

# Spoliation and the Dangers of Failing to Preserve Evidence

## Labor & Employment Law Update

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In a case pending in the U.S. District Court for the Southern District of Florida, *Equal Employment Opportunity Commission v. GMRI Inc.*, the EEOC recently argued that a restaurant chain acted in bad faith, and should be sanctioned for “spoliation” of evidence because, the EEOC claimed, it intentionally destroyed hiring data. It argued the destruction of evidence “prejudice[d] EEOC by opening the door for GMRI to attack EEOC’s statistical and anecdotal evidence, and to rely upon otherwise impermissible [defendant] favorable proxy data.”

Among the allegedly destroyed evidence are emails the EEOC claimed would have established the fact that the managers for the defendant were instructed to hire “young.” In addition, the defendants are said to have intentionally shredded paper applications and interview booklets used for new restaurant openings that would have supported the EEOC’s allegations that the company had a pattern or practice of failing to hire applications over the age of 40. In response, GMRI argued that the EEOC is looking at sanctions because it has failed to find any evidence of age discrimination.

In a different case that has been pending in Colorado since 2010, the EEOC secured sanctions against an employer for its failure to produce records it claimed had been destroyed. In *Equal Employment Opportunity Commission v. JBS USA LLC*, the EEOC claimed that a meat-processing company failed to reasonably accommodate Muslim workers’ requests for prayer breaks. JBS asserted an undue burden affirmative defense throughout the case, arguing production line slowdowns and downtime would have been caused by allowing prayer breaks to Muslim employees. The EEOC sought discovery from JBS about its undue burden affirmative defense, specifically, all reports or data showing all dates and times the fabrication lines on any and all shifts were stopped, as well as the speed of the lines.

After years of maintaining these records were destroyed, JBS produced a number of reports it found in a warehouse; however, more records presumably stored in boxes at the warehouse could not be located. The Court sanctioned JBS for the loss or destruction of documents directly relevant to JBS’s allegations of undue hardship. The critical problem for JBS, as the Court noted, was the fact that JBS management knew “within a year” after downtime records were created that

they were relevant to the EEOC investigation, yet still failed to set them aside for use in the litigation.

**What is the lesson to be learned?**

*EEOC v. GMRI Inc.*, teaches that the EEOC may claim spoliation and pursue sanctions against a defendant, even (or perhaps particularly) where the evidence does not readily support the EEOC's allegations of discrimination. *EEOC v. JBS USA, LLC* provides an important lesson for businesses regarding the preservation of documents in ongoing litigation. As noted above, the critical problem for JBS was that JBS management knew downtime records were relevant yet still failed to preserve them.

Both cases illustrate the importance of immediately implementing *Litigation Holds*. Employers must, as a matter of course, establish appropriate procedures and work with staff, IT professionals, and legal counsel to ensure all relevant evidence is preserved. Failure to preserve evidence may deprive defendant of an otherwise viable defense.

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