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**ASYMMETRICAL WARFARE: THE COST OF ELECTRONIC  
DISCOVERY IN EMPLOYMENT LITIGATION**

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I. COOPERATION IS THE WATCH WORD OF THE DAY

[1] A fundamental tenet of the 2006 Amendments to the Federal Rules of Civil Procedure (the “2006 Amendments”) is the notion that parties can agree and cooperate on issues relating to electronic discovery. Many of

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the rule changes now either require parties to meet and confer about electronic discovery or presuppose a certain level of dialogue between the parties regarding such issues.

[2] Rule 26, for example, which mandates the first live meeting between the parties, states that the “attorneys of record . . . are jointly responsible for . . . attempting in good faith to agree to the proposed discovery plan....”<sup>1</sup> The discovery plan, in turn, must address the parties’ “views and proposals on . . . any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”<sup>2</sup> Likewise, Rule 16(b) has permitted the courts’ scheduling order to “provide for disclosure or discovery of electronically stored information” and to “include any agreements the parties reach for asserting claims of privilege . . . after information is produced.”<sup>3</sup>

[3] Against this backdrop of anticipated cooperation, the criteria for resolving disputes remain fundamentally the same. As in prior versions of the Rules, the court may limit the frequency or extent of discovery after taking into consideration whether “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”<sup>4</sup>

[4] Although balancing the burden and expense of discovery with its likely benefit is certainly not a novel concept, it takes on a much higher level of significance when dealing with electronically-stored information (“ESI”). More importantly, this balancing can have a profound effect on lawyers responsible for the zealous representation of their clients. The incentives for striking a balance regarding electronic discovery depend, in large part, on how much discovery a party is likely to face. Good faith negotiations, cooperation, and bipartisan agreement can play an important and productive role in governing the conduct of parties when each party is faced with the prospect of costly electronic discovery. However, in civil

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<sup>1</sup> FED. R. CIV. P. 26(f)(2).

<sup>2</sup> FED. R. CIV. P. 26(2)(3)(C).

<sup>3</sup> FED. R. CIV. P. 16(b)(3)(B)(iii-iv).

<sup>4</sup> FED. R. CIV. P. 26(b)(2)(C)(iii).

disputes where one side has a significantly higher volume of ESI, such as in employment litigation, the incentive for bilateral cooperation on discovery issues is significantly diminished.

[5] In commercial litigation involving corporate entities, both parties usually have substantial (or at least comparable) volumes of potentially relevant ESI. Accordingly, both sides have an incentive to agree on methods for controlling the cost of preserving, searching, and producing discoverable information. Parties with equivalent volumes of ESI are more likely to reach a *détente* regarding such issues as the scope of production, the form of production, recovery of inadvertently produced privileged information, and similar issues.

[6] Employment litigation, in contrast, usually involves one or more individuals suing an employer or former employer. Even in class or collective actions, where large numbers of potential class members may be involved, the plaintiff class is a group of individual employees and the defendant is, most often, the organization that employed them. As a result, the corporate defendant is likely to have a much greater volume of ESI with which to contend.

[7] Employers usually have significantly larger volumes of ESI in their possession that may be relevant to the litigation. Even if the body of truly irrelevant information turns out to be substantially smaller, it is usually true that the potential universe of relevant ESI is much greater for the employer than the employee. For example, electronic mail messages regarding the employee are more likely to be kept on the employer's server.<sup>5</sup> Information regarding the reasons for the employment action at issue, such as a reduction in force, is almost always in the possession of the employer.<sup>6</sup> Employers maintain personnel databases which may contain potentially discoverable information in disparate impact cases, i.e. when one or more employees allege that a neutral employment action had

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<sup>5</sup> See, e.g., *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003) (recognizing that an employer's e-mail servers, including optical disk and tape backups, likely contained electronic mail messages relating to the plaintiff in a discrimination matter, and ordering sample of backup tapes to be restored and searched for discovery purposes).

<sup>6</sup> See, e.g., *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005) (requiring defendant employer to produce ESI, along with embedded metadata, associated with Sprint/United's decision making process during reduction in force).

a disproportionate impact on certain categories of individuals on account of age, race, gender, or some other protected characteristic.<sup>7</sup> Indeed, with the limited exception of certain diaries, journals, memos created by the employee, or correspondence directly to or from the employee, the vast majority of relevant ESI in employment litigation will likely reside with the employer.

[8] The difficulty lies in balancing the need to discover potentially relevant information with the risk of one party having unfair leverage over the other. The former is, of course, required for litigation to be objectively decided on the facts. The latter is a concern when the inherent costs of electronic discovery systemically force one party to either resolve cases that would otherwise be decided on the merits, or resolve them at a higher price because electronic discovery is inevitable. This concern does not presuppose or require any inappropriate or unethical behavior on the part of employees or their counsel. Indeed, the cost of litigation has always been a factor in determining whether to settle, and lawyers have a duty to be honest with their adversary in discussing material facts of the case, including the potential cost of discovery.<sup>8</sup>

[9] The systemic concerns exist, however, in light of the 2006 Amendments and the increased preeminence of electronic discovery in civil litigation. As a result, those costs are much higher than they used to be.<sup>9</sup> In employment litigation, the risks are magnified because electronic discovery costs may quickly dwarf the value of the litigation itself, as measured by potential damages. Compensatory and punitive damages in Title VII cases, for example, are limited to \$300,000.<sup>10</sup> The median jury verdict for discrimination cases nationwide, based on research of matters

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<sup>7</sup> See, e.g., *Raytheon v. Hernandez*, 540 U.S. 44, 52 (2004).

<sup>8</sup> See, e.g., *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 446 (D. Md. 2002) (discussing an attorney's obligation to avoid material misrepresentations in the context of settlement obligations).

<sup>9</sup> *Zubulake*, 217 F.R.D. at 311 (“As individuals and corporations increasingly do business electronically . . . the universe of discoverable material has expanded exponentially. The more information there is to discover, the more expensive it is to discovery all the relevant information. . .”).

<sup>10</sup> 42 U.S.C.A. § 1981a(b)(3).

between 2000 and 2006, was \$200,000.<sup>11</sup> The median settlement amount was even lower – \$70,000.<sup>12</sup> The combination of relatively modest case valuations with significantly increased electronic discovery costs may have a profound – and perhaps unintended – impact on the resolution of employment related litigation. Although not limited to employment cases, one study has already found that one in five corporate respondents have settled litigation to avoid the costs of electronic discovery.<sup>13</sup>

[10] Given the economic realities of employment litigation, therefore, it is instructional to review the cost shifting criteria associated with electronic discovery both before and after the 2006 Amendments.

## II. BEFORE THE 2006 AMENDMENTS

[11] One of the seminal cases addressing cost shifting for electronic discovery before the 2006 Amendments was *Zubulake v. UBS Warburg*.<sup>14</sup> In this gender discrimination and retaliation case, the court analyzed whether an employer had an obligation to search backup tapes for e-mails related to the plaintiff, and evaluated who had to pay for the cost of those searches. In analyzing these questions, the court established a seven factor test for determining whether cost shifting should occur in the context of electronic discovery:

- (1) The extent to which the request is specifically tailored to discover relevant information.
- (2) The availability of information from other sources.
- (3) The total cost of the production, compared to the amount in controversy.

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<sup>11</sup> *JVD Releases Its New Study of Employment Practice Liability Trends and Statistics for 2007*, EMP. PRAC. LIABILITY VERDICTS AND SETTLEMENTS, Nov. 2007, LRP Publications, at 2.

<sup>12</sup> *Jury Verdict Research Study Yields Statistics Analyzing Settlement Claims*, EMP. PRAC. LIABILITY VERDICTS AND SETTLEMENTS, Oct. 2007, LRP Publications, at 2.

<sup>13</sup> THE AMENDED FRCP: ONE YEAR LATER 3 (Fortiva 2007) (available by request at [www.fortiva.com](http://www.fortiva.com)).

<sup>14</sup> *Zubulake*, 217 F.R.D. at 311

- (4) The total cost of production, compared to the resources available to each party.
- (5) The relative ability of each party to control costs and its incentive to do so.
- (6) The importance of issues at stake in the litigation.
- (7) Relative benefits of the parties obtaining the information.<sup>15</sup>

[12] The court also determined that these factors should not be weighed equally, but instead they should be weighed in descending order of importance, with numbers (1) and (2) being the most important, (3), (4) and (5) being the next group, and (6) and (7) being independent groups of lesser importance.<sup>16</sup>

[13] Despite the relative appearance of objectivity in the seven factor test, it tips decidedly against employers in employment litigation.

[14] The first factor, the extent to which a request is specifically tailored to discover relevant information, fails to account for the fundamental costs of electronic discovery, even in responding to a narrowly tailored discovery request. For example, the document request at issue in *Zubulake* was that the defendant produce “all documents [including ESI] concerning any communication by or between UBS employees concerning plaintiff.”<sup>17</sup> In an employment case alleging gender discrimination and retaliation with regard to the terms and conditions of plaintiff’s employment, it would appear that the request for “all communications

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<sup>15</sup> *Zubulake*, 217 F.R.D at 322. The “new” seven factor test was actually a modified test from a prior opinion in the same court. See *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002). Interestingly, one of the factors added to the cost shifting test by the *Zubulake* court was consideration of the “amount in controversy” in the litigation. *Zubulake*, 217 F.R.D. at 321. Initially, this would appear to balance some of the concerns relating to high discovery costs in low-value employment cases. However, as discussed *infra*, the placement of this factor in the overall hierarchy of the *Zubulake* test all but negates its balancing effect.

<sup>16</sup> *Zubulake*, 217 F.R.D. at 322-23.

<sup>17</sup> *Id.* at 312.

concerning the plaintiff” is, in fact, fairly narrowly tailored. However, in the electronic age, “all communications” includes all electronic mail messages, which may encompass evidence located only on backup tapes. Such information may be costly to restore and search, as was evidenced by UBS’s estimate that the cost of producing the emails on its backup tapes would be approximately \$300,000.<sup>18</sup> Thus the cost of fully responding to a single document request would actually have matched the statutory cap on compensatory and punitive damages under Title VII.<sup>19</sup> Herein lies the flaw in giving preeminence to the first *Zubulake* factor: Even a narrowly tailored request for information may be so cost-intensive as to surpass the overall value of the litigation in question.

[15] The second factor in *Zubulake*, the availability of information from other sources, also cuts consistently against the employer. As discussed above, the availability of information from other sources is virtually meaningless in employment litigation, because the vast body of ESI will ordinarily rest with the employer. Personnel records, aggregated employment data, and electronic communication regarding relevant topics will, for a variety of reasons most likely reside on the employer’s computers or the employer’s network. Moreover, this information will be exclusive to the employer. Again, to use *Zubulake* as an example, the plaintiff had independently retained over 450 e-mails that either mentioned her by name or related in some way to her employment.<sup>20</sup> Despite the fact that the plaintiff had actually retained more electronic communication than the defendant (at least with respect to its live electronic systems), the court assumed that other relevant e-mails existed exclusively in the employer’s backup tapes, stating “[c]learly, numerous responsive e-mails had been created and deleted at UBS, and *Zubulake* wanted them.”<sup>21</sup> Thus, when applying the second factor in the cost-shifting test, information will frequently be available *only* from the employer’s data systems, even where the employee has collected and retained a subset of such information on his or her own.

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<sup>18</sup> *Id.* at 313.

<sup>19</sup> Although *Zubulake* sued under New York Civil Rights law and the Administrative Code of the City of New York, which do not have comparable caps, for comparison purposes the analogy remains valid.

<sup>20</sup> *Zubulake*, 217 F.R.D. at 313.

<sup>21</sup> *Id.*



[16] Likewise, two of the next three factors also weigh heavily against employers. The fourth factor, the total cost of production compared to the resources available to each party, flatly applies the “David versus Goliath” rule and penalizes the employer for having greater resources than the employee. Rarely, if ever, would those tables be turned and would this factor weigh in favor of shifting the costs of production to the employee.

[17] The fifth factor, the relative ability of each party to control costs and its incentive to do so, is at best a two-edged sword. As discussed above, even when faced with even a reasonable discovery request, full compliance on the part of an employer might require a significant expenditure of costs despite the best efforts to curtail the same. In contrast, an employee with little or no ESI at his or her disposal has little or no incentive to control costs associated with electronic discovery. As individuals, employees may have, at most, a personal computer with potentially relevant information, and one or more online accounts, such as an electronic mail account provided by a public internet service provider. Employees, therefore, need not confront the significant expense associated with searching data networks, servers, e-mail archives and backup tapes in responding to discovery.

[18] The purpose for the seven-factor test is both legitimate and admirable. In analyzing whether cost shifting should be considered, the *Zubulake* court framed the issue against the backdrop of disparate resources in employment litigation:

Courts must remember that cost shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting as well will have the effect of crippling discovery in discrimination and retaliation cases. Both undermine the “strong public policy in resolving disputes on their merits” and may ultimately deter the filing of potentially meritorious claims.<sup>22</sup>

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<sup>22</sup> *Id.* at 317-318.

[19] While this public policy concern is without a doubt legitimate, the seven factor test that resulted from *Zubulake* allows the pendulum to swing too far in the opposite direction. When the majority of the factors deemed most important are inherently adverse to the employer, even *assuming* good faith discovery practices on the part of the plaintiff, the potential impact on litigation is significant and dangerous. Even employers involved in cases with little or no evidence of liability, but nevertheless faced with several hundred thousands of dollars in discovery costs, may quickly conclude that settlement of a meritless claim is a better option than incurring those costs.

### III. THE 2006 RULE CHANGES

[20] Against the backdrop of the *Zubulake* decision, the Federal Rules of Civil Procedure were amended, effective December 2006. In the context of cost shifting, perhaps the most important rule is Rule 26(b)(2)(C). Rule 26 indicates that a party “need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”<sup>23</sup> Further, the Rule provides that the court may deny a discovery demand if:

- a) It is unreasonably cumulative or duplicative, or is obtainable from another source that is more convenient, less burdensome, or less expensive;
- b) The parties seeking discovery had had ample opportunity by discovery in the action to obtain the information sought; or
- c) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, and the importance of the issues at stake in the litigation.<sup>24</sup>

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<sup>23</sup> FED. R. CIV. P. 26(b)(2)(C).

<sup>24</sup> FED. R. CIV. P. 26(b)(2)(C).

[21] This Rule carries over two of the fundamental problems (at least from the employer's perspective) from the *Zubulake* seven-factor test.<sup>25</sup> First, the Rule relies on an undefined distinction between accessible and inaccessible ESI. Therefore, courts will more likely continue to look to the analysis in *Zubulake* because it remains one of the most comprehensive discussions on the topic.

[22] That discussion, however, simply assumes that employers should bear the cost of searching any accessible data in their possession.<sup>26</sup> At first glance, this would seem to comport with the language of the new Rule 26. However, the *Zubulake* court effectively concluded that the only truly inaccessible data is either tape backup or fragmented or damaged data.<sup>27</sup> Thus, with the limited exception of tape backups, the entire universe of electronic mail, including locally archived mail messages such as .pst files, is considered accessible. This definition, however, may be far too broad, especially in light of the actual language of Rule 26.

[23] The *Zubulake* decision makes distinctions between accessible and inaccessible based purely on the technological methods used for retrieval.<sup>28</sup> The amended Rule 26, however, protects parties from having to produce any ESI that is "not reasonably accessible because of undue burden or cost."<sup>29</sup> It is quite conceivable, even likely, that a party will be unable to access certain categories of ESI because of the "undue burden or cost" even when those categories do not fall within one of the two narrow categories of "inaccessible" ESI defined by *Zubulake*.

[24] An employer, for example, who is asked to produce all electronic mail messages about certain employees, may be faced with the prospect of searching through thousands of local e-mail archive files (such as .pst files created by Microsoft Outlook). Although some of these files may be contained on the employer's network, they may also be located on local drives, CD or DVD recordable media, or other locations. Because of the

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<sup>25</sup> In fact, Rule 26(b)(2)(C) was not changed by the 2006 Amendments.

<sup>26</sup> *Zubulake*, 217 F.R.D. at 320 ("For these sources of e-mails – active mail files and e-mails stored on optical disks – it would be wholly inappropriate to even consider cost-shifting.")

<sup>27</sup> *Id.* at 319-320.

<sup>28</sup> *Id.*

<sup>29</sup> FED. R. CIV. P. 26(b)(2)(C).

sheer volume of the possible universe of ESI that must be searched, it is possible that such information is not “reasonably accessible” to that employer because of the “undue burden or cost” associated with retrieving it. Under those circumstances, the employer ought to at least be able to argue that the court should consider shifting some of the cost to the requesting party. However, under the *Zubulake* analysis, the court would not even consider cost shifting because the data in question is not damaged, fragmented or located on backup tapes. Thus, to avoid further disparity in allocating the costs of electronic discovery, courts must be prepared to take a broader view of accessible versus inaccessible within the meaning of Rule 26.

[25] Second, even if an employer can show that certain ESI is not reasonably accessible, it will still be forced to overcome some, if not all, of the *Zubulake* seven factor test to justify cost shifting. The *Zubulake* test was ostensibly derived from the existing rule at the time, which included the discussion of the needs of the case, the amount in controversy, and most significantly, the parties’ resources. That portion of the Rule did not change in December of 2006. Therefore, there is a strong likelihood that courts will continue to look to the seven factor test articulated in *Zubulake* to determine whether cost shifting is appropriate.<sup>30</sup> For the reasons cited above, the rote application of this test risks a significant disproportionate impact on larger entities, such as employers, when compared to individual adversaries with very little ESI in their custody or control.

[26] *Quinby v. Westlb AG* further demonstrates this point.<sup>31</sup> In *Quinby*, a former director of a securities firm brought gender discrimination and retaliation claims against her former employer.<sup>32</sup> The plaintiff initially submitted a request for production seeking a search of nineteen employee and former employees’ email accounts for references to the plaintiff specifically and sexist content generally.<sup>33</sup> Following the defendant’s objections, the court limited the number of e-mail accounts to seventeen,

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<sup>30</sup> *In re: Veeco Instruments, Inc.*, 2007 U.S. Dist. LEXIS 23926 (S.D.N.Y., Apr. 2, 2007) (acknowledging the 2006 Rule Amendments but nevertheless, relying on the *Zubulake* factors in cost shifting analysis).

<sup>31</sup> *Quinby v. West LB AG*, 245 F.R.D. 94 (S.D.N.Y. 2006).

<sup>32</sup> *Id.* at 96.

<sup>33</sup> *Id.* at 98.

as well as the time period for some of those accounts.<sup>34</sup> In order to obtain the emails, the defendant hired a consultant to restore and search its backup tapes.<sup>35</sup> The consultant charged the defendant a total of \$226,266.60, which included a 25% premium for expediting the work.<sup>36</sup> The defendant moved to shift those costs to the plaintiff.<sup>37</sup> The plaintiff opposed, arguing that because of its preservation obligations, the defendant needed to have preserved the relevant documents in an accessible format once it reasonably anticipated litigation, and therefore, was not entitled to cost shifting as a threshold matter.<sup>38</sup> Then, the court agreed as to the majority of the e-mail accounts, because they involved employees who worked for the company during and after the initiation of the company's preservation obligations.<sup>39</sup>

[27] The court then applied the *Zubulake* factors to determine the appropriateness of cost shifting for the e-mail account of employees who left prior to the obligation. As to the first two *Zubulake* factors, specific tailoring and availability from other sources, the court upon review found that the plaintiff's sampling of relevant emails was too low to be considered specifically tailored, especially when compared to the vast number of documents ultimately produced from a search of the affected account, and in spite of the fact the documents were not available from another source.<sup>40</sup> As to the next three *Zubulake* factors – amount in controversy compared to cost of production, total cost compared to party resources, and ability and incentives of the parties to control costs-- the court noted that a) the plaintiff had the potential to receive a multi-million dollar recovery in the case, which weighed against cost shifting; b) that the employer's assets in the billions of dollars weighed against costs shifting, and c) that because the plaintiff requested a broad search, she had some control over the cost, and therefore, this factor "slightly" weighed in favor of cost shifting.<sup>41</sup> As to the sixth factor, importance of issues at stake, the court analogized the case specifically to *Zubulake*, which held that

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<sup>34</sup> *Id.* at 99.

<sup>35</sup> *Id.* at 100.

<sup>36</sup> *Id.* at 101.

<sup>37</sup> *Id.* at 99.

<sup>38</sup> *Id.* at 103.

<sup>39</sup> *Id.* at 105-06.

<sup>40</sup> *Id.* at 109.

<sup>41</sup> *Id.* at 109-110.

discrimination claims were “hardly unique,” making the factor “neutral” to the cost shifting analysis.<sup>42</sup> As to the seventh and “least important” factor, the court concluded that because the plaintiff had more to gain, the factor weighed in favor of cost shifting.<sup>43</sup> The court ultimately determined that the factors favored cost shifting as to the emails stemming from the period prior to the preservation obligation. Even then, however, the court stated that, “[e]ven where cost-shifting is granted, the defendant must still pay for the majority of the production because of the presumption that the responding party pays for its discovery cost.”<sup>44</sup> Again, the court cited *Zubulake*, noting that because the plaintiff’s requested searches in the present case were broader than those in *Zubulake*, and in *Zubulake* 25% of the cost was shifted, shifting 30% of the cost of producing the e-mails prior to preservation obligation was appropriate.<sup>45</sup>

[28] Thus, in *Quinby*, even with a favorable ruling on cost shifting, the costs for production fell more heavily on the employer.

#### IV. THE COST OF COMPLIANCE

[29] Finally, certain aspects of the 2006 Amendments may also risk a disproportionate cost allocation even before litigation begins. Rule 37 provides an often-touted “safe harbor” for the destruction of ESI that is the result of “routine, good faith operation of an electronic information system.”<sup>46</sup> Ostensibly, this provision benefits employers because it creates a potential defense in the event of the destruction of ESI. However, the effect is likely to force employers to expend significant sums in developing and implementing document retention and destruction policies. Individual employees, on the other hand, face no equivalent obligation. Generally, a preservation obligation by an individual employee can be met by simply turning off his or her computer, or at worst, creating a forensic copy of his or her hard drive. The implications for employers are significantly more complex.

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 110.

<sup>44</sup> *Id.* at 111.

<sup>45</sup> *Id.*

<sup>46</sup> FED. R. CIV. P. 37(e)(3).

[30] *Broccoli v. Echostar*<sup>47</sup> illustrates the dangers employers face when they fail to meet these preservation obligations. In *Broccoli*, an employee brought multiple claims against his former employer, alleging sex discrimination and retaliation under Title VII, as well as Maryland state wage payment, breach of contract, and tortious interference claims. The jury found in favor of the employer on the Title VII and tortious interference claims and awarded a modest amount to the plaintiff on the remaining state law claims.<sup>48</sup>

[31] During discovery, the plaintiff filed a motion for sanctions based on the employer's alleged failure to preserve critical employment documents, in particular, those relating to the plaintiff's November 2001 termination and those relating to a reduction in force that the employer provided as the bona fide reason for the termination.<sup>49</sup> The plaintiff asserted that the preservation obligation began in January 2001, when he made oral and email complaints to two of his supervisors about the alleged sexually harassing behavior of a human resource manager.<sup>50</sup> The plaintiff stated he complained again in July 2001 to a more senior member of human resources, and again in November 2001 in conjunction with his termination.<sup>51</sup> The defendant asserted that it had no knowledge of the plaintiff's complaints until December 2001, when senior executives received a letter from the plaintiff's girlfriend alleging that the plaintiff's termination was discriminatory, and therefore, had no obligation to suspend its ordinary practice of purging deleted e-mails twenty-one days and personnel files thirty days after termination.<sup>52</sup>

[32] The court disagreed, citing *Zubulake* and holding that the employer was on notice of the pending litigation and therefore, had a duty to preserve, beginning in January 2001 when the plaintiff first complained to his supervisors.<sup>53</sup> The court stated that "[g]iven Echostar's status as a large public corporation with ample financial resources and personnel management know-how, the court finds it indefensible that such basic

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<sup>47</sup> *Broccoli v. Echostar Commc'n Corp.*, 229 F.R.D. 506 (D. Md. 2005).

<sup>48</sup> *Id.* at 508-509.

<sup>49</sup> *Id.* at 509.

<sup>50</sup> *Id.* at 510-511.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 511.

<sup>53</sup> *Id.*

personnel procedures and related documentation were lacking.”<sup>54</sup> Accordingly, the court awarded reasonable attorneys’ fees associated with discovery to the plaintiff, even though the plaintiff had actually lost on the underlying Title VII claims. This amount was almost twice that of the jury award for state wage payment law claims.<sup>55</sup>

[33] This decision highlights the potential costs of electronic discovery compared to the actual value of an employment litigation claim. It also demonstrates the unique risks to corporations when the notice of threatened litigation comes from a current employee. As the *Broccoli* court seems to suggest, one employee complaining to two supervisors about his treatment can, under certain circumstances, put the entire corporation on sufficient notice to require preservation of potentially relevant ESI. To achieve the level of “corporate readiness” required to meet such preservation obligations, corporate employers are now forced to establish complex and costly legal hold procedures. Again, because of the disparate nature of electronic discovery in the employment context, employees are usually not saddled with such burdens.

## V. CONCLUSION

[34] It is important that discovery rules avoid the systemic effect of chilling discovery by either party. However, this concept, grounded on the notion that litigation should be based on the facts equal and known to all parties, cuts both ways. The cost shifting analysis in *Zubulake*, which will likely continue to have a profound effect under the amended Federal Rules, forces employers to bear the brunt of discovery costs. Because the value of employment cases may be lower compared to these costs, the result may cause a chilling effect on employers. While frequent cost shifting may have the undesirable effect of chilling plaintiffs from bringing litigation against their employers, the opposite risk should not be ignored.

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<sup>54</sup> *Id.* at 512.

<sup>55</sup> *Id.* at 513-14.