

Labor & Employment Law

Employment Litigation in the ‘Everything Is Electronic’ World

By Nancy Richards-Stower and Debra Weiss Ford



Richards-Stower



Weiss Ford

This is the 25th Bar News “debate” over the last 20 years between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here, they discuss the impact of artificial intelligence on their advocacy, and *US v. Heppner*, in which the US District Court for the Southern District of New York ruled that a criminal defendant’s AI searches on a publicly available platform were not privileged under either attorney-client or work product privileges.

Nancy: First, it was electronically stored information (ESI) requiring thousands of dollars in time (and, for me, tech consultant costs). My clients have phones, tablets, and computers along with multiple service providers for texts, calls, emails, Facebook, Twitter (X), etc. It became so prohibitively expensive for me to even screen anything other than “slam

dunk” cases that I could never have had the decades of solo practice I’ve enjoyed, nor helped thousands of employees who were mostly “little gals/guys.”

Deb: It is tough on employers’ counsel, too. We’re doing all the same work for multiple people (and departments) in each case, and few of our clients’ employees have dedicated work devices, so we’re dealing with both work networks and personal accounts.

Nancy: Larger defense firms long ago staffed up with “techie,” and those costs can be built into your clients’ fees. For those of us doing civil rights employment law (discrimination, wrongful termination, whistleblower, wage claims, etc.), most of our terminated clients arrive with great injustices and zero ability to pay.

It reminds me of the “dark days” of 1996-2004, when I had to turn away all small-dollar cases because the fees awarded to me easily exceeded the damages awarded to my clients, and civil rights attorney fee awards became double-taxed for cases in which there was no physical injury in 1996; my fee awards were taxed to me and then taxed again to my client, until October 2004, when the civil rights tax relief laws untaxed attorney fees for the client.

Deb: I recall that the unintended consequences of that 1996 tax law got changed after the *New York Times* wrote about a Chicago police officer’s sexual harassment trial victory costing her a net loss of over \$100,000 because of taxes on her fees owed to the government. It was

impossible to settle small damage cases once the fees rose unless the employee’s lawyer simply gave up her fees.

Nancy: And now we have a “new age.” I think it is dark; techies think it is the brightest dawn imaginable. How can I screen a case for litigation worthiness whose value is mostly emotional distress? Before, it was easy to review an employee’s Facebook pages during the period of harm to make sure she hadn’t posted pictures of herself smiling, running down the beach the same week she claimed debilitating depression from a job loss.

Deb: What about us defense attorneys? Bad managers who harass often do so with texts and emails. Victims who received photos of some guy’s private parts often (understandably) deleted them immediately, so the readily available source would be the electronic history on the harasser’s phones – so it was employers providing the evidence to employees.

Nancy: And now, with AI, we advocates have to worry about our clients’ use of AI before they contact us, adding to the exploding spectrum of our due diligence. After clients contact us, we can provide protocols to halt all use on public AI platforms, but come on – it will be so tempting for clients to “Google” during the years it takes to get to trial, and now there’s ChatGPT, Claude, and Perplexity. Plus, AI has been developed mostly by men, so watch for that prejudice to unfold.

Deb: The courts are weighing in, ruling in *US v. Heppner* that a criminal defendant’s AI searches (before hiring his

attorney) were not privileged.

Nancy: Which is stupid! In the past, a client’s communications in anticipation of hiring counsel, to help that future counsel, were deemed privileged attorney work product.

Deb: *Heppner* means that public AI sites which lack privacy “locks” are fair game.

Nancy: I am exhausted just trying to draft a notice to potential clients about this new aspect of confidentiality; and, candidly, my guess is that with AI so readily available, many clients will come to their lawyers with big baggage. Of course, after being retained, the client can be invited into the lawyer’s private, paid-for AI platform, which has pressed all the “you cannot share this to teach your stupid system” buttons.

Deb: The capturing of electronic histories from phones and devices in employment discrimination litigation – where proving intent is usually key – gave us ESI protocols. Now, we must add AI searches to the list.

Nancy: Over the last 50 years, litigating small-dollar cases coming with fee-shifting statutory protections allowed me to help many thousands of employees find some justice in the workplace. The electronic explosion requires huge investments of time and treasure to even understand the landscape. Gone are the days when knowledge of the law, human behavior, and trial advocacy skills were

DEBATE *continued on page 31*

■ DEBATE *from page 26*

enough for successful employee rights practice. There may not be enough time left in my life, let alone before I retire, to become competent in AI, but I’m trying.

Deb: We lawyers do promise com-

petence. The New Hampshire Rules of Professional Conduct require it. Solos and small firms able to get a handle on electronic law office technology in intake, webpage, email, document portal, and AI combinations will be on a more equal footing with larger defense firms.

Nancy: I guess those who’ve grown

up with it will navigate it, but I started out with a manual typewriter in high school. ♦

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