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Electronic evidence firm grilled over absent memos

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Cassandra Todd, left, and her attorney, Arnold Peter, at Peter's law firm, Raskin Peter Rubin & Simon, LLP, in Los Angeles on Dec. 26, 2008. Todd sued her former employer, Guidance Software, for wrongful termination.

Guidance Software Inc. bills itself as the leading provider of technology that helps companies dig up old e-mails and other electronic documents that might be evidence in a lawsuit. Yet when Guidance itself had to face a judge, it was accused of bumbling its internal digital search.

Whether Guidance intentionally hid documents or just couldn't find them is a matter of dispute. The company said it did all that was required. But its inability to cough up certain e-mails, even over several months, led an arbitrator to accuse it of gross negligence and proceeding in bad faith.

At the very least, the case shows how thorny electronic evidence searches can be, even for a specialist.

The mountains of digital information piling up on hard drives and backup tapes have made discovery — the exchange of information between parties at the start of a

lawsuit — increasingly complex. "E-discovery" software and services boomed from a \$40 million business in 1999 to nearly \$2.8 billion in 2007, according to George Socha and Tom Gelbmann, directors of the industry group Electronic Discovery Resource Model.

Pasadena, Calif.-based Guidance Software is one of the largest software specialists, with sales of \$89 million over the last four quarters. The company began in 1997 making tools to help criminal investigators search computer hard drives. In recent years Guidance added new programs for scouring corporate networks for digital evidence.

Guidance needed to turn that expertise on itself in a case involving its former marketing director, Cassandra Todd.

Todd believed Guidance's chairman pressured her manager to fire her, in part because she is a woman. After she got a scathing performance review in 2007, she asked for an investigation.

"I was quite confident that whatever information was produced would wipe clean what was going on," Todd said in an interview. "That's what we did for a living." But Guidance told Todd it found no evidence of discrimination. It apologized for the harshness of the review but wouldn't delete it from her file.

Todd responded by hiring Arnold Peter, an attorney with Los Angeles-based Raskin Peter Rubin & Simon. A few weeks later, she was laid off.

Todd filed a wrongful-termination claim, and both sides were required to perform discovery, a hunt for documents that might matter to the case. The results of Guidance's initial run of e-discovery seemed scant to Todd. She expected to see far more e-mails from her days in the company. But she couldn't argue Guidance was holding back — intentionally or not — until she got a break a few months later.

Tim Leehealey, Todd's first manager at Guidance and now the head of a rival company, had printed and saved some memos from the time of Todd's bad performance review. When Todd reviewed his stash, she found e-mails about her that Guidance hadn't turned over. In one, Leehealey questioned whether someone in the company was setting Todd up to be fired.

"Other than (Guidance Chairman Shawn McCreight's) hatred of her, she was a good employee and produced for me," he wrote to Victor Limongelli, now Guidance's chief executive.

Whether Guidance didn't find Leehealey's memos or whether it chose not to hand them over, "either one was extremely damning," Leehealey said in an interview. "Those documents were on people's hard drives for sure, and they didn't produce them," said Leehealey, whose company, AccessData Inc., tried to buy Guidance last year but was turned down.

The arbitrator handling Todd's case, a retired judge, ordered Guidance to do a more thorough round of e-discovery. The company came back empty-handed — except for news that one of its e-mail backup tapes had been corrupted. The arbitrator lost patience.

"I want this game-playing stopped," the arbitrator, William McDonald, told Guidance's attorney, according to a court transcript.

McDonald stopped short of saying Guidance was sitting on a smoking gun. But he was disturbed that Todd kept identifying documents the company hadn't unearthed. When he learned the corrupted backup tape had purportedly gone unnoticed for nearly a year, he had harsh words for the company.

"These are routine things in this business. And it wasn't done until pulling and screaming and kicking and facing the ultimate sanction," McDonald said, referring to his option to end the case in Todd's favor. "We're looking at people who should be very sophisticated in this area, given Guidance's business."

As punishment, McDonald ordered the company to pay for Todd's expert witnesses and her travel costs, plus the cost of rescheduling the trial. He also forced Guidance to search the backups, despite its arguments that it would take weeks, amounting to a task Guidance would charge customers \$100,000 to perform.

In an interview, Limongelli said he didn't know in detail why Guidance didn't initially find many of the files Todd identified as missing, though he blamed a lost laptop for one oversight. Guidance executives also say the company was not legally required to search its backup tapes at first, given the expense of reading them.

"It wasn't an attempt to hide any information," Limongelli said. "We think we followed what is a quite normal course."

Some experts not involved with the case said there is support for Guidance's argument about the backup tapes. Under federal rules, all electronically stored information is potentially discoverable. But the rules distinguish between "reasonably accessible" files and ones that are too expensive to tackle, at least in initial e-discovery. Backup tapes often count as overly burdensome, said Scott Carlson, co-chair of e-discovery for the law firm Seyfarth Shaw.

Outside experts hired by Todd gave the arbitrator more critical assessments of Guidance's actions.

Brett Harrison, a director in FTI Consulting Inc.'s electronic evidence consulting group, wrote that the way Guidance saved documents once it knew of Todd's legal actions "was not performed to commonly accepted standards within the e-discovery field and in great part did not occur at all."

A second expert, William Moylan of Aon Consulting Inc., questioned why Guidance asked that deleted files be ignored during discovery because hunting for them would be a burden.

"Recovery and searching of deleted files is at the very heart of computer forensics," he wrote.

Ultimately, the arbitrator found enough information to decide in Todd's favor. He awarded her more than \$300,000, about twice her annual compensation. A federal court is also set to consider whether Todd should receive damages under separate laws that prohibit discrimination. With most of the facts of Todd's dismissal already established, her attorney plans to focus on whether Guidance attempted to thwart e-discovery during arbitration.



Guidance was "egregiously in violation of everything they report to be best practices," Todd says. "They had every resource at their disposal. They didn't want to take it seriously."

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