

2. A decision from the U.S. District Court for the Middle District of Tennessee finding that an employer did not have an obligation to preserve ESI after an employee reported alleged harassment or filed an internal complaint and that the duty to preserve did not arise until the company received a charging document from the Equal Employment Opportunity Commission (EEOC).

In *Chatman v. TruGreen Limited Partnership*, No. 22-cv-2705-TLP, 2023 WL 8284401 (M.D. Tenn. Nov. 30, 2023), Chief U.S. Magistrate Judge Tu M. Pham addressed when a company's obligation to preserve evidence related to alleged harassment began in the context of an internal complaint that ultimately led to litigation.

In this employment discrimination and retaliation case under Title VII of the Civil Rights Act of 1964, Plaintiff alleged that she reported an incident of harassment on July 9, 2021, and that she was constructively terminated on July 23, 2021, after filing an internal human resources (HR) complaint. *Id.* at *1. Plaintiff submitted her original harassment report through EthicsPoint, Defendant's system for facilitating and managing investigations of workplace concerns. Defendant's senior HR director investigated the report, including by reviewing office surveillance footage that allegedly captured the incident. While the HR director placed his investigative materials into the EthicsPoint drive, Defendant claimed that he could not upload the surveillance footage because of "technical issues involving the size" of the video footage. Defendant had a 90-day video surveillance retention policy.

Defendant's HR director determined that the evidence of harassment was inconclusive and, on or around July 15, 2021, informed Plaintiff of the decision not to take further action. Plaintiff claimed to have filed a charge of discrimination with the EEOC on August 11, 2021, but her EEOC charging document was signed December 4, 2021. The EEOC issued Plaintiff a "right to sue" letter on July 19, 2022, and she filed her complaint on October 14, 2022. During discovery, Plaintiff learned that Defendant did not retain the surveillance video, and Plaintiff later brought a motion for sanctions for spoliation of the video. *Id.* at *2.

Chief Magistrate Judge Pham began his analysis by describing the standards under Federal Rule of Civil Procedure 37(e) governing the burden of proof and available sanctions for a party's failure to preserve relevant information, including ESI. He explained that under this rule, "if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery," a court could, upon finding prejudice to another party from loss of the information, order measures "no greater than necessary to cure the prejudice." In addition, if the court finds that the spoliating party acted with the intent to deprive another party of the information's use in the litigation, the court could order sanctions, including to (1) presume that the lost information was unfavorable to the party, (2) instruct the jury that it may or must presume the information was unfavorable to the party, or (3) dismiss the action or enter a default judgment.

Chief Magistrate Judge Pham explained that there are four initial requirements under Rule 37(e) that must be met before the court may consider imposing such sanctions: "(a) the existence of ESI of a type that should have been preserved; (b) ESI is lost; (c) the loss results from a party's failure to take reasonable steps to preserve it; and (d) it cannot be restored or replaced through additional

discovery.” He noted that the parties did not dispute that the video at issue was ESI or that it was lost.

But the parties disputed that Defendant had an obligation to preserve the video when it was lost, with Plaintiff arguing that either her internal HR complaint filed on July 23, 2021, or her EEOC charge allegedly filed on August 11, 2021, should have provided Defendant sufficient notice of relevant future litigation. *Id.* at *3.

Chief Magistrate Judge Pham explained that Rule 37(e) asks whether the loss was a result of a party’s failing to take reasonable measures to preserve it. The rule “does not create a duty to preserve ESI” but rather “recognizes the common-law duty to preserve relevant information when litigation is reasonably foreseeable.” He noted that the duty arises when a party “has notice that the evidence is relevant to litigation or ... should have known that the evidence may be relevant to future litigation.”

Chief Magistrate Judge Pham further explained that “[v]arious events may put a party on notice of litigation and trigger a duty to preserve,” including demand letters, preservation requests, threats of litigation, or a party’s decision to pursue a claim. But he noted that the duty “is not met by the theoretical possibility of litigation, which arises after almost every employment decision or business transaction.” Instead, it requires a “reason to believe that litigation was ‘probable’ when the evidence was destroyed.” Chief Magistrate Judge Pham noted that “[m]erely making an internal complaint is generally not sufficient to trigger the duty to preserve.”

Chief Magistrate Judge Pham found that Plaintiff’s HR report alone was insufficient to trigger Defendant’s duty to preserve. In particular, he noted that there was no evidence that Plaintiff threatened suit or that an attorney contacted the company on Plaintiff’s behalf at the time of Plaintiff’s HR report, during Defendant’s investigation, or immediately after its decision.

Chief Magistrate Judge Pham held that the duty to preserve attaches when the party receives actual notice of the EEOC charge, potentially as soon as the charge is filed. Here, the only EEOC charging document in the record indicated that Plaintiff signed the charge on December 4, 2021. Chief Magistrate Judge Pham concluded that this was “well beyond [Defendant’s] ninety-day surveillance video retention policy. Therefore, because Defendant was not given notice that the surveillance video was relevant to future litigation in the ninety days following the July 9, 2021 incident, it did not have a duty to preserve it during and up to the end of that time.”