

**Federal Bar Association's 2019 Labor Law and Employment Law Conference
February 21-22, 2019 @ La Concha Resort**

eDiscovery in Employment Cases – Outline/Materials

Learning objectives: Attendees will learn about issues that typically arise in planning for, conducting, and responding to electronic discovery in employment litigation. Panelists will cover some of the ways that employment litigation and the outside employment counsel/in-house counsel relationship present unique electronic discovery challenges and opportunities. Attendees will also learn how different types of employment litigation (e.g., single plaintiff, wage and hour, investigations) may warrant different approaches and tools.

Secondary Sources

Craig Ball, *eDiscovery Right from the Start: Employment Law Collection*,
Zach Warren, *LegalTech's Predictions for 2019 in eDiscovery*, LegalTech News (Dec. 19, 2018)
Bob Rohlf, *Judges Say eDiscovery Education at Both State and Federal Level a Must*, LegalTech News (May 9, 2017)
Michael Hamilton, *3 Key Lessons from eDiscovery Caselaw in 2018*, LegalTech News (Dec. 20, 2018)
Jared Coseglia, *For Staffing, The History of eDiscovery Mirrors the Present of Cybersecurity*, LegalTech News (May 19, 2017)
Jyotin Hamid and Tricia B. Sherno, *E-Discovery in Employment Cases: Practical Considerations for Employers*, Practical Law Labor & Employment (Thomson Reuters 2018)
Danuta Bembenista Panich, *'Show Me the Information' or How to Meet the Challenges of eDiscovery in Wage & Hour Litigation*, The Federal Lawyer, (2012)
Rodney A. Satterwhite and Matthew J. Quatrara, *Asymmetrical Warfare: The Cost of Electronic Discovery in Employment Litigation* 14 Rich. J.L. & Tech 9 (2015)
David A. Green, *The Fallacy of Liberal Discovery: Litigating Employment Discrimination Cases in the E-Discovery Age*, 44 Cap. U.L. Rev. 693 (2016)
Kate Bauer, *Technology Assisted Review: Overcoming the Judicial Double-Standard*, (Jan. 24, 2018),
<https://jolt.richmond.edu/2018/01/24/technology-assisted-review-overcoming-the-judicial-double-standard/>
David J. Waxse, *Cooperation: What Is It and Why Do It*, 18 Rich. J.L. & Tech. 8 (2012)

Caselaw

Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. 2003) (“Zubulake I”)
Zubulake v. UBS Warburg, 216 F.R.D. 280 (S.D.N.Y. 2003) (“Zubulake III”)
Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640 (D. Kan. 2005)
Wm. A. Gross. Constr. Assoc., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009)
Zoobuh, Inc. v. Better Broadcasting, LLC, 2017 WL 1476135, at *4-5 (D. Utah Apr. 24, 2017)
Fish v. Kobach, 2016 WL 893787, at *1 (D. Kan. Mar. 8, 2016)
Vaigasi v. Solow Mgmt. Corp., 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016)
Albritton v. CVS Caremark Corp., 2016 WL 3580790, at *4 (W.D. Ky. June 28, 2016)
Williams v. Angie's List, Inc., 2017 WL 1318419, at *5 (S.D. Ind. Apr. 10, 2017)
Goonewardena v. State Workers Comp. Bd., 258 F. Supp. 3d 326, 348 (S.D.N.Y. 2017)
Vasser v. Shulkin, 2017 U.S. Dist. LEXIS 193174, at *6-7 (D.D.C. Nov. 22, 2017)
Snider v. Danfoss LLC, 2017 U.S. Dist. LEXIS 107591, at *13 (N.D. Ill. July 12, 2017)
Bailey v. Brookdale Univ. Hosp. Med. Ctr., 2017 U.S. Dist. LEXIS 93093, at *14-17 (E.D.N.Y. June 16, 2017)
Beard Research Inc. v. Kates, 981 A.2d 1175, 1187 (Del. Ch. 2009)
Life Plans Inc. v. Sec. Life of Denver Ins. Co., 52 F. Supp. 3d 893, 904 (N.D. Ill. 2014)

Statutory References

Fed. R. Civ. Proced. 1, 16, 26, 34, 37 and 45

Outline

- Introduction

- General overview of eDiscovery challenges in employment litigation
 - Craig Ball, *eDiscovery Right from the Start: Employment Law Collection*
 - Zach Warren, *LegalTech's Predictions for 2019 in eDiscovery*, LegalTech News (Dec. 19, 2018)
 - Bob Rohlf, *Judges Say eDiscovery Education at Both State and Federal Level a Must*, LegalTech News (May 9, 2017)
 - Michael Hamilton, *3 Key Lessons from eDiscovery Caselaw in 2018*, LegalTech News (Dec. 20, 2018)
 - Jyotin Hamid and Tricia B. Sherno, *E-Discovery in Employment Cases: Practical Considerations for Employers*, Practical Law Labor & Employment (Thomson Reuters 2018)
- Employer vs. Employee's Preservation and eDiscovery Obligations
 - Plaintiff employees not entirely "off the hook"/Requesting ESI from employees
 - Obligation to preserve and produce ESI in their possession, control or custody which reflects their activities
 - Possible custodians and litigation hold recipients
 - Early assessment of potential relevant ESI
 - Challenges concerning privacy and claims of privilege
 - Craig Ball, *eDiscovery Right from the Start: Employment Law Collection*
 - Jyotin Hamid and Tricia B. Sherno, *E-Discovery in Employment Cases: Practical Considerations for Employers*, Practical Law Labor & Employment (Thomson Reuters 2018)
 - *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003)("Zubulake I")
 - *Zubulake v. UBS Warburg*, 216 F.R.D. 280 (S.D.N.Y. 2003)("Zubulake III")
- Proportionality in Employment Litigation
 - Data Imbalance: employers' general control over discoverable evidence vs. employee access to discoverable ESI
 - Potential effects on litigation dynamic:
 - Disproportionality?
 - Reduced incentives for cooperation?
 - Increased costs?
 - Push for settlement vs. claim adjudication on its merits?
 - Jyotin Hamid and Tricia B. Sherno, *E-Discovery in Employment Cases: Practical Considerations for Employers*, Practical Law Labor & Employment (Thomson Reuters 2018)

- David A. Green, *The Fallacy of Liberal Discovery: Litigating Employment Discrimination Cases in the E-Discovery Age*, 44 Cap. U.L. Rev. 693 (2016)
- Zoobuh, Inc. v. Better Broadcasting, LLC, 2017 WL 1476135, at *4-5 (D. Utah Apr. 24, 2017) (defendant failed to quantify how much responsive material was in its possession and therefore did not establish undue burden);
- Fish v. Kobach, 2016 WL 893787, at *1 (D. Kan. Mar. 8, 2016) (employers must support undue burden objections with evidentiary proof).
- Vaigasi v. Solow Mgmt. Corp., 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016) (proportionality "has become 'the newblack'")
- Albritton v. CVS Caremark Corp., 2016 WL 3580790, at *4 (W.D. Ky. June 28, 2016) ("Proportionality is the touchstone of the revised Rule 26(b)(1)'s scope of discovery provisions.")
- The benefits and advantages of *Technology Assisted Review* ("TAR") in employment litigation
 - Kate Bauer, *Technology Assisted Review: Overcoming the Judicial Double-Standard*, (Jan. 24, 2018), <https://jolt.richmond.edu/2018/01/24/technology-assisted-review-overcoming-the-judicial-double-standard/>
- Potential for Cost – Shifting
 - Employer vs. Employee Hurdles
 - Is the notion of "liberal discovery" a "fallacy" in employment discrimination cases?
 - The asymmetry concerning the costs of litigation in employment cases and how it affects the intended purposes of cooperative exchange under the new eDiscovery rules.
 - David A. Green, *The Fallacy of Liberal Discovery: Litigating Employment Discrimination Cases in the E-Discovery Age*, 44 Cap. U.L. Rev. 693 (2016)
 - Rodney A. Satterwhite and Matthew J. Quatrara, *Asymmetrical Warfare: The Cost of Electronic Discovery in Employment Litigation* 14 Rich. J.L. & Tech 9 (2015)
 - *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("Zubulake I")
 - *Zubulake v. UBS Warburg*, 216 F.R.D. 280 (S.D.N.Y. 2003) ("Zubulake III")
 - *Williams v. Angie's List, Inc.*, 2017 WL 1318419, at *5 (S.D. Ind. Apr. 10, 2017) (analyzing similar factors of those set forth in *Zubulake I* in declining to impose cost-shifting))
- Duty to "Cooperate" and the Potential for Spoliation Sanctions under the New Federal Rules
 - David J. Waxse, *Cooperation: What Is It and Why Do It* 18 Rich. J.L. & Tech. 8 (2012)
 - *Wm. A. Gross. Constr. Assoc., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI.)
- Different types of Employment litigation may warrant different types of data collection, review, and analysis

- Wage and Hour Litigation
 - Broader scope of potential relevant sources/uncommon sources of data
 - Determination of form and scope subject to party's compliance with "meet and confer" obligations, system's architecture, quantity of data and reporting options
 - Complicated effect of limited record keeping – i.e. inadequate or nonexistent formal records of time worked
 - Danuta Bembenista Panich, *'Show Me the Information' or How to Meet the Challenges of eDiscovery in Wage & Hour Litigation*, The Federal Lawyer, (2012)
- Employment discrimination cases
 - Plaintiff's burden of proof in light of the eDiscovery age
 - David A. Green, *The Fallacy of Liberal Discovery: Litigating Employment Discrimination Cases in the E-Discovery Age*, 44 Cap. U.L. Rev. 693 (2016)
- BYOD and eDiscovery
 - Requirements and obligations for BYOD programs
 - Jyotin Hamid and Tricia B. Sherno, *E-Discovery in Employment Cases: Practical Considerations for Employers*, Practical Law Labor & Employment (Thomson Reuters 2018)