

Electronic Discovery: E-mail Trail Withstands the Delete Key

A sex discrimination case that has been closely followed by the legal community is now likely to draw the attention of the business world as well, thanks to a \$29.2 million verdict which, according to plaintiff's counsel, is the largest single plaintiff sex discrimination verdict in U.S. history. The discrimination and retaliation lawsuit, *Laura Zubulake v. UBS Warburg LLC*, pending in United States District Court of the Southern District of New York, has already distinguished itself for its breakthrough case law on the subject of electronic discovery, resulting in four widely cited opinions on that subject.

One of the most important lessons that businesses must learn from this case has almost nothing to do with sex discrimination or hiring and firing practices, but rather relates to the impact of electronic discovery, or e-discovery, on all lawsuits regardless of size. In a society where the storage and transmission of data has gone, almost overnight, from paper to megabyte, our legal system, and the discovery process in particular, is now forcing litigants to come to grips with this technology.

While the term "e-discovery" includes all computer data, such as graphics, databases, unpublished drafts or "metadata" (*i.e.*, computer codes and hidden data revealing history, revisions and "data about data"), it is e-mail that has become the lightning rod among judges, lawyers and legal scholars in a gathering storm over electronic discovery. Anecdotes abound, from funny to downright frightening, which demonstrate that e-mails are all too often sent with little forethought. Moreover, litigants are now realizing that e-mails – even "deleted" e-mails – continue to reside in electronic format in many places.

The Tale of the Tapes

The core issues in the lawsuit were whether the defendant discriminated based upon gender and whether it then retaliated against the plaintiff for reporting her discrimination claim to the Equal Employment Opportunity Commission (EEOC). A discovery dispute emerged when the defendant claimed that it had produced "all relevant e-mails" and argued against the substantial cost of restoring, and then producing, network "backup tapes" that, the defendant contended, contained only duplicative data. Plaintiff argued that the backup tapes contained e-mails that had been deleted and cited longstanding Supreme Court precedent requiring that the producing party bear the cost of production. Naturally, in the new context of electronic data, such a rule can often impose substantial costs.

The court began by requiring the defense to produce a sampling of backup tapes. Plaintiff chose tapes from the time period between her EEOC report and her termination two months later. These backup tapes revealed 600 e-mails that had not been included in earlier productions, leading the court to "the unavoidable conclusion that there are a significant number of responsive e-mails that now exist only on backup tapes." The court also concluded that in some instances the restored e-mails proved that key witnesses deleted relevant e-mails in the hope that such deleted e-mails would not be produced in discovery.

Satisfied by the contents of the tapes that more production was warranted and employing a complex, case-specific "seven point" test, the court then ordered the defendant to bear 75 percent of the more than \$165,000 restoration costs and all costs related to attorney review, an additional \$107,000.

Three months later, plaintiff sought sanctions after learning of the loss or destruction of seven backup tapes. Following court-ordered depositions to explore that issue, plaintiff argued that even more e-mails, the exact contents of which would never be known, had been intentionally deleted. The court found as a matter of law that “the lost information is presumed to be relevant.” Plaintiff also demonstrated that a substantial number of relevant extant e-mails had not yet been produced.

Several sanctions were imposed, which almost certainly led to a landmark plaintiff’s verdict, including:

- An “adverse inference instruction” that allowed the jury to infer that the lost e-mails would have been unfavorable to the defendant.
- Additional depositions or re-depositions, all at the defendant’s cost, of witnesses as warranted by the late production of e-mails that were recovered.

The court also observed that the defendant’s belated production of previously requested e-mails “has resulted in a self-executing sanction,” where witnesses testified at depositions without the benefit of reviewing e-mails that assisted or perhaps conflicted with their recollection. These witnesses would be confronted for the first time at trial with sworn discovery testimony that could then be contradicted in front of a jury by clearly conflicting e-mail evidence.

Zubulake ultimately became a lawsuit over e-mail and discovery tactics. During closing arguments at trial, plaintiff’s counsel emphasized specific examples of e-mails proving retaliation that “were not preserved and were found only because they were recovered from a backup tape.” Counsel also spoke of “one e-mail we couldn’t find” but to which another email responded, which, by its absence, played directly into the court’s adverse inference instruction and allowed the jury to conclude, without ever seeing the e-mail, that it was harmful to the defense. It is likely that the evidence of deleted e-mails and failed attempts to delete even more e-mails, coupled with the adverse inference instruction from the judge, influenced the jury in deciding to award the plaintiff such a large verdict.

With data usurping paper as the medium through which ideas are exchanged, the proverbial “paper trails” of evidence are being replaced by “data trails” that are infinitely more voluminous and therefore potentially more damaging (or exculpatory). Although they are neither the first opinions on the subject nor officially binding on other courts, the decisions by Judge Scheindlin in *Zubulake* are widely regarded by lawyers and scholars as the most comprehensive attempt to date by a court to fashion sensible rules covering electronically stored information.

Legal standards in case law as well as the responsibility of litigants codified in Rules of Procedure are evolving at a rapid pace. The complex issues surrounding e-discovery merit close scrutiny by both attorneys and their clients. Duane Morris is well positioned to confront these challenges head on, combining the resources of experienced litigators with an in-house staff comfortable in the world of electronic data.

About the Author

John Coughlin is a partner in the Trial Practice Group and is admitted to practice before state and federal courts in New Jersey and Pennsylvania. John has written and spoken on developing trends in litigation, including the use of technology in litigation management and legal and technical developments in electronic discovery. John can be reached at jjcoughlin@duanemorris.com or 609.631.2422.

For Further Information

If you have any questions about e-discovery or proactive electronic data retention policies, please contact one of the members of the [Duane Morris Trial Practice Group](#) or the lawyer in the firm with whom you are regularly in contact.