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Employers Face Higher Costs for Plaintiffs' Electronic Discovery Demands

In a decision that could make employment litigation more expensive for corporate defendants, a federal district court in New York recently addressed which party should pay for the production of electronic information during discovery. In *Zubulake v. UBS Warburg LLC, et al.*, the court concluded that the analysis used by courts to resolve that issue should be weighted more heavily in favor of individual plaintiffs.

The Discovery Dispute

Laura Zubulake filed a lawsuit against her former employer, "UBS," alleging sex discrimination and retaliation under federal, state, and municipal laws. During discovery, Zubulake demanded production of "[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff." Zubulake defined "document" to include "electronic or computerized data compilations." UBS produced some responsive e-mails, but refused to review its backup media for additional ones because doing so would be prohibitively expensive. UBS estimated that, exclusive of attorney time, restoring the requested e-mails would cost $175,000. Zubulake sought to compel production of the e-mails at UBS's expense.

UBS maintained current e-mails in active files on its server, and retrieving such e-mails was neither difficult nor costly. UBS also routinely stored e-mails on backup tapes and optical disks. The tapes captured virtually all of UBS's e-mails, but they were expensive to retrieve. It was less costly to retrieve e-mails from the optical disks, but they only captured e-mails between certain individuals.

In deciding Zubulake's motion, the court discussed the competing principles at issue. Under the Federal Rules of Civil Procedure, permissible discovery is extremely broad, but may be limited if the burden to the responding party outweighs the benefit to the party seeking the discovery. Moreover, although the responding party is presumptively responsible for the cost of complying with its discovery obligations, courts may shift unduly burdensome costs.

Based upon these principles, another federal district court in New York, in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, previously articulated an eight-factor test to determine whether the costs of electronic discovery should be shifted to the party seeking the discovery. The analysis considered such factors as: the specificity of the discovery requests, the likelihood of discovering critical information, the cost, and each party's resources.

The *Zubulake* court held that electronic documents are discoverable to the same extent as paper documents and, therefore, a cost-shifting analysis should not be applied in a case simply because 'it involves electronic discovery. Instead, "'cost-shifting should be considered *only* when electronic discovery imposes an undue burden or expense' on the responding party."

The court concluded that electronic discovery only imposes such a burden when the information being sought is "inaccessible." According to the court, "accessible" electronic information is stored in a "readily usable format," whereas "inaccessible" electronic information is "not readily usable." The court explained that cost-shifting should only be considered in cases involving inaccessible electronic information.