

Zubulake's e-Discovery: The Untold Story of my Quest for Justice

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A story of E-discovery Leveling the Playing field in a David versus Goliath Litigation Battle

“E-mails were powerful evidence, dictating the who, when, how, and why of observed events. Unlike the typical direct evidence recanted years later from the memory of a witness, a contemporaneous email did not forget... I wanted my trial to be ‘he said’ versus the e-mail.”¹

The book *Zubulake’s e-Discovery: The Untold Story of my Quest for Justice* is written by Laura Zubulake. Ms. Zubulake tells the story of how electronic discovery provided her with the means to prevail against her employer for employment discrimination based on gender.² Laura Zubulake details the procedural steps and struggles she went through in electronic discovery (e-discovery) to access key evidence she would otherwise would not have been able to access to prove that the powerful Wall Street employer, UBS Warburg, LLC, and UBS AG, discriminated against her on the

¹ LAURA A. ZUBULAKE, ZUBULAKE’S E-DISCOVERY: THE UNTOLD STORY OF MY QUEST FOR JUSTICE 79 (Laura A. Zubulake, 2012).

² See Zubulake, *supra* note 1, at 2

trading floor because she was a female.³ More importantly, she details how diligent she had to be to gather electronic information during the discovery process. Ms. Zubulake had no precedent to fall back on to assert her right to electronic communications in her employer's possession, but through the legal process she was able to establish her rights, and more importantly a future party's rights to electronic information from the adverse party.⁴ This book provides Zubulake's personal story and emotions behind her lawsuit against UBS that has now become a landmark case on the legal issues that arise during electronic discovery. For Ms. Zubulake, the court resolved one of the most important legal issues in e-discovery: the disparity between a smaller party against a larger party with greater resources and power.⁵ The court resolved the disparity by establishing that a party cannot control the discovery process by withholding relevant electronic documents and correspondence from the adverse party in order to hide incriminating evidence.⁶

The author, Laura Zubulake, was the plaintiff in the landmark case on e-discovery, *Zubulake v. UBS Warburg*.⁷ Ms. Zubulake holds an M.B.A degree in economics from New York University. Upon earning her M.B.A, she worked on Wall Street for twenty years which served as the setting for the lawsuit against her former employer UBS. Currently, Ms. Zubulake works in Business Development for Sotheby's International Realty Hamptons, NY. She also is a professional speaker on e-discovery and "information governance" with corporations and legal, information technology and student groups as her audience.⁸

³ See Zubulake, *supra* note 1, at 9

⁴ See Zubulake, *supra* note 1, at 3

⁵ See Zubulake, *supra* note 1, at 2

⁶ See Zubulake, *supra* note 1, at 199

⁷ See Zubulake, *supra* note 1, at 2

⁸ See Laura A. Zubulake, *Contact/Bio: Professional Summary*, archived at <http://www.laurazubulake.com/contact.htm>

Zubulake's e-Discovery: The Untold Story of my Quest for Justice covers the legal area of Federal Rules of Civil Procedure. Although issues arising out of the discovery stage of litigation are normally decided by magistrates, the case introduced new discovery issues on electronic documents and records to cause a Federal District Judge with expert on discovery to preside on the matter.⁹ The fact that the issues of discovery were argued in front of a federal district judge demonstrated how electronic discovery was still in its infancy during the litigation of Zubulake v. UBS between 2003 and 2005. The matter was introduced into the federal court arena in order determine the role electronic discovery plays in the Federal Rules of Civil Procedure.

Ms. Zubulake explains her legal battle with her former employer by beginning with the setting that gave rise to her claim and ending with the final verdict with the court ruling in her favor.¹⁰ Ms. Zubulake begins the first chapter with describing the work culture she operated in as a female on the male dominated trading floor on Wall Street. She then proceeds into her second chapter by providing specific comments and actions by fellow male employees and supervisors treating women as inferior to men. Although she was allegedly terminated for underperformance, she asserts that she was undermined, denied and isolated from men on the trading floor.¹¹ She heard comments regarding her different treatment from men based on her gender, but she suspected many more of the comments being exchanged through e-mail. She knew, rather than suspected, that essential information about the employment discrimination based on gender laid within UBS's email servers.

⁹ See Zubulake, *supra* note 1, at 51

¹⁰ See Zubulake, *supra* note 1, at 12

¹¹ See Zubulake, *supra* note 1, 24-30.

Ms. Zubulake then goes on to chapter three titling “The Underdog” which describes the legal struggle that she describes in the subsequent chapters. She explains that as an individual plaintiff suing her employer, a large Wall Street company, she was facing a David versus Goliath scenario with few resources, and control in the litigating matters. She felt an inequity when the documents she felt she was privy to, were being withheld¹². It was this issue that was the basis of the legal battle on e-discovery, and on deciding what production of electronic documents and records a party is privy too, and what arguments will determine to what quantity and at what cost. The subsequent chapters move through the trial proceedings as Ms. Zubulake pushes against her former employer for her right to electronic documents to support her claim of employment discrimination based on gender. The final chapter, titled the Verdict, explains how the court ruled in Ms. Zubulake’s favor holding that by the defendant, UBS, withholding the production of documents indicating fault to plaintiff’s claim of employment discrimination, breached duty to preserve, and produce relevant material documents within its control to the opposing party.¹³

This book speaks to individual plaintiffs and defendants rather than academics, or lawyers. Although Ms. Zubulake’s story provides lawyers insight into how important e-discovery build’s their client’s case, this speaks more to the client who faces an adverse party that displays control over information that is material to their claim. Ms. Zubulake raised the legal issues that develop out of e-discovery by addressing the inequities that exist when one party possesses incriminating evidence that is fatal to their defense and essential to support the opposing party’s allegations.

¹² See Zubulake, *supra* note 1, at 51

¹³ See Zubulake, *supra* note 1, at 195

The defendant UBS withheld e-mail correspondence that supported Ms. Zubulake's claim that she was terminated based on the fact that she was a female in a male dominated trading floor. The defense argued that e-mails that they did not produce to Ms. Zubulake's attorney were difficult and costly to access.¹⁴ However, the court held that such defenses do not allow a party to withhold important documents from the opposing party that are material to the case.¹⁵ In fact, a party has a duty to preserve, and produce relevant documents in preparation for litigation. Ms. Zubulake provides the story behind the current laws on electronic discovery including the duties imposed on both parties, began with a David versus Goliath scenario where Ms. Zubulake as the individual client and former employee was David, and UBS as the corporate Street was Goliath.¹⁶ The power struggle that Ms. Zubulake highlights how one party was capable of controlling litigation through the discovery phase by withholding essential information to the case. Fortunately, Ms. Zubulake pushed through several setbacks in order to fight for what she believed was rightfully hers, electronic documents in the possession of her employer that indicated that she discriminated based on her gender. Unlike Ms. Zubulake, today's adverse parties have precedent to fall back on to establish their rights in e-discovery.

¹⁴ See Zubulake, *supra* note 1, at 79

¹⁵ See Zubulake, *supra* note 1, at 116

¹⁶ See Zubulake, *supra* note 1, at 46