HUNTON& WILLIAMS

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FROM THE LABOR & EMPLOYMENT TEAM

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Failure To Produce Single Email Leads To Sanctions Against Employer

by Stacy Williams

If it is better to learn from the mistakes of others than from our own, here is an opportunity for a learning experience.

On March 5, 2008, a federal judge in Atlanta imposed sanctions on an employer as a result of its failure to preserve a single email. The lesson here is that what can seem insignificant can have a tremendous impact through either its presence or absence in subsequent litigation.

Maria Connor worked in an Atlanta bank's internal communications department. She was given steadily more responsibility, until in or about June 2006, she oversaw eight employees who managed several functional areas in the department.

Ms. Connor adopted a child in November 2006. Shortly before she went out on leave, two of the eight employees were reassigned and of the remaining six, three worked in Atlanta and three worked in Orlando performing different functions. In December 2006, one of the Orlando employees resigned and Ms. Connor's supervisor, Leslie Weigel, decided not to replace that individual, but rather to move those two employees to another area of the business and supervise them directly herself.

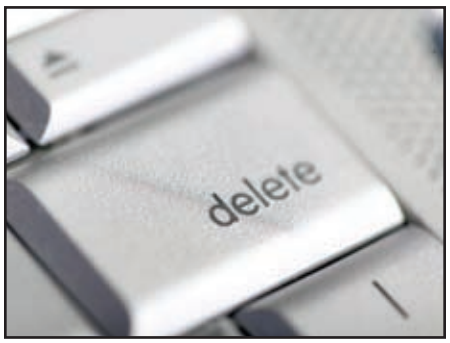
Ms. Connor returned to work on January 2, 2007. Shortly thereafter, Ms. Weigel sent an email to her supervisors explaining that she had decided to terminate Ms. Connor because the position had gone from managing eight people to managing only three, and she could not justify the expense. It was the employer's failure to preserve this email that led to sanctions in subsequent litigation.

At the end of February, the bank received a demand letter from Ms. Connor's attorney advising it of its obligation to preserve documents relevant to Ms. Connor's termination. The bank retained counsel, who investigated and informed all custodians of their obligations not to destroy relevant information, including emails. The crucial email, however, somehow slipped through the cracks. Ms. Connor learned of the existence of the email and, when it was not produced in the litigation, moved for sanctions. The court granted the motion and imposed an instruction to the jury that the evidence had not been preserved and that the jury could draw its own conclusions about that fact.

We all know the volume of email generated every single day. To think that the failure to preserve and produce a single email could lead to the imposition of sanctions is chilling. Although the judge called the sanction he imposed "the lightest possible penalty," the result was an instruction to the jury to draw whatever inference it pleased from the lack of evidence on the subject. As one

might imagine, this inference typically is highly unfavorable to the party that has failed to produce the evidence in question.

The lesson is to take preservation of documents seriously. Businesses and their counsel must take steps to see that all managers comply with legal hold notices and understand the concepts of spoliation and preservation. Perhaps just as important is determining which managers should receive legal hold notices in the first place. Thorough interviews can determine the people who should be affected by legal hold obligations and can allow the remainder of business operations to continue undisturbed.



Take A Message: Employee Mobile Phone Use Can Be Costly

by Paul Sherman

Productivity and responsiveness are wonderful traits for employees. But there is a time and a place for demonstrating these traits — not in traffic.

With ubiquitous mobile phones and other communication devices, "multitasking" employees increasingly are becoming sources of liability. An employer in Georgia recently paid $5.2 million to settle claims by an accident victim who alleged that the defendant's employee slammed into her vehicle while talking on a company-supplied mobile phone.

As a result of the accident, the plaintiff suffered numerous injuries and ultimately had to have her arm amputated almost up to the shoulder. While a dispute existed as to whether the employee was actually using the phone at the time the accident occurred, the specter of that allegation, at least according to the plaintiff's attorney, persuaded the employer to settle.

This case is only a recent example of costly litigation arising from employee use of a mobile communication device while driving. Claims are not limited to situations in which the employer supplied the device. Plaintiffs' attorneys argue that any time a mobile communication device is being used for business purposes and that use causes an injury, the employer should be held responsible.

For instance, in 1999 a large financial services firm paid $500,000 to settle a wrongful death suit in Pennsylvania after one of the firm's brokers, who had been talking on his own cell phone outside business hours, was involved in an accident in which the driver of a motorcycle was killed. The plaintiff argued that the firm was liable because it encouraged its employees to use cell phones but failed to establish a proper policy for their safe use. Numerous other cases involving employee cell phone usage have resulted in large-dollar settlements, including a $16.2 million concession from an employer in Arkansas.

These cases illustrate the importance of implementing strong written policies that prohibit employees from using mobile phones and other devices for business purposes where safety is an issue. Ideally, these policies should be accompanied by written educational material regarding the safe use of mobile communication devices. Of course, even with such policies in place, an employer will not be completely insulated from liability, but such actions certainly could help reduce exposure in the event of an accident.

And these are only examples of personal injury litigation arising from employee communications. Many other forms of risk may arise from employee use of mobile communication devices, including the potential for disclosure of confidential business information and possible claims of "off the clock" work by employees who are not exempt from overtime.

If you have any questions about these issues or would like assistance in drafting a policy on the use of mobile communication devices, please do not hesitate to call any of our attorneys.

NLRB's Proposed New Procedure To Expedite Union Elections May Hurt Employers

by Angela Mahdi

On February 26, 2008, the National Labor Relations Board ("NLRB" or the "Board") proposed a new type of consent procedure for an expedited election process.

Currently, there are three different methods for consent elections. The first and second methods require the employer and union to stipulate to jurisdictional facts, labor organization status, appropriate unit description, classifications of employees included and excluded, and the time, place and other election details. The first method also requires the union and employer to agree that postelection disputes will be resolved with finality by the Board's Regional Director. The second method, however, allows the parties to file exceptions or requests for review with the Board.

The third method allows the Regional Director to resolve with finality all disputed preelection and postelection matters.

Under the new proposed fourth method, the union and employer would jointly file the petition for a consent election, after agreeing to the bargaining unit, and the date, place and time of the election. Within three days of the filing, the Regional Director will approve the petition, absent "extraordinary circumstances." As proposed, this method requires no showing of interest on behalf of the employees, such as the signing of authorization cards or petitions.

To help expedite an already expedited process, the proposed procedure also does not allow for appeals to the Board or to the courts if problems arise. Additionally, the filing of unfair labor practice charges will not block or postpone the election, even if the union has violated the National Labor Relations Act. Any problems that arise will be addressed *after* the election, and all election issues "will be resolved with finality by the Regional Director."

This proposed consent procedure appears to have arisen due to union complaints that the election process is too lengthy. As a result, the proposed fourth method for consent elections may help unions and hurt employers. For example, during a nonconsent election, unions generally acquire authorization cards from a majority of employees in the bargaining unit prior to filing a petition with the NLRB asking for a representation election. This solicitation of employees often occurs before the employer is even aware of the union's presence.

It is reasonable to believe that unions will continue to solicit such support before approaching the employer about a joint petition, although no showing of employee interest is required under the proposed fourth method. Under such circumstances, the party who suffers as a result of the new proposed method is the employer, who would have less than a month to educate its workforce regarding the facts about unionization.

The NLRB's comment period on this proposal ended on March 27, 2008. A final rule is expected within the next several months.

Court Extends Sarbanes-Oxley Whistleblower Jurisdiction To Claim By Overseas Employee

by Paul Sherman

Until recently, the Sarbanes-Oxley Act ("SOX" or the "Act") had not been held to apply outside the United States. A recent federal court decision, however, introduces a new wrinkle in the analysis, potentially subjecting employers to SOX whistleblower claims from workers stationed overseas where such claims were previously thought to be foreclosed under the Act.

The plaintiff in *O'Mahony v. Accenture LTD*, No. 07-Civ-7916 (S.D.N.Y. Feb. 5, 2008), Rosemary O'Mahony, was an employee of a United States subsidiary of a Bermuda corporation, Accenture, which is listed on the New York Stock Exchange. In 1992 O'Mahony left the United States to establish and head a new office for Accenture in France, where she remained stationed for the balance of her employment with the company. Accenture obtained an exemption from paying social security contributions to France on O'Mahony's behalf from 1992 to 1997.

In October 2001 O'Mahony began repeatedly informing a number of executives at the United States subsidiary that the Company was responsible for paying social security contributions in France since the exemption expired in 1997. She alleges that in 2004, she was informed by officers of Accenture that the Company's "interests" would be better served by not making any of the French social security contributions and by concealing O'Mahony's continued employment from French authorities.

O'Mahony alleges that she objected to this action and stated that she would not be a party to tax fraud. Shortly thereafter, O'Mahony's job responsibilities were curtailed, as well as her compensation, allegedly as a result of a decision made by an officer at the Company's United States subsidiary.

O'Mahony subsequently filed a complaint with the U.S. Department of Labor ("DOL") alleging that Accenture and its subsidiaries had violated the whistleblower provisions of SOX by retaliating against her because of her objection to the allegedly fraudulent scheme to evade payment of social security contributions to France. The DOL dismissed the complaint on the ground that the whistleblower provisions of SOX do not apply extraterritorially (outside the U.S.). After that finding was upheld by an administrative law judge on appeal, O'Mahony filed suit in the U.S. District Court for the Southern District of New York against Accenture and its U.S. subsidiary. Accenture filed a motion to dismiss on the same basis recognized by the DOL, i.e., that SOX did not extend whistleblower protections to employees outside the United States.

The district court recognized that the First Circuit, in *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006), had previously held that "a foreign employee complaining of misconduct abroad by overseas subsidiaries could not bring a [whistleblower] claim … against the United States parent company." The *Carnero* court's decision was based on the fact that Congress did not explicitly extend SOX whistleblower protections beyond the nation's borders and that, in the

absence of such an express provision, U.S. courts and agencies should not delve into the employment relationship between foreign employers and their foreign employees.

The court distinguished the First Circuit case, however, on the basis that, unlike the plaintiff in *Carnero*, who was a foreign employee employed by a foreign subsidiary, O'Mahony was a domestic employee employed by a U.S. subsidiary (even if overseas) at the time the alleged misconduct occurred. Moreover, the decision to engage in the alleged fraud and retaliation against her was allegedly made by Company officers located in the United States, whereas in *Carnero* the alleged misconduct occurred in Latin America. Under these facts, the district court concluded that *Carnero* was not controlling and that O'Mahony could pursue her SOX whistleblower claim despite having been stationed overseas.

The court also addressed two defenses raised by Accenture that have received varied treatment in the courts and agency decisions. First, the court found that O'Mahony had engaged in "protected activity" under SOX by reporting

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Recent Supreme Court Decision Regarding "Me Too" Evidence Leaves Employers With More Questions Than Answers

by Marcia S. Alembik

May a plaintiff support a claim of discrimination with evidence of similar discrimination alleged by other employees, even though such employees reported to different supervisors? On February 26, 2008, the U.S. Supreme Court answered this question with: "sometimes."

In *Sprint/United Management v. Mendelsohn*, Case No. 06-1221, the Court held that the admissibility of so-called "me too" evidence of discrimination alleged by nonparty employees should be determined by a "fact-intensive, context specific inquiry" of whether the relevancy of such evidence outweighs the potential prejudice to the employer.

Ellen Mendelsohn, 51, sued her employer, Sprint, claiming that she was discriminated against on the basis of age after she was terminated as part of a reduction in force. To support her claim, Mendelsohn offered testimony of other employees who also claimed their terminations, also part of a reduction in force, were motivated by age discrimination, notwithstanding that they reported to different supervisors.

The U.S. District Court for the Northern District of Illinois held that the testimony of other former employees was not relevant to show discrimination because such employees were not "similarly situated" to Mendelsohn. Although the district court's opinion was limited to two sentences, apparently the court found that the only evidence that was relevant to Mendelsohn's claim focused on whether her own supervisor's actions were motivated by discrimination. It also noted that evidence of other supervisors' actions were irrelevant and unduly prejudicial to Sprint. However, because the district court's ruling was not sufficiently clear about the grounds for exclusion of the evidence, Mendelsohn appealed the decision to the U.S. Court of Appeals for the Tenth Circuit.

The court of appeals reversed the district court's order, disagreeing with what it considered to be the lower court's application of a blanket rule that "me too" evidence should never be admissible. In addition, the court held that, while "me too" evidence may not prove discrimination in and of itself, such evidence can show that age is a motivating factor for an employment decision. In making its determination to remand the case to the district court for a new trial, the court of appeals performed its own analysis and concluded that the evidence should have been admitted.

The case was then appealed to the Supreme Court, which held that "me too" evidence is "neither per se admissible nor per se inadmissible." The Court held that, while the court of appeals' rejection of a blanket rule against the admission of "me too" evidence was proper, the court of appeals erred by assuming that the district court was applying a blanket rule. Furthermore, the Court held, instead of assuming the district court applied a blanket rule and reversing the district court's decision, the court of appeals should have remanded the decision to the district court for clarification and a more sufficient explanation of its rationale for excluding the evidence.

The Supreme Court's decision means that, in certain circumstances, some plaintiffs may be allowed to introduce evidence of other employees' allegations of discrimination to support their own claims, regardless of whether the challenged decision was made by the same supervisor or around the same time. In short, courts will continue to have discretion to determine when such evidence is admissible. Thus, it behooves every employer to take steps to minimize the potential for such allegations to arise anywhere within their organizations.

Court Extends Sarbanes-Oxley Whistleblower Jurisdiction To Claim By Overseas Employee *continued from page 4*

alleged tax fraud even though some courts have found that the whistleblower provisions protect only employees who specifically report "fraud against shareholders."

Second, the district court also noted that jurisdiction over the Bermuda parent was somewhat questionable because it was unclear whether Accenture maintained the necessary degree of control over the employing U.S. subsidiary to pierce the corporate veil and hold the parent company liable. Concluding that the record was not clear on that point, the court allowed the suit to proceed with leave for the parties to revisit the issue later in the litigation.

O'Mahony is an important decision because it recognizes that even *overseas* employees may bring viable SOX whistleblower claims against U.S. corporations and their foreign parents if the alleged wrongful conduct is sufficiently alleged to have occurred in the U.S. by individuals located in the U.S. As business becomes more and more globalized, *O'Mahony*'s holding could broaden the number of potential whistleblower plaintiffs.

Two Recent NLRB Decisions Shift Burden of Proof from Employers

by Valerie Barney

In late 2007 the National Labor Relations Board ("NLRB" or the "Board") decided two cases regarding union "salting." Both cases abandoned previous NLRB precedent and shifted key burdens of proof from employers to the NLRB.

"Salting" is an organizing technique in which a union sends organizers to apply for work at a nonunion employer. The purpose is usually to gain employment and organize the workforce on behalf of the union. Sometimes such organizers actively try to generate unfair labor practice charges and reduce nonunion employers' competitive advantage over unionized employers. Some "salts" declare their intention to organize the workforce and file unfair labor practice charges if they are not hired.

The Office of the General Counsel of the NLRB recently issued two memoranda to guide its enforcement personnel in applying the rulings to unfair labor practice charges and compliance actions.

One memorandum, issued on February 15, 2008, provides guidance on the shift of the burden of proof in determining whether a salt is protected from discrimination based on union affiliation. Applicants for positions are generally protected by the National Labor Relations Act ("NLRA"). However, in *Toering Electric Co.*, decided in September 2007, the Board abandoned its own precedent and held that, to be protected, an applicant must be genuinely interested in working for the employer. Previously, the Board had applied a presumption that all applicants, whether actually interested in employment or not, were protected by the NLRA and eligible for remedies if a violation was found.

Furthermore, the Board held that the NLRB General Counsel has the burden to prove the salt's genuine interest in working for the employer. An employer may raise the issue of an applicant's genuine interest by showing that he or she did not act in a way that showed interest, such as offensive conduct during an interview or providing a stale or incomplete application. Once the employer puts the genuineness of the applicant's interest at issue, the burden shifts to the General Counsel to prove it. The Board may use direct testimony, the salt's actions during the application or interview process, and applications to other employers as evidence of the salt's genuine interest.

Absent manifest injustice, *Toering* may apply retroactively, although the guidance memorandum instructs NLRB employees to argue against application if an administrative law judge has already found employer liability for an unfair labor practice.

A second memorandum, issued on the same date, provides guidance to NLRB enforcement personnel on the shift of the burden of proof regarding the length of a salt's projected employment. The length of this period determines, in part, the amount of damages for which an employer will be liable if found to have violated the NLRA. The backpay period generally begins when the individual is fired or denied employment and ends when the employer makes an unconditional offer of employment or reinstatement.

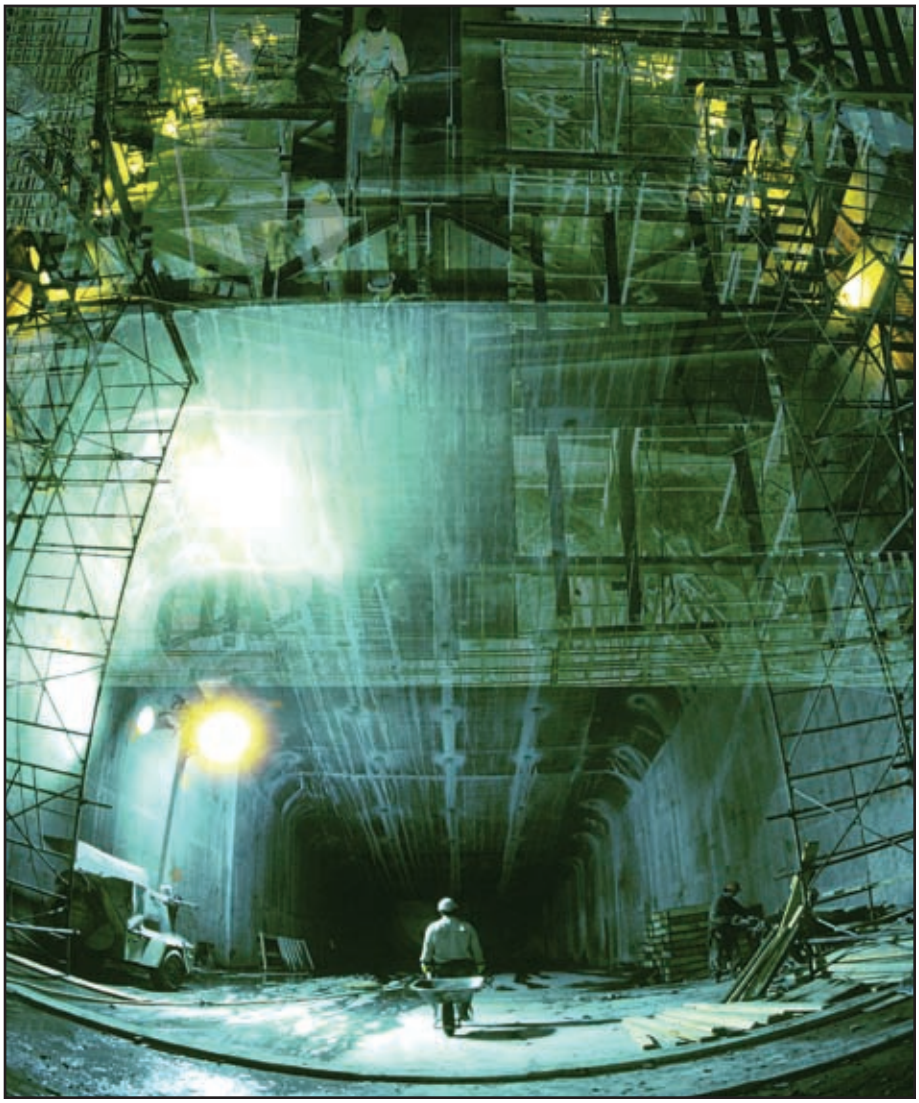
Until recently, it was the employer's burden to limit the backpay period by proving the salt would have quit when the union's campaign ended. In *Oil Capitol Sheet Metal*, decided in May 2007, the NLRB rejected another presumption: that a salt who was not hired or was fired would have continued working for the employer indefinitely. In *Oil Capitol*, the Board held that the NLRB General Counsel has the burden to prove the salt would have worked throughout the backpay period.

Now, if the NLRB General Counsel fails its new burden to prove that the salt would have continued working for the employer, the salt loses his right to an unconditional offer of reinstatement. In industries where project-based work is the norm, the NLRB General Counsel also has the burden to prove a salt would have accepted an offer to move to another job with the employer.

Evidence the NLRB may use to prove the length of the salt's employment includes the salt's personal circumstances, the union's policies and practices relevant to current and previous salting campaigns, the union's plans for the employer, and the agreement between the union and the salt regarding the planned duration of the campaign.

Oil Capitol's holding may be applied in ongoing cases, absent manifest injustice. NLRB employees are instructed to argue manifest injustice in older pending cases based on the lack of evidence preserved to meet the Board's new burden.

Both *Toering* and *Oil Capitol* shifted key burdens that had previously been on employers to the Board General Counsel supporting the union. Nevertheless, an employer should be



extremely careful to avoid claims of discrimination based on union affiliation when dealing with a suspected or known union salt who applies for employment. To protect itself, an employer should train its recruiting managers on how to deal with suspected salts and keep careful records regarding job applications and interviews of all applicants.

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