

## E-Discovery: Preservation Of ESI Is Still Paramount Under New Rule 37(e)

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Magistrate Judge Paul M. Warner recently decided that sanctions, including attorney's fees and costs, were appropriate as a result of evidence of a defendant's failure to preserve relevant *electronically stored information* ("ESI") after receiving a preservation letter from the plaintiff in a wrongful death action.

At issue in ***McQueen v. Aramark Corp.***, 2016 U.S. Dist. LEXIS 43958 (D. Utah, Nov. 29, 2016) was the discovery of certain work orders which the defendant's employee had testified existed. Following this testimony, and in response to a request for the production of the work orders from the plaintiff, the defendant stated that the work orders did not exist and submitted a declaration from its employee that he had been mistaken in his deposition. The plaintiff then filed a motion to compel, citing the defendant's employee's deposition testimony and other evidence demonstrating the likely existence of the work orders. The Court requested a "detailed explanation" from the defendant regarding the steps it had taken to preserve evidence after receipt of the plaintiff's pre-suit preservation letter, as well as the discrepancy between the other evidence submitted by the plaintiff and the defendant's statement that the work orders at issue "do not exist and have never existed." In response, the defendant conceded that ESI and other physical documents had been destroyed because it failed to relay necessary preservation instructions to the appropriate individuals.

Judge Warner analyzed whether spoliation sanctions were appropriate under the amended Federal Rule of Civil Procedure 37(e). While the defendant argued that the work orders were not relevant to the litigation, the Court found it was unable to determine relevance because the defendant had not taken reasonable steps to preserve the ESI and physical documents at issue and no appropriate substitute existed to replace the ESI and physical documents. The Court concluded that while the defendant acted with gross negligence, it did not act with the intent to deprive the plaintiff of the information's use in the litigation. The Court refused to grant the plaintiff's request that the jury be specifically instructed regarding a presumption or inference regarding the destruction of those materials. Instead, the Court ordered that the parties be permitted to present evidence to the jury regarding the spoliation of the work orders and ESI and to argue any inferences they wanted the jury to draw. The Court also awarded the plaintiff attorney's fees for bringing and arguing its Motion to Compel.

This case once again underscores the importance of notifying the appropriate individuals of pending

or threatened litigation as soon as possible, as well as documenting all of the preservation efforts taken. It may very well be that the defendant in this case could not have anticipated that the work orders at issue would become relevant to the case. However, if the plaintiff placed the defendant on notice of litigation, the defendant was under an immediate obligation to take reasonable steps to ensure that ESI and physical documents were preserved.

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