

Spoliation of Evidence

A party's duty to preserve evidence under its control is well established. In 1905, the North Carolina Supreme Court stated that "where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control . . . there is a presumption, or at least an inference that the evidence withheld, if forthcoming, would injure his case." *Yarborough v. Hughes*, 139 N.C. 199, 208-09, 51 S.E. 904, 907-08 (1905). In the last 100 years, the nature of documents has changed from carbon paper to e-mails, but the duty to preserve relevant evidence has remained unchanged. Also unchanged, is the court's legitimate concern with missing documents and its obligation to properly instruct the jury regarding missing documents. *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 527 S.E.2d 712 (2000), *review denied* 352 N.C. 357, 544 S.E.2d 563 (2000).

A jury instruction on spoliation of evidence is required when a party shows that: (1) the spoliator was on notice of the claim or potential claim at the time the evidence was lost or destroyed; and (2) the missing evidence was relevant to the non-spoliator's allegations. *McLain*, 137 N.C. App. at 186-87, 527 S.E.2d at 717-18. The law requires the trial court to instruct the jury on the law arising from the evidence presented. N.C. Gen. Stat. §1A-1, Rule 51; *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 182, 527 S.E.2d 712, 715 (2000); *Lusk v. Case*, 94 N.C. App. 215, 216, 379

S.E.2d 651, 652 (1989). When a party requests a specific instruction, correct in itself and supported by evidence, the trial court must give that instruction. *Calhoun v. Highway Com.*, 208 N.C. 424, 426, 181 S.E. 271, 272 (1935); *McLain*, 137 N.C. App. at 182, 527 S.E.2d at 715. Thus, if there is evidence that the spoliator was on notice of the claim or potential claim at the time the evidence was lost or destroyed and the missing evidence was relevant to the non-spoliator's allegations the failure to give the spoliation instruction is reversible error. See *McLain*, 137 N.C. App. at 186-87, 527 S.E.2d at 717-18.

The North Carolina Pattern Jury Instructions contain an instruction on a party's destruction of evidence. See N.C.P.I. Civil 101.39 Evidence -- Spoliation by a Party. The instruction states:

Evidence has been received which tends to show that **(describe despoiled evidence)** was in the exclusive possession of **(name party)** and has been **[lost]** **[misplaced]** **[suppressed]** **[destroyed]** **[corrupted]** even though **(name party)** was aware of **(name other party's)** **[claim]** **[defense]**. From this you may infer, though you are not compelled to do so, that **(describe despoiled evidence)** would be damaging to **(name party)**. You may give this inference such force and effect as you think it should have under all of the facts and circumstances. (You are permitted this inference even though there is no

evidence (***name party***) acted intentionally, negligently or in bad faith.) (You should not make this inference if you find that [the (***describe despoiled evidence***) was equally accessible to both parties] [there is a fair, frank and satisfactory explanation of what happened to the (***describe despoiled evidence***).])

N.C.P.I. Civil 101.39 Evidence -- Spoliation by a Party.

This instruction is especially important to lawyers representing employees, because in employment cases the bulk of the evidence is in the control of the employer. In many employment cases the critical issue is what motivated the employer to take the adverse employment action. Evidence of the employer's true motivation may often only be found by a diligent review of the employer's documents, including e-mails. A review of a personnel file or a deposition of the decision maker will rarely reveal that the decision was made for an impermissible reason. As the court stated in *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994), "'employers are rarely so cooperative as to include a notation in the personnel file' that their actions are motivated by factors expressly forbidden by law. Because an employer who discriminates is unlikely to leave a 'smoking gun' attesting to a discriminatory intent, a victim of discrimination is seldom able to prove his claim by direct evidence, and is usually constrained to rely on circumstantial evidence." (quoting *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464 (2d Cir. 1989) (citations

omitted); See also *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988) ("[In] reality ... direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it. Employers of a mind to act contrary to law seldom note such a motive in their employee's personnel dossier."). The circumstantial evidence of discrimination may often be buried in a computer file in the form of e-mails, draft documents and internal memos. It is the duty of the attorney representing the wronged employee to ferret out that information. It is the duty of the employer and the employer's counsel to insure that the evidence is not destroyed and is maintained in a manner that it can be retrieved.

The *McLain* court clearly articulated that a party has an obligation to preserve potentially relevant evidence once it is aware of circumstances that will likely to give rise to future litigation, even if the litigation has not been initiated.

While notice of the importance of certain documents may ordinarily be derived from institution of suit, see *Yarborough*, 139 N.C. at 208, 51 S.E. at 907 ("complaint itself was sufficient notice to the defendants of the importance of these writings as evidence to them"), "the obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced," *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991), and the "spoliator [must] do . . . what is reasonable under the circumstances," *Hirsch v. General Motors Corp.*, 266 N.J. Super. 222, 628 A.2d 1108, 1122 (N.J. Super. Ct. Law Div. 1993)(citation omitted). For example, "when the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a factfinder may reasonably infer that the party probably did so because

the records would harm its case.”
McLain, 137 N.C. App. at 187-88, 527 S.E.2d at 718 (quoting
Blinzler v. Marriott International, Inc., 81 F.3d 1148, 1158-59
(1st Cir. 1996))(emphasis added).

We have held with some regularity that a trier of fact may (but need not) infer from a party's obliteration of a document relevant to a litigated issue that the contents of the document were unfavorable to that party. See, e.g., *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1158 (1st Cir. 1996); *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (1st Cir. 1988); *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 217-18 (1st Cir. 1982). This permissive negative inference springs from the commonsense notion that a party who destroys a document (or permits it to be destroyed) when facing litigation, knowing the document's relevancy to issues in the case, may well do so out of a sense that the document's contents hurt his position.

Testa v. Wal-Mart Stores, 144 F.3d 173, 177 (1st Cir. 1998).

McLain was a gender based hostile environment case tried in state court with claims for battery, negligent supervision, retention and hiring, intentional infliction of emotional distress based upon sexual harassment, and wrongful discharge in violation of public policy. Plaintiff was an assistant manager of a Taco Bell who wrote down in a loose leaf managers' log book descriptions of the sexual harassment she encountered and requested the

assistance of the district manager. Defendant employer did not conduct an investigation into the plaintiff's allegations of sexual harassment until after she was fired following an especially vulgar and brutal encounter with one of the male employees. During the investigation, but prior to litigation being initiated, most of plaintiff's entries into the log book disappeared. The *McLain* court held that the obligation to preserve relevant evidence began on the first day that plaintiff's complaint of sexual harassment and retaliation was investigated by management, not as defendants argued on the day a lawsuit was filed. *McLain*, 137 N.C. App. at 187, 527 S.E.2d at 718. The court of appeals found the trial court's failure to give an adverse inference instruction regarding the missing evidence reversible error and remand the case for a new trial. *McLain*, 137 N.C. App. at 180, 527 S.E.2d at 714. The pattern jury instruction on spoliation is derived from *McLain*.

In another gender discrimination case, *Zubulake v. UBS Warburg, LLC*, plaintiff engaged in a lengthy discovery battle to obtain e-mails and other documents related to her performance. The *Zubulake* court issued five separate discovery orders (*Zubulake I-V*). The court concluded that once defendant was on notice to reasonably anticipate litigation, it was obligated to preserve relevant documents, including electronic documents. "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents."

Zubulake v. UBS Warburg, LLC, 2004 U.S. Dist. LEXIS 13574, *30-31 (S.D.N.Y July 24, 2004).

The *Zubulake* court holding reflects the 100 year old common law obligation of parties in North Carolina to preserve relevant evidence. *Yarborough v. Hughes*, 139 N.C. 199, 51 S.E. 904 (1905); *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 527 S.E.2d 712 (2000). The *Zubulake* court articulated the clear duty of parties and their counsel to insure the preservation of documents in this electronic age.

First, counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.

Second, counsel should communicate directly with the "key players" in the litigation, *i.e.*, the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these "key players" are the "employees likely to have relevant information," *Zubulake IV*, 220 F.R.D. at 218, it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place.

Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place. . . . Regardless of what particular arrangement counsel chooses to employ, the point is to separate relevant backup tapes from others. One of the primary reasons that electronic data is lost is ineffective

communication with information technology personnel. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled.

Zubulake v. UBS Warburg at *39-41.

Zubulake was a relatively routine employment discrimination dispute in which discovery dragged out over two years. In the fifth discovery hearing, plaintiff again moved to sanction UBS for its failure to produce relevant information and for its tardy production of other material. The court framed the issue as: "In order to decide whether sanctions are warranted, the following question must be answered: Did UBS fail to preserve and timely produce relevant information and, if so, did it act negligently, recklessly, or willfully?" *Zubulake v. UBS Warburg* at *2. The *Zubulake* decision addressed defense counsel's obligation to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information and a client's obligation to heed those instructions. Early in the *Zubulake* litigation, the employer's in-house and outside counsel instructed UBS personnel to retain relevant electronic information. Notwithstanding these instructions, certain employees deleted relevant e-mails. Other employees never produced relevant information to counsel. As a result, many discoverable e-mails were not produced because a number of e-mails responsive to

document requests were deleted and lost altogether, or were produced almost two years after the initial request was propounded.

The *Zubulake* court made detailed specific factual findings and determined that the employer's counsel failed to request retained information from one key employee and to give the litigation hold instructions to another. Counsel also failed to adequately communicate with another employee about how she maintained her computer files. Counsel also failed to safeguard backup tapes that might have contained some of the deleted e-mails, and which would have mitigated the damage done by UBS's destruction of those e-mails. The court then concluded that because "of this failure by *both* UBS and its counsel, *Zubulake* has been prejudiced. As a result, sanctions are warranted." *Zubulake v. UBS Warburg* at *4.

The *Zubulake* court recognized that a major consideration in choosing an appropriate sanction was to restore plaintiff to the position that she would have been in had defendant employer faithfully discharged its discovery obligations. The *Zubulake* court then imposed the sanction of an adverse inference instruction based on the deleted e-mails. See N.C.P.I. Civil 101.39 Evidence -- Spoliation by a Party as an example of an adverse inference instruction. The court then held that because of the delayed production of other e-mails and documents that defendant employer was to pay the costs of any depositions or re-depositions required by the late production. *Zubulake v. UBS Warburg* at *51-54.

McLain, Blinzler, and Zubulake teach that once a party

reasonably anticipates litigation it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.

If evidence of missing relevant documents is presented to the jury, the trial court is required to instruct the jury on the law regarding spoliation. N.C. Gen. Stat. §1A-1, Rule 51; *McLain*, 137 N.C. App. at 182, 527 S.E.2d at 715. It is then for the jury, as the trier of fact, to either infer that the contents of the missing documents were unfavorable to defendant, or based on the explanation provided by defendant, decline to draw such an inference.

Zubulake also teaches the need for plaintiff's attorneys to be diligent in pursuing reasonable discovery requests. It took five discovery hearings before the court imposed the sanction of an adverse inference instruction regarding the missing evidence. It will take well grounded arguments before a court is likely to require defendants to undergo the expense of searching multiple computers and back-up tapes for dated documents and e-mails. These cases also teach the benefit of obtaining from the court early in litigation orders regarding the preservation of computer documents and back-up tapes.

In a non-employment tobacco litigation case, the federal district court entered an initial order titled *Order # 1, First Case Management Order for Initial Scheduling Conference*, which required the preservation of "all documents and other records

containing information which could be potentially relevant to the subject matter of this litigation." *US v. Phillip Morris*, 2004 U.S. Dist. LEXIS 13580 *4 (D.C.D.C. July 21, 2004). The court subsequently determined that "employees at the highest corporate level in Philip Morris, with significant responsibilities pertaining to issues in this lawsuit, failed to follow Order # 1, the document retention policies of their own employer, and, in particular, the "print and retain" policy which, if followed, would have ensured the preservation of those emails which have been irretrievably lost." *US v. Phillip Morris* at *8. "Phillip Morris specifically identified at least eleven employees who failed to follow the appropriate procedures, and that those eleven employees hold some of the highest, most responsible positions in the company. These individuals include officers and supervisors who worked on scientific, marketing, corporate, and public affairs issues that are of central relevance to this lawsuit. Specifically, they include, among others, the Director of Corporate Responsibility, the Senior Principal Scientist in Research Development and Engineering, and the Senior Vice President of Corporate Affairs." *US v. Phillip Morris* at *5-6. Ruling on the government's Motion for Evidentiary and Monetary Sanctions Against Philip Morris Due to Spoliation of Evidence, the court imposed monetary sanctions of \$2,750,000.00 and precluded Phillip Morris from calling as fact or expert witnesses at trial any of the eleven individual who failed to comply with the document retention

program. *US v. Phillip Morris* at *12-13.

In summary, the law requires the jury instruction on spoliation when there is sufficient evidence to show that the missing evidence was relevant to plaintiff's allegations. *McLain*, 137 N.C. App. at 186-87, 527 S.E.2d at 717-18. The law requires that when a party, including an employer, is on reasonable notice of a claim it has an obligation to preserve potentially relevant evidence. *Yarborough v. Hughes*, 139 N.C. 199, 51 S.E. 904 (1905); *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 527 S.E.2d 712 (2000), *review denied* 352 N.C. 357, 544 S.E.2d 563 (2000). It is the employee's attorney's duty to identify where potentially relevant evidence is stored and to seek appropriate orders and discovery to preserve and obtain the evidence.