Shipman & Goodwin LLP

CLIENT ALERT

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HOLD THOSE RECORDS OR ELSE

Defending employment lawsuits is expensive and time consuming. Knowing who your witnesses are and where they will be when you need them is critical to being able to explain challenged decisions. Equally important is having documents available to use in the defense and to produce them, if requested by the former employee. Keeping track of people is fairly easy, but maintaining documents in the electronic age is much more complex. It requires preserving hard drives, voice mails and other computer generated and computer exchanged information, where once we only had to be concerned with paper.

A recent Connecticut federal court decision brought the issue of electronic preservation to the forefront and should send chills down the spines of the unwary. In February 2004, a meeting was held by managers to discuss allegations that an employee had sexually harassed another employee, Jane Doe. Then in September 2004, Jane Doe's lawyer sent a letter to the employer indicating her intent to sue, if there were no immediate resolution of her complaint. In November 2004, the lawsuit was filed against the employer and the alleged harasser.

During the discovery phase of the case, the plaintiff sought all e-mails involving the alleged harasser as well as the e-mails of those involved in the investigation and discussions about the harassment. Among the items requested was a copy of the computer hard drive of the accused harasser. The employer was only able to partially comply with production request. The plaintiff then hired a computer expert to inspect the hard drive and to review the computer system in order to try to retrieve the e-mails that appeared to be missing. The plaintiff's expert found that the hard drive had been "scrubbed" clean and that the e-mail files appeared to have been deleted, with e-mails from a critical time period no longer available.

The employer tried to explain why the information was no longer available. First it said that it was its usual practice to "reformat" a computer hard drive when an employee leaves. Therefore, when the alleged harasser resigned, it was only normal to prepare the hard drive for someone else's use. Then management explained that they had a retention policy that only preserved e-mails for 2 years and that in the usual course of business the e-mail accounts were deleted.

Frustrated in her search for evidence, the plaintiff asked the court to sanction the employer for not preserving documents. She requested that the jury be instructed that the employer had destroyed or significantly altered evidence and that the jury be permitted to assume that the evidence that was missing would have supported her claim. Such an instruction is devastating to defendants. With the court's blessing, it allows the jury to assume that there was a "smoking gun" that the employer destroyed. It also undercuts the credibility of the defendant's witnesses as they are faced with having to answer questions about missing evidence which they simply cannot answer.

The court conducted two days of hearings to better understand what the plaintiff's computer expert did and found, and to listen to the employer's explanation. For the employer, the result was crushing.

The court found that the employer's obligation to preserve evidence was not fulfilled. It found that evidence over which the defendant had control had been destroyed after the obligation to preserve it came into effect. The judge made clear that the obligation arose no later than when the plaintiff's lawyer sent the demand letter prior to initiating the lawsuit. In fact, the judge noted that the obligation arose when the defendant's managers were discussing the allegations of sexual harassment, seven months before the demand letter was received. The court found that the records were destroyed with a "culpable state of mind" as the employer never issued a litigation hold notice to preserve the e-mails and hard drives relevant to the case. The court said that this failure amounted to gross negligence, if not recklessness. The court next determined that the missing evidence would have been relevant to the case as there was other evidence of exchanges about plaintiff's allegations and the alleged harasser's past actions.

The court decided that it would instruct the jury that the employer had destroyed relevant evidence and that the jury could assume the missing evidence would have supported the plaintiff's case. The court also ordered the employer to pay the costs of the forensic investigation by the plaintiff's computer expert.

As this case makes clear, there are significant dangers in not preserving records. Whenever there are formal or informal internal complaints, an employer must take steps to preserve relevant paper and electronic documents. This same obligation is triggered by a demand letter from a lawyer, the filing of a discrimination claim with an agency or an internal complaint.

The preservation order must go to the persons involved in reviewing the situation and anyone else who might have relevant information. What is relevant should be viewed broadly as it should include records related to persons who are similarly situated to the person making the complaint. It is also critical to make the people responsible for the employer's computer system aware of the litigation hold so that back-up tapes can be saved, hard drives are not overwritten or at least copied, and that e-mails are preserved. It is important to remember that relevant information relates not merely to what will help in the defense of the case, but also what information may support the claim. Finally, the litigation hold notice should be clear and there should be a record of the persons to whom it was sent and a notation that each acknowledged receiving it.

QUESTIONS OR ASSISTANCE?

If you have any questions about Hold Those Records or Else, please do not hesitate to contact:

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