

1. A ruling from the Northern District of Indiana granting the defendants' motion for sanctions against the plaintiff for failure to preserve data from his Snapchat account, imposing monetary sanctions and permitting the admission of evidence regarding the relevance of the deleted data.

In *Doe v. Purdue Univ.*, 2021 WL 2767405 (N.D. Ind. July 2, 2021), Magistrate Judge Joshua P. Kolar granted a motion for Rule 37 sanctions filed by defendants Purdue University, Purdue University Board of Trustees, and several named individuals (Purdue) for Plaintiff's failure to preserve data from his Snapchat account but imposed relief different from that requested by Purdue and denied sanctions for spoliation of evidence. *Id.* at *10.

Purdue served an interrogatory requesting Plaintiff to identify his social media accounts and a request for production (RFP) seeking Plaintiff's social media postings from August 1, 2015, to the present. *Id.* at *1. In response, Plaintiff identified only accounts on Instagram and Facebook and otherwise objected to the RFP as seeking irrelevant data. *Id.* at *2.

In its second set of RFPs, Purdue requested all data from any Snapchat account owned or operated by Plaintiff, specifying his username and stating that this data was "the property of the Plaintiff, and may be obtained and downloaded in its entirety." Purdue additionally provided a link containing instructions for downloading various data from Snapchat. After Plaintiff filed a motion to compel, the parties entered into a joint stipulation that included an agreement that Plaintiff would provide the requested Snapchat and Instagram data. Magistrate Judge Kolar granted the relief requested in the joint stipulation.

Purdue later filed a motion for sanctions, alleging that Plaintiff failed to provide the Snapchat data as agreed in the joint stipulation and required by the court's order. Plaintiff filed a declaration in response, asserting that there were "limitations of what can be done as to Snapchat discovery" because Snapchat did not archive files or retain user information longer than 30 days. Plaintiff further stated that Snapchat did not retain user identity longer than 30 days or preserve user content and that all he could learn from Snapchat was the name or username of Plaintiff's current friends. Plaintiff represented that he used the link provided by Purdue and did his own research to see if the requested content could be downloaded from Snapchat, but the information in the link made it clear that only limited information was available. *Id.* at *3. Plaintiff additionally represented that the data he downloaded from Snapchat regarding his profile contained no images, videos, or chats and that the data available was primarily irrelevant metadata.

Purdue responded that Plaintiff had an obligation to produce the Snapchat data and waived relevancy objections with the joint stipulation by agreeing to produce a complete data download. Purdue then explained that Snapchat collected information such as Snap history, chat history, user profile, friends, account history, location history, and search history.

The court denied without prejudice Purdue's motion for sanctions but ordered Plaintiff to provide the Snapchat data consistent with the agreement noted in the joint stipulation. Purdue then filed the present motion for an order to show cause regarding Plaintiff's noncompliance with a court order and spoliation of evidence, asserting that Plaintiff deleted files subject to the joint stipulation and the court's order. The court held an evidentiary hearing and issued an order for supplemental briefing regarding what data the Snapchat app and website reflected was available for users to

download when these downloads took place. The order required the parties to jointly or separately file a report with exhibits describing the screen displays that existed as Plaintiff would have seen them when completing the download of Snapchat data.

After this briefing, Magistrate Judge Kolar found that Plaintiff could not credibly deny Purdue's representation that he deleted Snapchat data. *Id.* at *5. Further, Purdue showed that in response to the joint stipulation, Plaintiff produced a Snapchat download with broken links and downloads to 86 images and videos dated between 2016 and 2020. The download contained a warning noting that the download links would expire seven days from when the data file was made available and therefore had expired by the time the production took place. In response, Plaintiff produced an additional download of Snapchat data; however, this omitted 11 links to videos and images listed in the prior production. Purdue stated that Plaintiff admitted that he had deleted certain files from the memories folder within Snapchat on his phone.

Purdue argued that this deletion constituted spoliation warranting the imposition of sanctions, because Plaintiff had a duty to preserve the destroyed data, he willfully deleted the files in bad faith, and the only credible explanation for the conduct was to hide the 11 images and videos from Purdue. *Id.* at *6. Purdue argued that inappropriate conduct preserved on social media would undermine Plaintiff's claim that his actions caused harm to Plaintiff's honor and damage to his reputation. Plaintiff sent Purdue a document providing an explanation for his conduct, explaining that he was initially unaware of the seven-day time limit for downloading and viewing files saved in the memories folder and that, when he deleted the files at issue, he was unaware that they would be deleted from his Snapchat account and from Snapchat servers entirely. Plaintiff reiterated his understanding at the time of his initial production that the downloaded data primarily contained metadata and that the 11 files were "not material to this case." Refuting an accusation of wrongdoing, Plaintiff argued he did not admit intentionally destroying any evidence. Plaintiff also disputed the claim that Plaintiff had 86 downloaded Snapchat videos and photos in his possession, reiterating the claim that the first download contained only metadata and nonworking links. *Id.* at *7.

Magistrate Judge Kolar provided a summary of his findings of fact before examining the spoliation claim by Purdue. He stated that in evaluating a spoliation claim, the court must determine (1) whether there was a duty to preserve the destroyed evidence, (2) whether this duty was breached, and (3) whether the destruction of evidence was done in bad faith. Bad faith in the context of spoliation meant that evidence was destroyed for the purpose of hiding adverse information.

Magistrate Judge Kolar held that the duty to preserve the relevant Snapchat data arose at the latest when Purdue sought this data in its RFPs, at which point Plaintiff had an affirmative duty to preserve his Snapchat data from August 2015 to the present. Magistrate Judge Kolar added that at least one court order separately obligated Plaintiff to preserve the Snapchat data. This included an order from 2017 ordering parties to "take reasonable steps to preserve ESI that is relevant to any claim or defense in this case ... relat[ing] back to the point in time when the party or attorney reasonably anticipated litigation about these matters." *Id.* at *8.

Magistrate Judge Kolar noted in reference to Plaintiff's claims that the data was not relevant that "he is not the one who decides what is relevant." Further, Magistrate Judge Kolar explained that the fact that Snapchat content was created after the events leading to this lawsuit did not render it

irrelevant and that “a social media post need not directly reference or discuss a lawsuit for it to be relevant to the claims at issue.” Noting that the second amended complaint included allegations that Plaintiff’s “dream and hope to serve his country as a Naval officer ha[d] been destroyed” and sought damages for loss of future career prospects, Magistrate Judge Kolar found it “entirely conceivable” that the Snapchat files could be relevant. *Id.* at *9.

Further, Magistrate Judge Kolar determined that even if the deletion of Snapchat files did not violate the 2017 order to preserve ESI, the order to preserve these files was explicitly laid out in the order for Plaintiff to produce the Snapchat data per the agreement in the joint stipulation. Magistrate Judge Kolar added that the language in the joint stipulation provided “no interpretation ... that would allow [Plaintiff] to send merely what he chose from his Snapchat account while deleting other files off the Snapchat application on his phone.” *Id.*

Magistrate Judge Kolar then examined whether Plaintiff breached his duty to preserve Snapchat data, stating that the “determination on this point is simple.” Magistrate Judge Kolar stated that Plaintiff conceded deleting the files from Snapchat, provided an exhibit showing he had saved files to the memories folder and was provided with a link from Purdue stating that content from the memories folder could be downloaded from Snapchat’s servers. It was therefore “hard to see how Plaintiff would think he only had metadata available via Snapchat.” Additionally, Plaintiff represented that he conducted research on what information could be obtained from Snapchat, and even a superficial internet search would show that Snapchat would erase files from its servers quickly if a user deleted content from the memories folder in his or her phone application. Magistrate Judge Kolar found that even without knowledge of the effect of deletion on the availability of data from Snapchat’s servers, Plaintiff “undertook no effort to ensure that the files would be preserved elsewhere before he deleted them from his Memories folder” and “plainly breached his duty to preserve the 11 images and videos.” *Id.*

Magistrate Judge Kolar then examined whether the breach was done in bad faith for the purpose of hiding adverse information. To determine whether evidence was destroyed for the purpose of hiding adverse information, a court must “(a) assess the actual evidence, which one typically cannot do because the evidence no longer exists, or (b) infer bad intent based upon when the destruction occurred in relation to the destroyer’s knowledge that the evidence was relevant to potential litigation.” *Id.* at *10. Even if the destroyer knew the evidence was needed for litigation, the court must look to the “totality of the circumstances” of the destruction, and a party can refute bad faith by providing a credible explanation for the destruction. As neither the court nor Purdue had seen the images and videos in question, Magistrate Judge Kolar stated that he was unable to assess the actual evidence for this determination. Further, he found the second option difficult to evaluate, as Purdue could not provide any argument to refute Plaintiff’s assertion that the images and videos were not relevant to the litigation. Magistrate Judge Kolar found that Purdue’s argument that there was no credible defense for the deletion other than bad faith was impeded by Plaintiff’s destruction of the files and that Plaintiff’s argument that he deleted the files to free up storage on his device was believable. Magistrate Judge Kolar therefore was unable to find that Plaintiff deleted the files for the purpose of hiding adverse information and held that Purdue’s spoliation claim therefore failed.

Magistrate Judge Kolar then looked to the court’s inherent power to impose sanctions for misconduct under Rule 37. He discussed the Rule 37 powers of a court in response to a party that

fails to obey an order to provide or permit discovery, including payment of expenses, as well as the rules for imposing sanctions specifically for the failure to preserve ESI. *Id.* at *11. Under Rule 37(e)(1), after the loss of ESI causing prejudice to another party, courts may order measures no greater than necessary to cure the prejudice if the ESI should have been preserved in anticipation or conduct of litigation but it was lost because a party failed to take steps to preserve it, and the ESI cannot be restored or replaced through additional discovery. Under the advisory committee's note to the 2015 amendment, Rule 37(e)(1) leaves judges with discretion as to how to best assess prejudice. Magistrate Judge Kolar stated that prejudice under Rule 37(e) meant that a party's ability to obtain the evidence necessary for its case has been thwarted or that a party has been forced to unnecessarily litigate e-discovery issues when ESI is spoliated.

Magistrate Judge Kolar further stated that Rule 37(e)(1) encompassed more than financial prejudice, such as the prejudice resulting from costs incurred due to unnecessary litigation, but also substantive or merits-based prejudice. *Id.* at *12. Magistrate Judge Kolar stated that substantive or merits-based prejudice results from harm to the merits of the moving party's case, the extent of which can be determined by looking to whether the content of the missing ESI was produced in other documents or whether the moving party obtained similarly relevant information from other sources. Magistrate Judge Kolar stated that district courts have wide latitude in fashioning appropriate sanctions for violations of discovery orders, but the sanctions must be proportionate to the circumstances surrounding the failure to comply with discovery, and courts must look at the procedural history as a whole. He stated that the failure to comply with a discovery order need not be due to willfulness, bad faith, or fault to impose sanctions except when dismissal or default is imposed.

Reiterating much of his prior analysis, Magistrate Judge Kolar held that Plaintiff's deletion of Snapchat data was sanctionable under Rule 37. He stated that Plaintiff had a duty to preserve the deleted files because they were sought in formal discovery requests, pursuant to at least one court order, and pursuant to the joint stipulation with Purdue. Despite this, Plaintiff refused to provide the data due to his own finding of irrelevance, prompting the order requiring Plaintiff to comply with his previous agreement to produce the data. Because the deletion took place after the agreement between the parties to produce the data, Magistrate Judge Kolar found the conduct sanctionable.

Magistrate Judge Kolar determined that Plaintiff's failure to comply with the court's orders was at least the result of negligence, which is sufficient under Rule 37 for imposing sanctions. *Id.* at *13. Magistrate Judge Kolar suggested the conduct may indicate bad faith as well, noting that in the context of failure to obey a court's discovery order, bad faith could constitute either intentional or reckless disregard of the party's obligations to comply with a court order. Magistrate Judge Kolar pointed to Plaintiff's lack of consideration toward the impact of deleting Snapchat data and reliance "on a number of self-serving assumptions about Snapchat's ability to preserve data, many of which turned out to be wholly inaccurate." Magistrate Judge Kolar stated that Plaintiff was not only wrong about the data available from Snapchat, but Plaintiff affirmatively knew that he had access to other files in the memories folder. Based on Plaintiff's testimony and the fact that saving data to the memories folder requires users to take affirmative steps, Plaintiff clearly took knowing, purposeful action to save the files to his memories folder. Further, Purdue provided a link in their second set of RFPs that explicitly clarified that data contained in a user's memories folder was available for download. *Id.* at *14.

Magistrate Judge Kolar stated that once Purdue served its second set of RFPs, Plaintiff and his counsel had the necessary information to understand that they could download more than mere metadata from Snapchat servers. Further, Plaintiff knew or should have known that his claim that Snapchat archives no content files was false, having been saving content to the memories folder for years. Magistrate Judge Kolar did not accept Plaintiff's explanation for his affirmative misrepresentations that he did not think in depth about whether a data download from Snapchat's servers would include content saved to the memories folder, calling this illogical and contradictory to Plaintiff's other testimony. He also did not accept Plaintiff's claim that he could not recall when he deleted the data. Magistrate Judge Kolar pointed to Plaintiff's understanding that he was obligated by a court order to produce his Snapchat data. Magistrate Judge Kolar held that Plaintiff's conduct showed intentional or reckless disregard of his obligations and was therefore done in bad faith for purposes of Rule 37.

Magistrate Judge Kolar stated that Plaintiff's intentional deletion of the 11 files constituted a failure to take steps to preserve data that should have been preserved and could not be restored or replaced through additional discovery. *Id.* at *15. Further, the deletion "undoubtedly" prejudiced Purdue, as it caused "wholly unnecessary litigation to resolve this dispute" and may have contained evidence relevant to Plaintiff's claims for damages based on loss of career opportunities. Magistrate Judge Kolar stated that even when viewed in the best possible light, sanctions would be "eminently appropriate."

Magistrate Judge Kolar then examined the issue of the appropriate sanctions to impose. Purdue asked the court to order Plaintiff to show cause as to why Count I of the amended complaint alleging a claim under the 14th Amendment to the U.S. Constitution and under 42 U.S.C. § 1983 for denial of due process should not be stricken and why Plaintiff should not be held in contempt of the court's order. Magistrate Judge Kolar denied this relief. He found striking Count I disproportionate to Plaintiff's deletion of the files, considering the lack of anything in the record indicating whether the files were in fact adverse to Plaintiff's case. Further, Magistrate Judge Kolar found that he needed no further explanation from Plaintiff as to whether he failed to abide by court orders. Instead, Magistrate Judge Kolar imposed monetary sanctions, allowed for the introduction of limited evidence and a jury instruction related to the deletion of Snapchat data, and awarded attorneys' fees and costs for all litigation in connection with litigating the deletion of files from Snapchat. Magistrate Judge Kolar stated that the limited evidence related to the deletion would have to be as to the relevance of the data, for example as to Plaintiff's claim that Purdue's actions precluded a future career in the Navy. Magistrate Judge Kolar added that an adverse inference instruction was not warranted.

Magistrate Judge Kolar did not rule on jury instructions in this opinion but provided guidance as to how the parties could draft them. *Id.* at *16.