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Middle District of Pennsylvania Rules Duty to Preserve Arose Five Years Earlier When EEOC Complaint Filed, But Refuses to Impose Sanctions for Spoliated ESI

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The United States District Court for the Middle District of Pennsylvania recently held that the defendant had a duty to preserve electronically stored information (ESI) more than five years before the plaintiff filed his complaint for age discrimination and retaliation in 2009. In *Culler v. Erick K. Shinseki, Secretary of the United States Veterans Affairs,* Civil Action No. 3:09-0305 (Aug. 26, 2011), citing *Zubalake v. USB Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2004), the court held that the filing of the plaintiff's first EEOC complaint in 2004, claiming that his position "downgrade" was the result of age discrimination, triggered the defendant's duty to preserve. Although there was evidence that a "verbal" directive to preserve ESI had been given, a written litigation hold was not issued until after the filing of the complaint in 2009. As a result, the defendant failed to preserve potentially relevant ESI, including plaintiff's computer, which was repurposed in 2007, resulting in the loss of all ESI on the computer. The *Culler* court, however, refused to impose sanctions against the defendant for the spoliated ESI because the plaintiff failed to establish that the defendant had acted intentionally or that the plaintiff had been prejudiced as a result.

> ***"At the time of the plaintiff's initial EEOC complaint, the defendant was undoubtedly aware that the plaintiff was protected by federal discrimination laws which require a party to complete the administrative process prior to filing federal litigation.***

On of the first issues that the *Culler* court addressed was the defendant's argument that, because no document requests had been served by the plaintiff, the court should not consider the sanctions motion. The court rejected this argument, noting that since the "inception" of the matter, plaintiff had raised the adequacy of defendant's preservation efforts and that the plaintiff specifically sought ESI through the defendant's initial disclosure obligations under Fed.R.Civ.P. 26(a)(1), which requires that parties make certain initial disclosures 'without awaiting a discovery request.'"

Next, the defendant argued that it did not have a duty to preserve ESI until the plaintiff filed his complaint in April 2009. The *Culler* court rejected this argument too, stating that "[t]he duty to preserve evidence begins when litigation is 'pending or reasonably foreseeable.'" According to the court, "when litigation is 'reasonably foreseeable' is a 'flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad [of] factual situations inherent in the spoliation inquiry.'" (Citing *Fujitsu Ltd v. Fed. Express Corp.* 247 F. 3d 423, 436 (2d Cir. 2001)). The *Culler* court reasoned that:

> At the time of the plaintiff's initial EEOC complaint, the defendant was undoubtedly

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> aware that the plaintiff was protected by federal discrimination laws which require a party to complete the administrative process prior to filing federal litigation. The filing of a formal EEOC complaint claiming age discrimination in employment, a form of litigation in itself, is certainly an indication that more formal federal litigation may follow.

Additionally, the court noted that "agency counsel exhibited an awareness of the potential for litigation" when the verbal directive was given to the plaintiff's supervisor to retain any emails and documents in her files that were relevant to the complaint.

"routine" cleaning of the computer when the plaintiff was transferred from the Wilkes-Barre VA Medical Center to the Maryland VA Medical Center in 2007.

On the question of prejudice, the court found that the plaintiff could have reviewed his own emails while he was employed by the Wilke-Barre VA prior to his transfer and that he had the "opportunity to meaningfully review" them.

Last, the court pointed out that the plaintiff had not presented any "'plausible, concrete suggestions' as to what the missing emails would have contained." According to the court, the plaintiff must establish that the lost emails "would have made his claim for retaliation more probably than not." The court reasoned that the plaintiff could provide testimony and call witnesses regarding information that he believed would have been contained in the emails.

For these reasons, the *Culler* court found that neither an adverse inference nor the imposition of costs and fees were warranted in the case, and denied the plaintiff's motion.

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"….agency counsel exhibited an awareness of the potential for litigation when the verbal directive was issued to the plaintiff's supervisor to retain any emails and documents in her files that were relevant to the complaint."

The court stated that once the duty to preserve arises, a litigant must "'suspend its routine document and retention/destruction policy and put into place a litigation hold' to preserve relevant ESI…." After the litigation hold is in place, then "counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce relevant documents." Further, the litigation hold must continue until "the final resolution of the relevant claims."

With regard to the issuance of sanctions, citing *Schmid v. Milwaukee Elec. Tool Corp*., 13 F.3d 76 (3rd Cir. 1994), the *Culler* court noted that it was required to choose the "the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim." Placing the burden on the plaintiff, the court found there was no evidence that the defendant intentionally destroyed evidence, but rather that the loss of the email on plaintiff's computer was the result of the defendant's

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