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04-CV-215

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1970-2003

via CERTIFIED MAIL No. 7000 1670 0004 6744 5153
**and Regular U.S. Mail**
February 9, 2005

Peter C. McCabe
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

I am writing in regard to two of the proposed changes of the Federal Rules of Civil Procedure in regard to electronic discovery.

Before discussing the changes specifically, I would like to give you a general background of the discovery situation that presently exists in my field in Columbus, Ohio, where I practice plaintiff's employment and civil rights law in a small (3 attorney) firm.

We represent employees who have been wrongfully terminated or discriminated against in the workplace. A fairly typical case begins as follows: a woman who is five months pregnant comes to our office and tells us that she has just been terminated from her position with a company where she has worked as a salesperson for several years. She tells us that all of her yearly performance reviews have been excellent, until she told her supervisor that she was pregnant. She tells us that the company's corporate databases will contain objective information about her sales, showing that her sales are better than almost all of her peers. Five days after her supervisor became aware of her pregnancy, she received an unprecedented "supplemental" performance review rating her as deficient in every performance category – categories in which she had received high scores in her regular performance review just two months previously. One month later, she is terminated from her position, allegedly for not correcting the deficiencies alleged in her "supplemental performance review." Additionally, our client tells us that she engaged in e-mail exchanges with her supervisor in which he could not explain the reasons for any of her alleged deficiencies. Finally, our client believes that her supervisor was reprimanded in the past for discriminating against pregnant employees.

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Normally, such a client will not have any supporting documentation. Her performance reviews will be part of her personnel file – she will have reviewed the documents with her manager but will not have been provided with a copy. She will also not have copies of any of the e-mails, as they were made on a company computer while she was still employed by the company. Finally, she will certainly not have access to her supervisor's personnel file. It is likely that the only documents she will have which relate to her employment will be her paycheck stubs, copies of benefit descriptions, and similar items.

The company in this case is in control of all of the evidence. They are in possession of all of the relevant data and documents, and control all of the witnesses except the plaintiff – principally all of the managers who at some point supervised the plaintiff and/or were involved in the decision to terminate her.

Compounding what is already a difficult situation for the plaintiff, our 20 years of experience tell us that her discovery requests are almost certain to be met with a flurry of objections and intransigence. The company will often begin their responses to plaintiffs' requests with what are known as general objections, a laundry list of boilerplate objections.

Additionally, a plaintiff's individual interrogatories and requests for production of documents will be objected to, sometimes with as many as four objections per request. This practice is not limited to a few companies or their counsel--it is our experience that in almost every case, almost all of plaintiffs' requests will be objecting to in some manner. In cases where at least the form of the objection seems reasonable, such as privilege, defendants most often fail to produce a privilege log as is required by the Rules. Often the objections – such as the claim that interrogatories which require a narrative response better suited to a deposition – are simply fanciful. Also, in our experience, almost never do defendant-employers fulfill their obligations under the Rules to seek a protective order from the court in regard to their claims of "unduly burdensome" etc. They simply object and do not produce or answer.

In our experience, employers routinely withhold documents that are clearly discoverable, such as the personnel files of decision makers, and fail to answer the most basic of interrogatories, such as "state every reason that plaintiff was terminated from her position." Even when requests are answered, they are often responded to "notwithstanding" several objections, leaving us only able to guess whether the answer or production was complete or if information was withheld under the phantom objection (also a problem with the "general objections"). We are routinely forced to engage in extensive letter writing campaigns to obtain relevant discovery, and quite often are required to file motions to compel discovery with the court.

With this as a background, I would like to first address proposed Rule 26(b)(2), which provides that a party need not provide discovery of electronically stored information that the party

identifies as not reasonably accessible. The wording of this rule positively begs for abuse – it allows the fox to guard the henhouse. Make no mistake, the phrase "not reasonably accessible" will promptly be interpreted by many defense counsel as meaning all discovery kept in an electronic format; after all, all electronic data require some degree of effort to put in a paper format or copy to a CD-ROM. Requiring the onus for filing a motion in regard to the discovery to be on the requesting party further undermines the concept that broad discovery will be allowed unless a protective order is obtained – a concept that has already been undermined by many employers and their counsel. Additionally, this rule will allow defendants to, by storing such information in an electronic format, object to what was heretofore clearly discoverable, such as a plaintiff's own personnel file.

Proposed Rule 26(b)(2) is also silent as to whether sanctions are available when an employer and their counsel wrongfully claims that electronic information is not "reasonably accessible." The threat of discovery sanctions is, of course, plaintiff's only weapon to convince employers and their counsel to settle discovery disputes without having to resort to filing a motion to compel. Many defense counsel in employment cases will surely take this ambiguity – compounded with the ambiguity of what "reasonably accessible" means, to mount an argument that they are not liable for sanctions with regard to electronic discovery. Additionally, Proposed Rule 37(f) explicitly absolves defense counsel of liability for sanctions in certain instances, provided that they have taken "reasonable steps" to preserve electronic information. What are these reasonable steps? Does a form letter to their clients telling them to preserve records suffice, or must they make real effort to preserve this discovery?

The proposed rules suggest that plaintiffs, rather than employers, will usually bear the costs of producing electronically stored information that is not reasonably accessible. Employers choose how to store their data. Most plaintiffs in employment cases are at a stark economic disadvantage: they have recently lost their jobs and are hunting for a comparable position under the burden of that termination on their resume.

The assumption is that, like personal injury and medical malpractice lawyers, plaintiff's lawyers will simply advance the expense of discovery. That assumption is misguided, largely because damages ceilings in federal civil rights statutes and the huge difference in size of jury awards between personal injury or medical malpractice cases and employment cases render plaintiff's employment lawyers less able to advance those expenses.

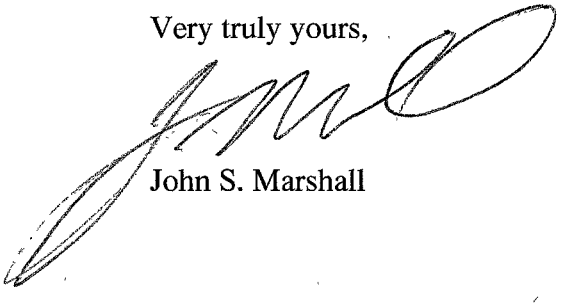
Employers should be presumptively forced to bear the expenses of the storage method they have chosen. Again, the Rules ought not provide employers an incentive to make discovery more difficult.

Which brings me to my final point. We will continue to aggressively seek electronic discovery whether the Rule takes effect or not. We *must* do so in employment cases, in order to obtain even the basic forms of proof. However, it is clear that the new Rule will require us to almost immediately file motions to compel whenever electronic discovery is withheld, which we know from experience will be quite often. This new rule cannot help but dramatically increase the number of motions pending before the courts, as one of its primary results will be to remove move incentives for parties to settle discovery disputes.

In closing, these Proposed Rules, especially operating in tandem, will serve to further what is already an inequitable power balance in the area of employment law, making it more difficult and more costly to obtain documents and data that are clearly discoverable and relevant to our clients. Further, they cannot help but increase the burden upon the federal courts, as they will be required to referee more and more discovery disputes that until now had been resolved between the parties.

Thank you for listening.

Very truly yours,



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