



Internal Investigations ♦ Trade Secrets ♦ Employment Litigation

Forensicon Helps Manpower Avoid Harsh Sanctions

Pinstripe, Inc. v. Manpower, Inc.,

2009 U.S. Dist. LEXIS 66422, 2009 WL 2252131 (N.D. Okla. July 28th, 2009)

Pinstripe, Inc., d/b/a Acct Knowledge, is a staffing firm who previously provided employees for IBM. On Oct. 25th, 2007, Pinstripe filed suit against Manpower, Inc. and IBM for breach of contract and to prevent the transition of its employees to Manpower, a competitor. Attorneys for Manpower immediately drafted a litigation hold, but in January 2009, in-house counsel for Manpower realized the company had failed to issue the hold. Further investigation revealed that two employees may have deleted pertinent email data. Upon learning of the oversight, Manpower sought to recover the documents. When initial efforts by Manpower's IT staff were unsuccessful, Forensicon was hired to conduct a forensic search of the various computer media in an attempt to find any retrievable data, which likewise did not result in any relevant salvageable emails. Manpower then contacted the recipients of the emails to re-acquire as many documents as possible, resulting in a late production of more than 700 messages. Plaintiff filed a motion for sanctions, in addition to an entry of default judgment -- or alternatively, an adverse inference instruction -- for failing to preserve and actively destroying relevant document.

The Court held that Manpower clearly failed to meet its preservation obligations, but did not agree it was a result of intentional conduct. In order for Manpower's actions to warrant such an extreme remedy, Pinstripe would also need to demonstrate that Manpower acted with a "culpable state of mind", which based on 10th circuit precedent requires a showing of bad faith. Even though Forensicon was ultimately unable to successfully locate the specific deleted emails, the Court held that Manpower's combined endeavors to retrieve the ESI and willingness to incur additional expense constituted a "special effort". As a result of its diligence and demonstration of good faith to rectify the situation, Manpower was merely ordered to pay for any necessary retaking of depositions due to late-produced evidence, and to contribute \$2,500 to the local Bar Association "to support a seminar program on litigation hold orders, and preservation of electronic data."

<http://www.forensicon.com/pr/Manpower-avoids-harsh-sanctions.asp>