

3. A decision from the U.S. District Court for the Northern District of Illinois imposing curative measures in the form of findings of fact that would be read to the jury detailing the circumstances of the defendant's spoliation of video recording evidence and the potential inferences the jury could draw from those circumstances.

In *Hollis v. CEVA Logistics U.S., Inc.*, No. 19 CV 50135, --- F. Supp. 3d ---- (N.D. Ill. May 19, 2022), U.S. District Judge Iain D. Johnston imposed curative measures in the form of findings of fact that would be read to the jury detailing the circumstances of Defendant's spoliation of video recording evidence and the potential inferences the jury could draw from those circumstances.

This wrongful termination case resulted from an alleged physical altercation at Defendant's warehouse that resulted in Plaintiff's termination. *Id.* at *1. Defendant fired Plaintiff based on descriptions of the alleged altercation from three white witnesses that Plaintiff assaulted another employee, while African American witnesses gave different descriptions of the alleged altercation and stated that Plaintiff did not assault the other employee. The evidence reflected that three video cameras were aimed at the area where the altercation took place and that Plaintiff had requested orally and in writing that the Defendant view the video footage. *Id.* at *2. Plaintiff filed a letter of complaint with Defendant, followed by a charge of discrimination with the Equal Employment Opportunity Commission, and, later, filed this litigation.

During discovery, Plaintiff served discovery requests seeking the video recordings and the identity of the custodian of the video. Defendant responded to this discovery by stating that no video existed and that the custodian of the video recordings was Unisight, a third-party vendor. But in a deposition, a representative of Unisight testified that it was never the custodian of footage from Defendant's plant, that Unisight merely sold the recording equipment, and that Defendant owned and operated the system and recordings. Recordings on Defendant's security camera equipment are normally retained between 30 and 90 days. In addition, the evidence reflected that Plaintiff's supervisor had pulled and reviewed video footage related to a different incident before Plaintiff's termination.

Judge Johnston began his analysis with a review of Federal Rule of Civil Procedure 37(e), which "provides the sole source to address the loss of relevant ESI that was required to be preserved but was not because reasonable steps were not taken, resulting in prejudice to the opposing party." He explained that Rule 37(e) has five threshold requirements: (1) the information must be ESI; (2) there must have been anticipated or actual litigation that triggers the duty to preserve ESI; (3) the relevant ESI should have been preserved at the time of the litigation was anticipated or ongoing; (4) the ESI must have been lost because a party failed to take reasonable steps to preserve it; and (5) the

lost ESI cannot be restored or replaced through additional discovery. *Id.* (citing Fed. R. Civ. P. 37(e)). Judge Johnston noted that if any of these requirements are not met, then curative measures and sanctions are unavailable under Rule 37(e), but if they are all met then the court must determine whether the party seeking the ESI has suffered prejudice or whether the party with possession, custody, or control of the ESI intended to deprive the seeking party of the ESI. If prejudice but not intent exists, the court may impose curative measures, including but not limited to an instruction that jurors may consider the circumstances surrounding the loss of the ESI. If intent exists, the court can impose sanctions, including presuming that the information was unfavorable, instructing the jury to presume the information was unfavorable, or entering dismissal or default.

Judge Johnston reviewed each of the five threshold requirements under Rule 7(e), starting with whether the information was ESI. Defendant argued that there was no evidence that video of the incident ever existed and that a party has no obligation to produce information that does not exist. *Id.* at *3. However, Judge Johnston rejected Defendant's argument that the burden of proof fell on Plaintiff to prove that the video existed. While he acknowledged that some case law supported the contention that the party seeking relief bears the burden of establishing that video footage existed, he was not convinced that the burden to establish that ESI ever existed falls on the movant. He noted that "[b]urdens of proof generally fall on the party with better access to the information." Judge Johnston found that Defendant knew Plaintiff had requested a review of the video recordings, but there was no evidence of any effort to determine whether the video recording existed. He also found that, once alerted, determining whether video of the incident was recorded fell within the sole control of Defendant.

But Judge Johnston found that even if the burden were to fall on Plaintiff, he had met that burden by adducing evidence that the security camera system was working in the weeks before the alleged incident and that a supervisor knew how to access the recordings and obtained and reviewed video recordings as part of his investigation of an unrelated incident. *Id.* at *4. Judge Johnston also noted the absence of any evidence that Defendant's cameras were not operating or were prevented from recording the event. Based on this record, Judge Johnston found that video of the alleged incident was recorded and therefore was ESI.

Judge Johnston next turned to the question of whether there was a duty to preserve the ESI, which he noted is based on common law and is triggered when litigation is commenced or reasonably anticipated. Whether a duty to preserve has arisen is an objective inquiry, viewed from the perspective of the defendant at the time. Judge Johnston found that Defendant's knowledge of the incident on its premises, its termination of Plaintiff for his role in the incident, and Plaintiff's letter alerting Defendant to his allegation of discrimination and that video of the incident would be

relevant to determining what occurred triggered a duty to preserve any video of the incident that existed. Under these facts, litigation was reasonably anticipated.

Judge Johnston then addressed whether the ESI was relevant. *Id.* at *5. He noted that the burden to show relevance under Federal Rule of Civil Procedure 26(b)(1) is not high and is tempered further by the principle that the party with access to the proofs generally bears the burden on an issue. In the context of spoliation, the party seeking sanctions does not have access to all the necessary proof, in large part, because the other side spoliated it. Judge Johnston determined that the video evidence was relevant to whether Plaintiff engaged in the conduct for which he was fired or whether allegations of the conduct were merely pretext for discrimination.

With respect to whether the ESI was lost because Defendant failed to take reasonable steps to preserve it, Judge Johnston reiterated that burdens of proof generally fall on the party with better access to information. But, regardless of which party bears the burden, Judge Johnston found that there was no evidence that Defendant had ever intervened to stop its security system from proceeding as designed and discarding any video recordings after 30 to 90 days, even after Plaintiff alerted Defendant to the relevance and potential importance of any footage that had been recorded. *Id.* at *6. As a result, Judge Johnston concluded that Defendant did not take any steps, let alone reasonable steps, to preserve any security footage after learning about the incident.

Judge Johnston also found that the lost video recordings could not be restored or replaced. In making this finding, he noted the lack of evidence that the video recording could be restored or replaced. He rejected Defendant's argument that statements of witnesses could serve as a substitute for the security footage, because obtaining statements from witnesses is not what Rule 37(e) meant by "restored or replaced through additional discovery."

Finally, Judge Johnston addressed the questions of intent and prejudice. He noted that if there was intent to deprive Plaintiff of the video evidence, then he may impose sanctions such as adverse jury instructions, default, or dismissal, and if intent is established, then prejudice is presumed. On the other hand, to obtain curative measures under Fed. R. Civ. P. 37(e)(1), only prejudice needs to exist. With respect to prejudice, courts evaluate prejudice in the context of determining the harm inflicted by the nonexistence of relevant information, including the thwarting of a party's ability to obtain the evidence it needs for its case. *Id.* at *7. Judge Johnston found prejudice because while the witness testimony was mixed, definitive proof would have been recorded by Defendant's security cameras aimed at the scene. The loss of the video evidence left Plaintiff unable to obtain the video of the incident he needed for his case, and the loss of ESI has prejudiced him as that term is used under Rule 37(e).

Turning to intent, Judge Johnston noted that intent is difficult for a moving party to prove and for a court to find, in part because the evidence used to establish intent is almost always circumstantial. However, he noted that plenty of evidence exists in the record that could lead a reasonable person to conclude that Defendant acted with intent, including that Defendant did nothing in response to Plaintiff's request for the video. Judge Johnston referenced a prior finding on Defendant's motion for summary judgment that "[t]he inference that can be drawn is that the investigators did not want to know what the video might show; that they preferred to make their decision using only the witness statements and interviews and to make their determination of witness credibility based on factors other than what they might have been able to see with their own eyes by viewing the video. Deciding to ignore the video is not a decision likely to be made by investigators seeking the truth." Judge Johnston also noted that Defendant's inaccurate statements regarding the custodian of the video recordings could lead a reasonable person to conclude that Defendant's response was an attempt to deflect attention away from its own intentional conduct of allowing the automatic deletion of the video. *Id.* at *8.

However, Judge Johnston ultimately declined to make a finding regarding intent and left that determination to the jury. He stated that the jury could find that the failure to pull, preserve, and peruse the video recordings was not intentional, noting that "[h]umans are just as likely to be dimwitted as they are dastardly."

While Judge Johnston declined to impose sanctions, he did impose curative measures. In the words of Judge Johnston, "[t]he common, pedestrian step of determining if a video recording of an event exists, and if so, observing and preserving it to be used in an investigation, makes [Defendant's] unexplained and cavalier failure to take these steps — in the face of explicit and repeated requests from a terminated employee, no less — all the more troubling and deserving of a curative measure." *Id.* at *1.

A common curative measure is instructing the jury that it can consider the circumstances surrounding the loss of the ESI. *Id.* at *8. Judge Johnston decided to provide factual findings to the jury along with an instruction as to how to apply that factual finding under Rule 37(e), including the circumstances regarding Plaintiff's request for a review of the video, Defendant's inaccurate statements regarding the custodian of the security footage, and Defendant's prior review of video footage related to a different incident. *Id.* at *9.