

Zubulake v. UBS Warburg LLC (Zubulake I)  
Former employee (P) v. Former employer (D)  
217 F.R.D. 309 (S.D.N.Y. 2003).

**NATURE OF CASE:** Motion to compel discovery of electronic data at the producing party's expense.

**RULE OF LAW:** A company with potentially extensive relevant e-mail records should be ordered to produce those records at its own expense if they are relatively accessible and inexpensive to produce.

**FACTS:** Zubulake (P) filed suit against her former employer, UBS (D), for alleged gender discrimination and illegal retaliation under federal, state, and local law. Her case required access to UBS's (D) e-mail records, many of which existed only on archiving media that were not readily accessible; Zubulake's (P) production request sought all electronic documents about her. Early disputes over this request resulted in an agreement under which UBS (D) unconditionally agreed to produce all e-mails from the e-mail accounts of five UBS (D) employees identified by Zubulake (P). UBS (D) failed to produce any additional e-mails beyond the 100 pages of e-mails it had already produced before the agreement. In failing to produce more e-mails, though, UBS (D), citing excessive expense (estimated at \$300,000 and eventually \$175,000), did not search its electronic archives for more e-mails. Zubulake (P) objected to UBS's (D) failure to produce more e-mails because she had produced about 450 pages of her own e-mails from her time at UBS (D), and UBS (D) thus clearly had deleted, or tried to delete, several responsive e-mails involving Zubulake from its e-mail system. Given the company's heavy reliance on e-mail communications, UBS (D) regularly preserved its e-mails on backup tapes and optical disks. With the strong likelihood that many relevant electronic documents were actually available, Zubulake (P) filed a motion to compel production of UBS's e-mail records, with UBS (D) to bear the costs of producing its e-mail records.

**ISSUE:** Should a company with potentially extensive relevant e-mail records be ordered to produce those records at its own expense if they are relatively accessible and inexpensive to produce?

**HOLDING AND DECISION:** (Scheindlin, J.) Yes. A company with potentially extensive relevant e-mail records should be ordered to produce those records at its own expense if they are relatively accessible and inexpensive to produce. The Federal Rules create a rebuttable presumption that the producing party should bear the cost of production; if production requests place an undue burden or expense on the producing party, the Rules permit conditioning an order compelling production on the requesting party's payment of the costs of production. Under the influential analysis of *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002), deciding whether to shift discovery costs to the requesting party requires review of eight factors: (1) how specific the requests are, (2) the likelihood that the requests will succeed, (3) how available the requested information is from other sources, (4) why the

producing party keeps the requested information, (5) how the requested information benefits each party, (6) how much the production costs, (7) each party's ability and incentive to control costs of disclosing the information, (8) and each party's resources. In this case, UBS (D) clearly must make additional disclosures of its internal e-mails to Zubulake (P). Two categories of the company's e-mail records are both readily accessible and inexpensive to access: the active e-mail files and the e-mails saved on optical disks. UBS (D) thus will bear the expense of disclosing such files, as the Federal Rules typically require. The third category of UBS's (D) e-mail records, however, those on backup tapes, are not readily accessible and will be expensive to produce. Therefore, at its own expense, UBS (D) shall produce all relevant e-mails from its optical disks and active e-mail files; and UBS (D) shall produce, also at its own expense, all relevant e-mails from any five backup tapes of Zubulake's (P) choice, with the issue of cost-shifting for production of the backup tapes reserved for decision until UBS (D) knows its specific costs for that production. Motion to compel granted, with the cost-shifting issue reserved.

#### ANALYSIS

As so often happens in litigation, both sides “won,” to some extent, in *Zubulake*. Zubulake (P) prevailed on the substantive issues supporting the order compelling production of UBS's (D) e-mail records. UBS (D) also won an important victory here, though, with the trial judge reserving the cost-shifting analysis until the judge can assess the actual reasonable costs that UBS (D) incurs for producing the electronic documents. Although Zubulake (P) has an excellent chance of gaining “damages [that] may be substantial” from her suit, any damages she recovers will now also likely cost her a substantial amount to review UBS's (D) e-mail records.