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Trends in Employment Law

Leading the Way In E-Discovery

Employment disputes are shaping the law at its earliest stages.

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Since the electronic discovery amendments to the Federal Rules came into effect in December 2006, there have been a plethora of articles in respected legal publications regarding the parade of horrors awaiting unwitting counsel and their clients should they fail to preserve and/or produce electronic information in discovery. This article focuses on the unique aspects of electronic discovery in employment-related litigation. As explained below, all is not “gloom and doom” for employers, but they should certainly exercise caution.

Litigation of employment disputes accounts for a sizable percentage of the civil case dockets of federal and state courts.¹ Moreover, approximately 75 percent of all litigation against corporations is employment-related.² Furthermore, in today’s digital age, e-mail is the preferred method of day-to-day communications for most employees, and from a litigation standpoint, this increased use of e-mail has had serious consequences for large employers.³ It is not surprising, therefore, that many of the recent electronic discovery cases decided by the courts, including the Southern District of New York’s leading *Zubulake* decisions, arise from the sphere of employment litigation.

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As discussed below, there are sui generis aspects to employment disputes that tend to incubate the growth of e-discovery problems. Thus, within the federal and state courts encompassed within the U.S. Court of Appeals for the Second Circuit, there are 114 reported e-discovery decisions. Approximately 25 percent of these decisions, more than any other subject area, have their genesis in employment-related litigation.⁴ In other words, employment law cases are driving the developing corpus of electronic discovery jurisprudence.

Unique Situation

From a discovery standpoint, employment litigation varies from most civil commercial litigation because the plaintiff was (or is) a member of the defendant-employer’s work force. Thus, for example, in an employment discrimination lawsuit, alleged discriminatory decisions by a defendant-employer are usually memorialized in electronic communications and/or hard-copy documents in the sole possession and control of the employer. Not surprisingly, in most employment litigation (especially discrimination litigation), the employer controls the vast majority of the relevant electronic and other evidence. As a consequence, the employer’s electronic discovery obligations are generally more burdensome and expansive.⁵

Retaliation Claims

Not only are the burdens of e-discovery not evenly distributed between the parties to employment litigation, but employment-

related retaliation claims present special problems that are perhaps less likely to arise in commercial litigation. In this regard, we note that there is an increasing proliferation of employment retaliation claims.⁶ Of the 29 reported e-discovery employment law decisions in the federal and state courts encompassed by the Second Circuit, almost half (13 decisions) involved legal claims of retaliation. See note 4.

Why do retaliation claims present special e-discovery challenges? The answer lies in their timing. In the “plain vanilla” discrimination case, the employee files an administrative charge or legal complaint of discrimination after his or her termination. The employer will likely obtain the advice of counsel. In these cases, the employer is less likely to suffer discovery sanctions when pre-termination electronic evidence has become lost or destroyed (hopefully, pursuant to a permissible document destruction policy) because the employer lacked advance notice of the employee’s discrimination claim so as to require it to implement a litigation hold to preserve electronic evidence.

In contrast, in most retaliation cases involving discrimination claims, employees, while still employed, complain of prohibited discrimination to the employer, usually to a supervisor or manager. Most employers investigate and attempt to resolve these internal discrimination complaints through their human resources department, and they may be less likely to retain a lawyer or implement a litigation hold in response to the internal complaint. Moreover, while the employer may not preserve electronic and other evidence at this stage, the disgruntled employee is usually

taking the opposite tack—preserving any and all scraps of evidence (electronic or otherwise) that may substantiate his or her complaint of discrimination.

Of course, employers must treat internal company complaints of discrimination very seriously. It is critical that the employer take affirmative steps to preserve electronic information relating to an employee's complaint of discrimination, its investigation and resolution. For companies, this means that it is advisable to retain outside counsel and involve the company's management information system staff early in the process. Otherwise, the employer may be caught unprepared or unable to meet its e-discovery obligations.

Sharing Computer Servers and Network

Employment litigation also differs from general commercial litigation because both parties usually share the same computer servers and network, at least during the employee's employment. This creates unique e-discovery issues primarily because employees often leave an electronic trail, which employers can pick up in their review of available electronic evidence. Surprisingly often, the employee's trail includes personal or privileged information and/or evidence of misconduct. Below we review the factual and legal issues that can arise because both the plaintiff-employee and defendant-employer share access to the computer systems that maintain and process electronic information.

Access to Helpful Electronic Information and Potential After-Acquired Evidence. Vice President Richard Cheney accidentally shot his friend on a hunting expedition. Thereafter, the press subjected him to criticism—not for shooting his friend—but because he did not immediately report the incident to the White House press corps. Similarly, in failing to address e-discovery issues in an appropriate and timely manner, employers expose themselves to the risk that problems arising out of the preservation and production of electronic evidence can overshadow the actual merits (or lack thereof) of the underlying legal claims.

However, what is good for the goose is good for the gander. An employer's proper preservation of electronic evidence can unearth facts that a plaintiff-employee may not wish to have disclosed. Until the employer looks, it is impossible to know what will be found. Thus, there may be electronic evidence of employee theft. See, e.g., *Institute for Motivational Living v. Doulos Inst. for Strategic Consulting Inc.*, 110 Fed. Appx. 283 (3d Cir. 2004); *LeJeune v. Coin Acceptors Inc.*, 381 Md. 288, 849 A.2d 451 (Md. 2004); *Physicians Interactive v. Lathian Sys. Inc.*, Civil Action 03-1193, 2003 WL 23018270 (E.D. Va. Dec. 5, 2003). There might be evidence that the employee was surfing the Internet for porn. See, e.g., *Doe v. XYZ Corp.*, 382 N.J. Super. 122, 887 A.2d 1156 (N.J. Super. Ct. 2005).⁷ Alternatively, there may be electronic evidence that the employee misrepresented his or her job qualifications or credentials. See, e.g., *Plasse v. Tyco Elec. Corp.*, 448 F.Supp.2d

302 (D. Mass. 2006). Indeed, during discovery in the *Zubulake* case the employer learned that two of the plaintiff's former employers terminated the plaintiff contrary to the prehire representations plaintiff made to UBS. This evidence might have supported an after-acquired evidence defense, but the court ruled that UBS had waited too long to amend its answer. See *Zubulake v. UBS Warburg LLC*, 231 F.R.D. 159 (SDNY 2005).

Regardless of these potential benefits of electronic preservation, many employers, having no notice that the former employee intends to sue, often "wipe" the hard drives of departing



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employees and/or provide the former employee's computer to another worker, resulting in data being written over and sometimes irretrievably lost. If possible, it is best for employers to wait before "recycling" the computers used by former employees. Alternatively, they should make a "mirror copy" of the computer's hard drive if it is conceivable that the employee may pursue litigation, even if the employee has given the employer no notice of potential litigation.

Employers also should consider investigating other sources of electronic information that could reveal employee misconduct, as the following cases reveal.

- **Cell Phones.** For example, in *Smith v. Café Asia*, Civil Action 07-621, 2007 WL 2849579 (D. D.C. Oct. 2, 2007), the defendant former employer sought images stored on plaintiff's cell phone to prove that the plaintiff invited the alleged sexual harassment forming the basis for her claims. The court ordered the plaintiff to preserve the stored images because they might bear on the employer's defenses.

- **Compact Discs.** In *LeJeune v. Coin Acceptors Inc.*, 849 A.2d 451 (Md. 2004), the employee copied data from his employer's computer to compact discs shortly before he resigned to work for a competitor. The employee claimed that he copied only personal documents, such as his wedding pictures, but acknowledged that some of his employer's confidential and proprietary information may have been accidentally copied. The employer's computer forensic expert was able to disprove the former employee's assertions, and the court found that the defendant-employee had misappropriated trade secrets. See also *Liebert Corp. v. Mazur*, 357 Ill.App.3d 265, 827 N.E.2d 909 (Ill. Ct. App. 2005) (employee copied employer's confidential information respecting pricing to a compact disc and zip file on the day he resigned to join a competitor).

- **Instant Messaging.** Instant messages are another potential source of electronic evidence. The Southern District considered such evidence in dicta in *Convolve Inc. v. Compaq Computer Corp.*, 223 FRD 162 (SDNY 2004), but refused to offer an opinion on the circumstances under which the failure to preserve instant messages would be considered spoliation. In the financial services industry, however, broker-dealers are required to store instant messages for two years online and three years near-line. See 17 CFR §240.17a-4 (SEC Rule 17a-4) and Broker-Dealer Email & IM Archiving Compliance NASD Rule 3110.

- **Chat Rooms.** In a non-employment case, the plaintiff in *Malletier v. Dooney & Bourke Inc.*, Civil Action 04-5316, 2006 WL 3851151 (SDNY Dec. 22, 2006), claimed that Internet chat room messages might contain evidence helpful to her trademark case. While not denying that possibility, the Southern District held there was no duty to preserve communications from the chat room because the technology that it utilized did not provide a ready means for retaining such communications: "[Plaintiff's claim that defendant should have preserved this data] is more akin to a demand that a party to a litigation install a system to monitor and record phone calls coming into its office on the hypothesis that some of them may contain relevant information. There is no such requirement...."

- **BlackBerrys.** See *ACS Consultant Co. Inc. v. Williams*, Civil Action 06-11201, 2006 WL 897559 (E.D. Mich. April 6, 2006) (court entered a preservation order to prevent former employees in a restrictive covenant case from deleting, destroying, damaging or wiping clean company-issued BlackBerrys and laptops).

Other potential sources of helpful electronic data include printer and fax machine caches, thumb drives or other external hard drives, iPods and MP3 players (which can be used as portable hard drives) and electronic records of building access/egress and telephone and cell phone usage.

Electronic Evidence in Restrictive Covenant and Trade Secret Disputes and Litigation. Broadly speaking, in New York it is difficult for employers to enforce covenants not to compete absent special consideration or the employee having "unique" skills or experience. However,

the federal and state courts in New York are much more favorably inclined to enjoin employees from competing if the employer can produce evidence that the former employee has misappropriated confidential or proprietary information or trade secrets.

Accordingly, it is critical that employers make affirmative efforts to preserve and review the electronic trail left by their former employees in restrictive covenant and trade secret cases. Such a trail may reveal an employee's breach of restrictive covenants respecting non-disclosure, solicitation of clients or co-workers and/or non-competition. Many employers, however, still "recycle" the computers of their departing employees and lose valuable electronic information that could help prove the breach of a restrictive covenant agreement.

The cases abound where employees clandestinely copy their employer's confidential information and/or attempt to wipe away the trail of electronic evidence memorializing their misconduct. In those instances where employees have engaged in misconduct respecting electronic evidence, the courts have imposed sanctions that are just as harsh—if not harsher—as those imposed on employers who have engaged in e-discovery misconduct. Examples are discussed below.

- **Entry of Default Judgment.** In *QZO Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d 541 (S.C. Ct. App. 2004), the employer alleged that a former corporate officer violated state trade secret laws in planning to compete with his former employer. The court entered a temporary restraining order directing that the defendant produce his computer for forensic examination. After the computer was produced the neutral forensic examiner found that the computer had been reformatted the day before its production, thereby deleting all evidence. The court granted the plaintiff-employer's motion for a default judgment and sanctions. The trial court's decision was subsequently affirmed on appeal.

- **Adverse Inference.** The courts also have used adverse inference instructions to the jury to punish employees who have engaged in spoliation in restrictive covenant and trade secrets cases. Thus, for example, the U.S. Court of Appeals for the Seventh Circuit ordered an adverse inference when, the night before he was to produce his computer in discovery, a former employee downloaded six gigabytes of music onto the laptop, destroying files sought by his former employer as evidence of trade secret misappropriation. *Minnesota Mining & Mfg. v. Pribyl*, 259 F.3d 587 (7th Cir. 2001). See also *Easton Sports Inc. v. Warrior Lacrosse Inc.*, Civil Action 05-72031, 2006 WL 2811261 (E.D. Mich. Sept. 28, 2006) (imposing adverse inference sanction against employee who forwarded his former employer's confidential and proprietary information to his personal e-mail account before resigning to join a competitor).

- **Other Sanctions.** An Illinois federal court order granted an employer's motion for sanctions against its former employee when, days after being served with a lawsuit asserting

the employee had engaged in misappropriation, the employee threw out his computer with his garbage. The court found that the employee had acted in bad faith and ordered the employee to pay the plaintiff-employer's reasonable attorney's fees and costs and to pay for the employer's retention of a forensic computer expert. *APC Filtration Inc. v. Becker*, Civil Action 07-1462, 2007 WL 3046233 (N.D. Ill. Oct. 12, 2007).

Access to Employee's Privileged Communications. Disgruntled employees sometimes communicate to their counsel via e-mail on their office computer respecting their potential discrimination, retaliation or other employment-related legal claims. Depending on the circumstances, these communications may lose their privileged status. The most recent reported New York case concerning this issue is *Scott v. Beth Israel Med. Ctr. Inc.*, 2007 WL 3053351 (Sup. Ct., New York Co., Oct. 17, 2007).⁸ In that case, the court held that an employee waived the attorney-client privilege in communicating with his attorney using his office computer because the employer's e-mail policy made clear that e-mail is to be used solely for business purposes and that employees have no personal privacy rights in any material created or communicated on the company computer systems.

In contrast, in *Curto v. Medical World Communications Inc.*, Civil Action No. 03-6327, 2006 WL 1318387, *5 (EDNY May 15, 2006), the court found there was no waiver of the attorney-client privilege where laptop computers the employer supplied to the employee "were not connected to [the employer's] computer server and were not located in [the employer's] offices; thus, [the employer] was not able to monitor Plaintiff's activity on her home-based laptops or intercept her e-mails at any time." See also *In Re Asia Global Crossing, Ltd.*, 322 B.R. 247, 256 (SDNY Bankr. 2005) (holding that employee sending unencrypted e-mails may not waive attorney-client privilege unless employer has policy prohibiting personal e-mails and/or a policy of monitoring employee e-mails).

The principal difference between the *Scott* and *Curto* opinions appears to be the issue of monitoring: If the employer has an appropriate electronic communications policy and monitors the use of its e-mail system, the employer is more likely to succeed in arguing that the employee's e-mail communications lose their otherwise privileged status. See also *Kaufman v. SunGard Inv. Sys.*, Civil Action 05-1236, 2006 WL 1307882 (D. N.J. May 10, 2006) (certain e-mail exchanges between the plaintiffs and their counsel were discoverable after the plaintiffs received notice of the defendant's e-mail monitoring policy); *Natl. Econ. Res. Assoc. v. Evans*, CA 04-2618-BLS2, 2006 WL 2440008 (Mass. Super. Aug. 3, 2006) (employee's communications with attorney on employer's computer remained privileged when employee tried to delete them from computer before producing the computer during discovery).

These cases strongly suggest that employers are wise not only to have a written electronic

communications policy making clear that all equipment and electronic data is the property of the employer and that the employer has the right to monitor electronic communications, but also that employers actually monitor e-mail use by their employees to ensure company e-mail systems are not being used for improper purposes in contravention of such policies.

Conclusion

For better or worse, employment disputes are likely to remain the vanguard for the developing electronic discovery case law. As we suggest, however, the appropriate preservation and production of electronic evidence offers as many opportunities for employers as potential pitfalls.



1. Approximately one in every 11 civil cases in the federal courts involve employment discrimination. See 57 Daily Labor Report A-9 (March 25, 1999). Between 1970 and 1989 employment litigation in the federal courts increased 2,166 percent. See Richard T. Seymour & Barbara Berish Brown, Equal Employment Law Update, 1998 A.B.A. SEC. LAB. & EMPLOYMENT L. vi-vii (BNA, Spring ed.).

2. See www.cnapro.com/pdf/EPLProductSummary_10-9-07.pdf.

3. According to a 2004 Workplace E-Mail and Instant Messaging Survey of 840 U.S. companies by the American Management and The ePolicy Institute:

- One in five employers have had employee e-mail and instant messages subpoenaed in the course of a lawsuit or regulatory investigation; and

- 13 percent have had lawsuits triggered by employee e-mail.

4. See www.krollontrack.com.

5. In *Zubulake*, the defendant-employer's electronic discovery production was less substantial than the plaintiff's production, which raised a red flag with the court. The defendant-employer initially produced approximately 100 pages of e-mails. In contrast, the plaintiff-employee produced approximately 450 pages of e-mail correspondence. *Zubulake v. UBS Warburg*, 217 F.R.D. 309, 313 (SDNY 2003). The defendant-employer's inadequate production and preservation later became grounds for sanctions and an adverse inference instruction.

6. According to the Equal Employment Opportunity Commission, in 1992 retaliation claims comprised just 15.3 percent of the agency's discrimination charges. This number has steadily risen such that in 2005 retaliation charges roughly doubled to 29.5 percent. See www.eeoc.gov/stats/charges.html. This article will not address the reasons for this growth, but it is safe to say that expansion of retaliation-based employment litigation is likely to continue as a result of the U.S. Supreme Court's 2006 decision in *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53 (2006), which liberalized the standards for finding prohibited retaliation under Title VII.

7. See also *Liggett v. Rumsfeld*, Civil Action 04-1363, 2005 WL 2099782 (E.D. Va. Aug. 29, 2005) (employer accused employee of using office computer to view pornography); *United States v. Bailey*, 272 F.Supp.2d 822 (D. Neb. 2003) (child pornography found on employee's office computer); and *Moench v. Red River Basin Board*, Civil Action C5-02-312, 2002 WL 31109803 (Minn. Ct. App. Sept. 24, 2002) (plaintiff-employee forced to resign from executive director position after pornographic images found on his computer).

8. This case was thoroughly discussed in two earlier New York Law Journal articles. See Aloe, Paul, "Scott's Is Dire Warning About E-Mail Communications" (Dec. 10, 2007) and Bar, Beth, "Court Refuses to Protect E-Mail Exchange With Firm" (Oct. 29, 2007).