

ELECTRONIC DISCOVERY AND THE DUTY TO PRESERVE ELECTRONIC DATA

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INTRODUCTION

- THE ELECTRONIC WORKPLACE
- VOLUME OF ELECTRONIC DATA
- CREW 2008 REPORT
 - Record Chaos: The Deplorable State of Electronic Record Keeping in the Federal Government
- HUGE VERDICTS

What Is Data?

Electronic discovery refers to the discovery of electronic documents and data. Electronic documents include e-mail, web pages, word processing files, computer databases, and virtually anything that is stored on a computer. Technically, documents and data are “electronic” if they exist in a medium that can only be read through the use of computers. Such media include cache memory, magnetic disks (such as computer hard drives or floppy disks), optical disks (such as DVDs or CDs), and magnetic tapes.

Is Data Different From Paper?

- *Public Citizen, Inc. v. Carlin*, 2 F.Supp.2d 1, 13 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999) ("Simply put, electronic communications are rarely identical to their paper counterparts; they are records unique and distinct from printed versions of the same record.")
- *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993)
- Fed. R. Civ. P. 34 (comment): "Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper."

How Can Electronic Data Be Used in EEOC Cases?

- Just Like Paper Documents
- Further Explanation Regarding Paper Documents
- Statistical Evidence
- Comparative Evidence

Requirement to Preserve Electronic Data

- By Regulation: 29 C.F.R. § 1602.14
- By Federal Rules of Civil Procedure: Rule 37
- By Other Statutes

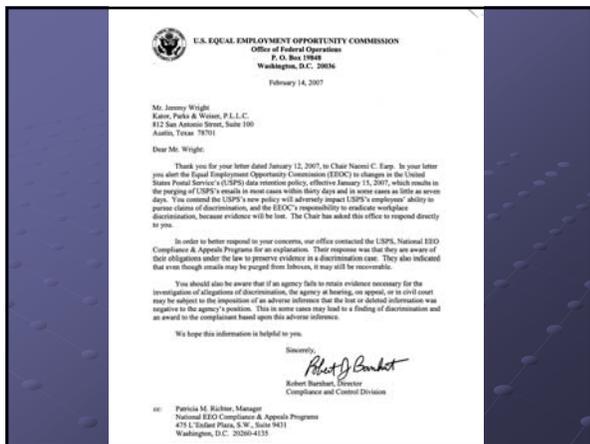
Spoliation

West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2nd Cir. 1999):

“The destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”

Excuses That Don't Work

1. Regular Data Retention Policy
2. Ignorance of Pending Complaint
3. Paper Versions Produced
4. Burden of Production



Consequences for Failing to Preserve Electronic Data

- **EEOC Regulation: 29 C.F.R. § 1614.109(f)(3)**

When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to an order of an administration judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances:

Consequences for Failing to Preserve Electronic Data

- (i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
- (ii) Consider the matter to which the requested information or testimony pertains to be established in favor of the opposing party;
- (iii) Exclude other evidence offered by the party failing to produce the requested information or witness;
- (iv) Issue a decision fully or partially in favor of the opposing party;
- (v) Take such other actions as appropriate.

Consequences for Failing to Preserve Electronic Data

- **EEOC Adverse Inference**
- Agency's Burden of Production
- Content of Missing Data
- Spoliation as Evidence of Pretext

EEOC Decisions

- *Stokes v. HHS*, EEOC No. 01933987 (1994): adverse inference where the agency failed to maintain rating or ranking sheets; “appellant satisfies his burden in establishing that the agency’s actions were based on his race and in violation of Title VII.”
- *Gennetten v. Navy*, EEOC No. 01973098 (1999): adverse inference should have been drawn against the agency for failure to maintain selection documents; EEOC finding of discrimination and order that complainant be retroactively placed in position.
- *Bayda v. DOJ*, EEOC No. 01955738 (1997): adverse inference where agency destroyed documents “as a matter of routine”; EEOC finding of discrimination

Other Penalties

- **Unlawful Destruction of Records**
 - *United States v Salazar*, 455 F.3d 1022 (9th Cir. 2006)
- **Obstruction of Justice**
 - *United States v. Lundwall*, 1 F.Supp.2d 249 (S.D.N.Y. 1998)
- **Sarbanes-Oxley Act of 2002**
- **Rules of Professional Conduct**

Zubulake v. UBS Warburg

Zubulake IV – 220 FRD 212 (S.D.N.Y. 2003)
Zubulake V – 229 FRD 422 (S.D.N.Y. 2004)

- **Duty to Preserve – When?**
- **Duty to Preserve – Who?**
- **Duty to Preserve – What?**
- **Counsel’s Failure**
- **Sanction**

What You Need To Do

1. "Litigation Hold" on Electronic Data
2. Contact All "Key Players"
3. Collection of Electronic Data from All Sources
4. "Mirror Image" of Computer System?
5. Take Duty to Preserve Seriously!

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