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E-mails: 'Smoking Guns' in Employment Litigation

By Ruth D. Raisfeld

E-mail traffic by employees in the workplace has proven to be key evidence in recent criminal and civil investigations of public companies like Martha Stewart Omnimedia, Merrill Lynch, Citibank and other Wall Street firms. For example, Citibank analyst Jack Grubman's e-mail in which he mixed messages about AT&T stock analysis with concerns about his kids' admission to a private nursery school of which Citibank Chair Sandy Weill was a trustee, surely made all corporate lawyers wince.

However, the significance of e-mail traffic is not limited to investigations of securities law violations. E-mails are also a fertile source of evidence of employee wrongdoing in situations involving sexual harassment, discrimination, and other inappropriate activity at work. Examples abound of employees instant messaging each other their opinions about bosses and co-workers, their sexual desires, or about just plain boredom. The *New York Law Journal* recently reported that a Harvard Law student at a $2500-a-week summer job at Skadden Arps learned a lesson the hard way when he inadvertently sent an e-mail intended for a personal friend to the law firm's entire corporate department. As a result, everyone in the entire legal community became privy to his irreverent and profane description of his 2-hour sushi lunch and the absence of significant legal work to do.

The informal banter, frequent e-mailing, and instant text messaging on cell phones and Blackberries while employees are at work has had a significant impact on workplace investigations and employment litigation. Typically, discriminatory attitudes and motivations are shared privately in subtle and often unspoken ways. Previously, employee complaints brought to Human Resources that included "he said/she said" allegations were difficult to investigate and to resolve without documentation or witnesses. Now, e-mails can corroborate or negate the stories of the complaining party and the accused. As employees have let their guard down in corporate e-communications, they may reveal sexual desires, romantic preferences, and stereotypical commentary — all discoverable evidence if an employee later complains about inappropriate conduct either during internal grievance processes or in litigation against the company.

Zabulake v. UBS Warburg, LLC

A recent sex harassment case in federal district court in New York provides a concrete example of how expensive and damaging e-mails can be when employees depend significantly on e-mail to communicate with each other. In the case *Zabulake v. UBS Warburg, LLC* (May 13, 2003), Judge Shira A. Scheindlin noted that an e-mail had "already produced a sort of 'smoking gun'" by providing documentation that the plaintiff's supervisors had suggested that she be fired some time after she had filed a charge of sex discrimination and harassment with the Equal Employment Opportunity Commission.

The plaintiff, a former employee, said that "key evidence is located in various e-mails exchanged among UBS employees that now exist only on backup tapes and perhaps other archived media." UBS responded that production of the e-mail data (in addition to the 100 pages already produced) would cost "approximately $175,000, exclusive of attorney time in reviewing the e-mails" and that the plaintiff should bear the cost of such discovery.

In a lengthy opinion, Judge Scheindlin ordered UBS to pay for the search and recovery of at least certain accessible e-mail messages that plaintiff could demonstrate would be relevant to her claim of discrimination. As to less accessible electronic data, for example, deleted or destroyed messages, Judge Scheindlin deferred decision on whether to shift the cost of additional discovery to the plaintiff, and set a multi-factor test to guide the issue of "who should pay for the discovery of e-mails." In her follow-up decision, reported July 25, 2003, Judge Scheindlin ordered that the plaintiff was responsible for 25% of the cost of discovering the bank's back-up e-mail tapes, thus shifting a significant share of the cost of e-mail discovery to the employee.

Conclusion

The *Zabulake* decision should trigger one more warning light for all companies about the importance of policies on employees' use of corporate e-communications. Now is the time for companies to "self-audit" their e-communications habits. Companies should:

- Review e-communications systems and make sure that user policies are clear and up-to-date;
- Train employees about the implications of e-mail and instant messaging in the corporate context and under diversity and anti-discrimination policies; and
- Make employee etiquette and respect in the workplace a "corporate-wide" communications credo.

In sum, the day is long past when employers could overlook employees' use of corporate e-communications systems "so long as they get their jobs done" and when employees could enter messages and hit "send" without any further thought. Best business practices must include implementation of and compliance with cautious and responsible electronic communications policies.

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