discover Mr. Harris' communications with his attorneys without seeking judicial permission for that effort. Its after the fact attempt to justify its efforts with such a questionable legal proposition should not be rewarded.

IV. FISH'S STATEMENTS UNDERMINE ITS PURPORTED RIGHT TO INTENTIONALLY INVADE THE PRIVILEGE

Fish refused to provide expedited discovery on other instances where it has overridden an attorney's password in order to access e-mail on the ground of relevance. Not surprisingly, in its Response, Fish now says that it has done so on other occasions (we don't know the circumstances). But that begs the question of what Mr. Harris was told about actual monitoring. As addressed in Mr. Harris' declaration (Exhibit C to motion), Fish informed Mr. Harris of a single instance of accessing an employee's e-mail: an investigation of a sexual harassment claim where Fish first obtained the

consent of a paralegal prior to accessing his e-mail. (Id.).

Also instructive is Fish's conduct after it learned that Mr. Harris (represented by the Niro firm) had filed a patent infringement lawsuit against a purported firm client, Dell Computer. Fish looked into the matter and expressly advised Mr. Harris that he had done nothing wrong. (Exhibit A to Scott Harris' Response to Fish's Motion to Compel).

Under these circumstances, Mr. Harris' belief that his password-protected communications with his attorneys would remain confidential was reasonable. The last thing he expected was that a law firm would access his e-mail for the very purpose of invading those communications.

CONCLUSION

For the reasons stated above, Scott Harris respectfully requests that his Motion for a Protective Order be granted.

Respectfully submitted,

/s/ Paul K. Vickrey
Raymond P. Niro
Paul K. Vickrey
David J. Sheikh
Richard B. Megley, Jr.
Karen L. Blouin
Niro, Scavone, Haller & Niro
181 West Madison, Suite 4600
Chicago, Illinois 60602-4515
(312) 236-0733
Fax: (312) 236-3137

Attorneys for Illinois Computer Research, LLC and Scott C. Harris

CERTIFICATION OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **SCOTT HARRIS' REPLY IN SUPPORT OF HIS MOTION FOR PROTECTIVE ORDER REGARDNIG PRIVILEGED E-MAIL** was electronically filed with the Clerk of Court using CM/ECF system, which will send notification by electronic mail to the following:

David J. Bradford
Eric A. Sacks
Daniel J. Weiss
Terrence J. Truax
Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611
(312) 222-9350

Counsel for Fish & Richardson, P.C.

on January 14, 2008.

/s/ Paul K. Vickrey