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"DELETING" EVIDENCE – WHAT A JURY MUST THINK

ADVERSE INFERENCE FROM DELETED EVIDENCE

Litigation happens. When it does, and sometimes even before it does, you need to be aware that, unless you take steps to preserve discoverable or relevant evidence such as emails, memos or data banks, a jury might be instructed by the court to assume that the deleted evidence was harmful to your case. That's not a good thing as one employer found out last month.

EMPLOYEE PRODUCTIVITY DATA AUTOMATICALLY DELETED

In this case, an employer fired an employee because of poor productivity. Employee productivity records were normally kept for one year, and then they were automatically electronically overwritten by a computer program. The fired employee filed an EEOC charge and hired a lawyer who sent a demand letter and a notice to preserve the evidence. Eight months later, the automatic computer program deleted the productivity records - even before the lawsuit was eventually filed in court.

LEGAL DUTY TO PRESERVE EVIDENCE

A party that knows or should know that litigation is imminent has a duty to preserve evidence in its control. A court may instruct a jury to infer that the destroyed evidence was unfavorable when a party intentionally destroys that evidence in bad faith. The duty to preserve the evidence arises not when the lawsuit is filed but when a party should anticipate litigation. Once a party is on notice (as in this case) that specific relevant documents are scheduled to be destroyed according to a routine document retention policy and the party doesn't do anything to prevent the destruction, then it has crossed the line between mere negligence and bad faith. In this case, the employer's general counsel was aware of the preservation request and the imminent litigation yet did nothing to prevent the automatic destruction of the evidence. That failure is evidence of recklessness and bad faith. The court came down hard on the employer and gave the jury this devastating Adverse Inference Instruction:

"Plaintiff contends that Defendant at one time possessed data documenting Plaintiff's productivity and performance that was destroyed by Defendant. Defendant contends that the loss of the data was accidental. You may assume that such evidence would have been unfavorable to Defendant only if you find by a preponderance of the evidence that (1) Defendant intentionally or recklessly caused the evidence to be destroyed; and (2) Defendant caused the evidence to be destroyed in bad faith."

PRACTICAL TAKEAWAYS

We don't know how this case will turn out or even if it will go to the jury, but it does bring home the importance of anticipating coming litigation and taking prompt action to preserve all relevant and discoverable evidence. Here are some things to think about:

- The duty to preserve goes both ways. The plaintiff has a duty to preserve evidence, too. Think of the plaintiff's personal emails, Facebook postings, Tweets and diary entries.
- The filing of an EEOC charge comes with its own evidence preservation instruction and should always be treated as "anticipated litigation" giving rise to a duty to preserve evidence.
- An employee's mention that "I'm going to an attorney" could give rise to a duty to preserve evidence.
- Once you get a Notice to Preserve, sometimes called a "Litigation Hold" letter, don't delay in preserving the evidence.
- Expect to get a "Litigation Hold" letter from your own attorneys. It's required by ethics rules.
- Preserving electronic evidence can be complicated so you need to involve IT experts to get it done correctly.
- The duty also means that you need to periodically check to make sure that the original preservation instructions are being followed.

Reference: Pillay v. Millard Refrigerated Services, Inc., (N.D. Ill., No. 1:09-cv-05725, May 22, 2013)

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