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ARE YOUR E-MAILS SAFE FROM PRODUCTION?

In a recent case, the Fifth Court of Appeals of Texas recently reviewed a writ of mandamus where a party was forced to produce her personal computer's hard drive and e-mail accounts in discovery. The party having to produce this information alleged the trial court abused it discretion and the Court of Appeals agreed. According to the Court, specific protocol must be followed for this type of production to take place. In this case it was not, and the Court of Appeals granted mandamus relief. *In re Jordan*, 05-12-00240-CV, 2012 WL 1098275 (Tex. App. Apr. 3, 2012).

THE FACTS OF THE CASE

In the original trial proceeding, Misty Jordan sued her former employer, Gajekse, Inc., for wrongful termination. Jordan alleged that she was subjected to a sexually hostile work environment and was fired for reporting it. Specifically, Jordan claimed, among other things, that she saw sexually graphic content on certain computers at Gajekse that was offensive to her. At her deposition, she claimed that she had never viewed pornography before her employment at Gajekse. She also alleged that she submitted her memoranda about the sexually explicit content to her supervisor. She claimed she created the memoranda on her work computer.

Written discovery was exchanged by the parties in this case. Gajekse generally requested for the production of Jordan's *home computer* and hard drive. Jordan objected, but the trial court nonetheless signed an Order compelling Jordan to allow Gajekse's "forensic computer examiner" to have access to her personal computer for the following purposes: (1) to determine Jordan's internet history for content of a pornographic or sexual nature from 2009 to present; (2) to examine Jordan's e-mail accounts to see if any e-mails with pornographic or sexual content were sent or received from 2009 to present; and (3) to attempt to locate the memoranda Jordan claim she prepared on her work computer.

THE COURT OF APPEALS' DECISION

In coming to their decision, the Court of Appeals looked at the Texas Supreme Court's decision *In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. 2009). In this case, the Supreme Court summarized the procedure to be followed when a party seeks production of another party's computer hard drive. As part of those procedures, the party seeking production must "make a specific request for [the] information and specify the form of production. *Id*.

In the instant case, Gajekse's written request merely asked for the hard drives of Jordan's computers without informing her of the exact nature of the information sought. Additionally, the Court of Appeals concluded that Gajekse "failed to demonstrate the particular characteristics of the electronic storage devices involved, the familiarity of its experts with those characteristics, or a reasonable likelihood that the proposed search methodology would yield the information sought." *Id*. at 311. The Court of Appeals also stated that the record did not reflect any attempt by Gajekse to explain the search methodology or its expert's credentials.

In *Weekley*, the Supreme Court specifically cautioned the trial court to be sensitive to the highly intrusive nature of computer storage search. The Supreme Court said that the trial court should consider, at the very least, a protective order addressing matters that might be revealed, especially where, as here, the person who will perform the search is retained by and under the control of the parties seeking the information.

In Jordan's case, there was nothing in the record showing that a protective order was even considered, although the record revealed the trial court did attempt to restrict the scope of its discovery by carefully wording its Order. By not observing the procedures elaborated in *Weekley*, the Court of Appeals concluded that the trial court abused its discretion. Additionally, Jordan has no adequate remedy at law, because an appellate court will not be able to remedy the trial court's error in the ordering and intrusive search without the procedural protections afforded by *Weekley*.

HOW DOES THIS AFFECT YOU?

We are now living an age where we communicate by e-mails more than face to face communication. We also get much of our information through the internet. Much of this information is stored in our computers and we need to be mindful of this.

In reviewing this recent ruling by the Court of Appeals, when such electronic information is requested in a case, specific protocols must be followed, otherwise such request will not be upheld.

If you are the party requesting such information, you need to show:

- ☆ that the information you are seeking exists;
- ☆ that the request for the information is specific with specification of the form of production;
- ☆ the particular characteristics of the electronic storage devices involved;
- ☆ that the expert who was trying to retrieve this information is familiar with Obtaining this type of data; and
- ☆ That the proposed methodology being used would yield the information sought.

On the other side, if this request is made upon you, take a look at the specific discovery request and determine if it is specific enough and if the proper procedures noted above were followed. If not, object on these grounds. You also need to allege that the information sought is highly sensitive and intrusive in nature.

Lastly, if the production of the information sought is granted by the Court, make sure that you enter into a Protective Order so that this information will not be revealed to anybody outside of the lawsuit.







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