

Spoliation! A New Drama at the District Courthouse about a Litigation Hold and Missing Electronically Stored Information

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The stage is set: There is a triggering event for a lawsuit, a litigation hold is enacted and evidence is preserved.

A drama played out not according to the above script with a law firm and client almost ending up on the hook for a botched litigation hold.



In *Pinstripe, Inc. v. Manpower, Inc.*, the Defendant failed to enact a litigation hold after being instructed by counsel to preserve evidence. However, after learning of the failed hold and loss of evidence, the Defendants spent \$30,000 on an expedition to find the lost ESI. The Plaintiffs sought a default judgment, a spoliation instruction and monetary damages. *Pinstripe, Inc. v. Manpower, Inc.*, 2009 U.S. Dist. LEXIS 66422 (N.D. Okla. July 28, 2009).

The Timeline of Facts

The follow chronology of events tells the spoliation story:

April 18, 2008 — Defendant responds to discovery. *Pinstripe, Inc.* 3.

July 15, 2008 — Defendant produces responsive documents. *Pinstripe, Inc.* 3.

Aug./Sept. — Discussion between Plaintiff and Defendant regarding sufficiency of Defendant's responses. Defendant is asked to certify the completeness of its responses and does. *Pinstripe, Inc.* 3.

Oct. 6, 2008 — Plaintiff realizes Defendant's document production is incomplete. *Pinstripe, Inc.* 3.

Jan. 13, 2009 — Plaintiff requests information from Defendant regarding preservation of documents. Defendant realizes not all e-mails have been produced. *Pinstripe, Inc.* 3.

Jan. 15, 2009 — In-house counsel realizes Defendant has not issued a litigation hold. Counsel issues the hold immediately. *Pinstripe, Inc.* 3.

March 2, 2009 — Defendant reveals that two employees may have deleted discoverable e-mails. *Pinstripe, Inc.* 3.

The Law on Litigation Holds and Spoliation (In Brief)

A party must enact a litigation hold to preserve evidence once it reasonably anticipates litigation. This includes suspending its document retention and destruction policy and communicating the “hold” to the “key players” in the litigation. *Pinstripe, Inc.*, 4.

Sanctions for the destruction of evidence can include the extreme measures of adverse inference instructions or dismissal of a case. The sanction must fit the willfulness of the “party who destroyed evidence and the prejudice suffered by the other party.” *Pinstripe, Inc.*, 5-6. The intent of these sanctions ensures discovery accuracy, punishment for those who willfully destroy ESI and compensation for those who suffer prejudice from the lost evidence. *Pinstripe, Inc.*, 5, citing *Koch v. Koch Indus, Inc.*, 197 F.R.D. 463, 483 (N.D.Okla. 1998).

The general test for issuing a negative inference instruction is “(1) that the party controlling evidence had an obligation to preserve it at the time it was destroyed; (2) that the destruction occurred ‘with a culpable state of mind’, and (3) that the evidence destroyed was relevant.” *Pinstripe, Inc.*, 9.

A Lawyer’s Nightmare: Threat of Sanctions for Spoliation



Attorneys at the law firm drafted a revised document retention policy and litigation hold for the Defendants. *Pinstripe, Inc.*, 7-8. The

attorneys believed their client had enacted a litigation hold, but after 14 months found out the client never enacted the litigation hold.

The attorneys learned about the lack of the litigation hold after producing discovery. *Id.*

The law firm was not sanctioned for what one might be able to argue was a failure to comply with Federal Rule of Civil Procedure Rule 26(g)(1)(A), which requires that a discovery response is certified as “complete and correct as of the time it is made” with the attorney’s signature. The Court found that the attorneys “made reasonable inquiry as to the completeness of Manpower’s document production and relied on the client’s representations in that regard.” *Pinstripe, Inc.*, 8.

A Lawyer’s Nightmare II: Client Sanctioned for Spoliation



The Defendant failed in their duty to preserve relevant ESI. Their lawyers sent them a litigation hold and the Defendants “failed to monitor compliance with the oral instructions” issued to some of the Defendant’s managers. *Pinstripe, Inc.*, 8.

The Court did not order a default judgment or adverse inference instruction against the Defendant, because the botched litigation hold was not an intentional attempt to destroy electronically stored information. *Pinstripe, Inc.*, 8.

However, one of the Defendant’s employees’s destroyed email messages. This sent the Defendants on a dramatic quest to recover the lost ESI, which include attempts by IT staff, a forensic consultant and a \$30,000 price tag. *Pinstripe, Inc.*, 9. The Defendant claimed that any of the lost email attachments were saved on a different server and approximately 700 emails were retrieved by recipients of the employee’s email messages. *Pinstripe, Inc.*, 9.

No Harm, No Foul?



The Court found not only that any extreme sanctions were not justified, but that Plaintiffs had not demonstrated the Defendant had “not recovered the e-mails at issue or that any missing e-mails are relevant to” the Plaintiff’s claims. *Pinstripe, Inc.*, 10.

The Plaintiff’s prejudice from the missing email was only preparing for and rescheduling depositions. *Pinstripe, Inc.*, 10. Moreover, the Plaintiffs were not able to produce any evidence that any specific ESI was destroyed. *Pinstripe, Inc.*, 11.

While the Defendants avoided “nuclear sanctions,” they did not get off scot-free from their failed litigation hold. The Court’s sanctions order included the following:

- 1) Defendants would cover the costs for any depositions that had to be re-opened. *Pinstripe, Inc.*, 11.
- 2) Plaintiff could depose Defendant’s IT person or forensic consultant at the Defendant’s expense, excluding attorney’s fees. *Pinstripe, Inc.*, 11-12.
- 3) If the Plaintiff learned of a specific, relevant e-mail that has not been recovered or otherwise produced, it could petition the Court for further relief. *Pinstripe, Inc.*, 12
- 4) The Defendant was required to “contribute the sum of \$ 2,500 to the Tulsa County Bar Association to support a seminar program on litigation hold orders, and preservation of electronic data.” *Pinstripe, Inc.*, 12.

Bow Tie Thoughts

Case law on litigation holds and the preservation of evidence seems to be coming out on a weekly or bi-weekly basis. Lawyers need to be vigilant when it comes to preserving evidence and working with their clients to ensure they are following a litigation hold. There are new tools on the market available to help attorneys track litigation holds to ensure compliance, which are certainly worth exploring given the cost to litigate a spoliation motion or spend \$30,000 to forensically search for lost ESI.

