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Dell goes on offense in lawsuit

Counterclaim: It was wrong for worker to keep emails as evidence

Premium content from Austin Business Journal by Christopher Calnan, Staff Writer

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Can an employee hold onto emails as evidence of alleged wrongdoing by an employer?

That's the issue inadvertently raised during a gender discrimination lawsuit that has suddenly put Dell Inc. on the offensive.

Court documents in the lawsuit indicate that **Ellen Fleming**, a former 11-year Dell executive, kept emails and other documents to help prove her discrimination case. But law employment experts say such actions may prove to undermine the lawsuit rather than bolster it.

In July, Dell lawyers discovered that Fleming, who held several finance and comptroller positions until she was fired in 2009, transferred files from her company laptop to her home computer. She moved the documents during 2008 to preserve evidence of discrimination, according to late September filings on the case before the U.S District Court for the Western District of Texas.

Dell lawyers are now saying the information is company property and its migration to Fleming's home computer violated a performance-based stock unit agreement by engaging in "conduct detrimental to Dell." The company has filed a counterclaim.

The U.S. Supreme Court has already ruled in favor of employers in such cases in which workers take proprietary information to prove wrongdoing. Instead, employees are expected to allow the evidence to be revealed during the discovery portion of their lawsuits, said **Emily Frost**, an Austin lawyer specializing in labor and employment law.

But in a recent filing, Fleming's attorney, **Geoffrey Weisbart** of Austin-based Hance Scarborough LP, challenges the company's complaint by requesting proof of how preserving emails were detrimental to Dell.

Earlier this week, Weisbart said Fleming didn't share the information with anyone except the U.S. Equal Employment Opportunity Commission.

"We intend to ask the court to dismiss this retaliatory claim," Weisbart said. "Suing an employee who only preserved evidence of discrimination is flat wrong, and a complete abuse of a company's confidentiality agreement."

Dell's attorneys, **Jason Boulette** and **Michael Golden** of Austin-based Boulette & Golden LLP, couldn't be reached for comment. Dell spokesman **David Frink** declined to comment.

Severe penalties exist for employers that destroy information that could be relevant in such cases. As a result, employees are generally advised to follow discovery procedures and not take company property to gather evidence, said lawyer **Nicolle Muehr**, an employment law specialist for Austin-based Henslee Schwartz LLP.

Depending on the type of document and business, the timeframe for how long an employer must archive something varies.

Fleming alleges she was treated differently from male counterparts and was fired in March 2009 after refusing to quit when she was demoted. Two months later, in May 2009, she filed her initial charge of discrimination.

The ensuing lawsuit also alleges that Dell withheld Fleming's annual bonus because she declined to waive her rights to file a claim against the company. The Harvard-educated Fleming is now teaching at the Acton School of Business in Austin, according to her online profile.

Her husband, lawyer **Monty Henson**, urged Fleming to prepare a chronology of events after she told him she was expecting retaliation by the company, according to court documents. Since such information was contained in her email account, Henson, who is an asset protection and property tax lawyer, assisted Fleming in preserving the emails on her laptop in 2008, the plaintiff's court filing states.

Most companies establish policies dictating that any information created on company computers is considered their property. But those policies need to be consistently enforced by companies for them to be considered valid by the courts, Frost said.

In addition to the emails, Fleming also removed three boxes of Dell materials and handwritten notes from her office cubicle — while escorted by a human resources department employee — following her termination, court filings state.

Round Rock-based Dell (Nasdaq: DELL), the No. 2 computer maker in the world, employs about 96,000 workers, including an estimated 14,000 in Central Texas. Notably, six local law firms contacted by the *Austin Business Journal* declined to comment on the Fleming case, citing conflicts with other Dell business.

The Fleming lawsuit, which was filed in December 2010, was at least the third gender-discrimination case brought against Dell since October 2008.

Fleming was fired two months before Dell settled, for an undisclosed amount, a 2008 class-action gender lawsuit filed in San Francisco by four human resources managers. Her firing was also four months before Dell settled in July 2009 a \$9.1 million federal gender-discrimination lawsuit.

The class-action lawsuit was filed in October 2008 by former Dell human resources manager **Jill Hubley**, who alleged that Dell “systematically denied equal employment opportunities to its female employees.” A second former manager, **Laura Guenther**, later joined the suit.

In another case filed in San Francisco but later rolled into Hubley’s class-action suit, former Dell human resources manager **Bethany Riches** cited a midyear 2007 performance review by **Michael Summers**, who was Dell’s vice president for global talent management.

In the written review, Summers praised Riches for her ability to break into “one of the toughest old-boy networks in Dell.”

In 2010, *Working Mother* magazine selected Dell as one of the nation’s top-100 companies for family-friendly benefits for the third consecutive year.

In May, the company reached a settlement with a former 11-year, award-winning account executive who was fired after taking time off under the Family and Medical Leave Act to deal with his son’s speech development problem. Financial details of the settlement were not disclosed in court filings.

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