Toxic E-mail: A Careless Message Can Lead to Costly Lawsuits for Employers

Viruses are a well-known danger. Lurking in the shadows is the real killer—careless e-mails that can be used in court.

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An e-mail produced in a lawsuit concerning alleged worthless securities: *"OK, still have this vomit?"* An e-mail produced in an improper refusal-to-hire employment lawsuit: *"Don't interview her. She is bad news."* What do these messages have in common? They are both e-mails that employers wish were never written or sent.

It is not uncommon for a meritorious lawsuit or otherwise "bulletproof" defense to suffer because of careless e-mail exchanges. At ease at one's desk during the workday, employees and management frequently type e-mails—seemingly harmless when written—containing their candid thoughts or witty observations about whatever they are working on, from company policies to personnel. The problem is that these thoughts, once committed to electronic form, have a limitless existence and, in the event of a lawsuit, are subject to disclosure to adverse counsel during discovery.

Consider the case of two hiring managers who trade e-mails concerning a job candidate's credentials and potential for being hired. Safe behind their desks and discussing the candidate's qualifications, the job managers are uninhibited in disclosing their candid thought processes and freely share their observations. Upon learning that the candidate had sued her prior employer, and had previously filed for bankruptcy, one manager remarked to the other: "Don't interview her. She is bad news. She sued a prior employer and has all kinds of financial problems."

While this type of e-mail exchange may not have seemed vexatious or otherwise repugnant at the time, consider the result when the candidate files a lawsuit for failure-to-hire for engaging in protected activity, and obtains during discovery the managers' e-mail exchange. This seemingly casual e-mail between colleagues has become the employee's "smoking gun." (See *Salisbury v. City of Pittsburgh,* No. 08-cv-0125 (W.D.P.A. 2010)).

Likewise, consider e-mails traded between employees at a well-known financial institution who internally described certain securities they were selling as "vomit" and "crap." That idle chatter may have seemed innocent and perhaps even humorous to the writer at the time. But consider how those e-mails will look to the disgruntled purchaser of the securities who was not told how certain factions of the financial institution viewed them. The purchaser filed a lawsuit and obtained the e-mails during discovery, and claimed that, contrary to the seller's representations, the seller knew that the securities were worthless. When such "smoking gun" evidence is handed to an adversary, there may be little that can be done to defend against the adversary's claims.

The unifying theme is that employees, perhaps not cognizant or sensitized to the perpetual life of electronic information, made unguarded, candid, perhaps sarcastic comments while at the safety of their desks and trading e-mails with fellow employees. Once committed to electronic writing, however, those thoughts will be preserved for a very long time. Defense lawyers are in many cases powerless to prevent turning over such evidence. As can be easily imagined from the few examples set forth in this article, the results of disclosure of such potentially incriminating e-mails can be devastating.

Business owners may or may not know that courts vigilantly protect parties' access to other parties' e-mails during discovery in the context of a lawsuit. In one of the leading cases in this area of the law, *Zubalake v. UBS Warburg, LLC,* 220 FRD 212, 216-17 (SDNY 2003) (*Zubulake* IV), the Court found that the triggering event for the preservation of e-mails and other electronic materials occurs "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."

Thus, while some may view this obligation as counter-intuitive, at the time that a company knows or should know that e-mails are relevant to a lawsuit, that company may be subject to a duty to preserve its own e-mails, so that those e-mails may be handed over to the other side in a litigated matter as part of discovery.

continued on page 64

continued from page 62

To prevent your business from being the object of ridicule or damage awards based on careless e-mails, it is important to consider a proactive strategy for sensitizing employees as to the dangers of inappropriate e-mails. One practical suggestion stems from the fact that informed employees are better equipped to handle challenges than uninformed employees. It is unwise to presume that employees know that their e-mails may be subject to disclosure to an adverse party in the context of a lawsuit.

Given this, a simple group meeting, team meeting or company-wide meeting to sensitize employees to the dangers of inappropriate e-mail drafting may be something for managers to consider. Such a meeting could also focus on establishing guidelines on what should and should not be put into e-mails, and could familiarize employees with the concept of "thinking" before they impulsively hit "send." ■

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