

June 7, 2022

STATE OF MINNESOTA

DISTRICT COURT

BECKER COUNTY

SEVENTH JUDICIAL DISTRICT

Margaret Campbell,

Plaintiff,

Order for Spoliation Sanctions

v.

Court File No. 03-CV-19-266

Honor the Earth,

Defendant.

On March 18, 2022, this matter came on for Motion Hearing on Plaintiff's Motion for Spoliation Sanctions before the Honorable Gretchen D. Thilmony, Judge of District Court. Attorney, Christy Hall, appeared on behalf of the Plaintiff, Margaret Campbell. Attorney, Frank Bibeau, appeared on behalf of the Defendant, Honor the Earth ("HTE").

At the hearing, the parties argued their respective positions on the motion and the Court took this matter under advisement.

Now therefore, based on the facts, the record, and the law, the Court enters the following:

Order

1. Plaintiff's Motion for Spoliation Sanctions is **granted**.
2. Plaintiff's Motion for Default Judgment is **denied**.
3. Defendant did not act in good faith when it failed to preserve data that it had a legal duty to preserve. Further, Defendant intentionally destroyed material evidence in an effort to deprive Plaintiff of information that is necessary and helpful to this litigation.
4. Defendant is required to pay Plaintiff for all attorney's fees and costs of investigating, researching, preparing, and arguing motions touching upon and concerning document destruction, spoliation, and sanctions. Plaintiff will file an invoice with the Court within 30 days.

Order Continued on Page 2

5. Adverse inference jury instructions will be given relating to any documents that were destroyed and are not recoverable. Appropriate jury instructions will be drafted and decided at a later date, based on the nature and substance of the missing documents, and the evidence and witnesses presented by the parties at trial.
6. *See* attached memorandum.

June 7, 2022

BY THE COURT:

Gretchen D. Thilmony
Judge of District Court

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Memorandum

Factual Background

The allegations at issue in this case occurred mainly between November 2014 and April 2015. For a complete recitation of the facts in this case, *see* previous filings and orders.

Procedural Timeline

During the pendency of this case, the following events have occurred relevant to this issue:

- 2/7/15 Defendant, Honor the Earth (“HTE”), sent a “Cease-and-Desist” letter to Plaintiff, Margaret Campbell (“Campbell”), prohibiting her from discussing HTE in email correspondence with HTE’s donors.
- 2/26/15 Counsel for HTE sent letter to Campbell entitled “Defamation Notice” threatening legal action against her for defamation.
- 2/27/15 HTE Executive Director, Winona LaDuke (“LaDuke”) texted Campbell “I am being forced to file a suit against you for defamation.”
- 7/2/15 Campbell sent a letter to HTE notifying them she was represented by counsel with respect to her employment at HTE.
- 1/29/16 Campbell filed a complaint against HTE with the Minnesota Department of Human Rights (MDHR).
- 6/3/19 Campbell filed first discovery requests, including requests for production of documents, on HTE. Discovery was later stayed pending the appeal of this Court’s denial of HTE’s motion to dismiss. Campbell’s document requests included the following:
 - “[A]ll documents that include any correspondence between Plaintiff and Defendant HTE and its agents, including Winona LaDuke. This specifically includes, but is not limited to, paper, email, text message, and Facebook correspondence.”
 - “[A]ny correspondence between Michael Dahl and Defendant HTE and its agents, including Winona LaDuke.”
 - “[A]ll personnel records . . . for Plaintiff and or Michael Dahl.”

- “[A]ll records of any payments from Defendant and Defendant’s fiscal sponsor for Plaintiff and for Michael Dahl from 2012 to the present.”
- Correspondence between HTE and its agents, including “correspondence with Defendant’s staff and board members regarding Plaintiff’s reports of sexual harassment and assault . . .”
- 6/23/20 This Court entered an order vacating stay of discovery. The parties re-commenced discovery.
- 7/22/20 LaDuke was deposed.
- 2/2/21 Campbell moved to compel discovery after receiving only a small number of documents in response to their requests for production.
- 4/7/21 Court granted Campbell’s motion to compel. HTE was ordered to provide Campbell with “access to email, Facebook, and text message data in the possession of HTE and its officers, directors and employees, including the Facebook and email accounts of Executive Director Winona LaDuke.”
- In June 2021 HTE provided Campbell with a hard drive containing the contents of LaDuke’s Gmail inbox and Facebook messages.

Missing Documents

Following receipt of the hard drive in June 2021, Campbell uploaded the contents to Everlaw, a cloud-based e-discovery service. Searches of the contents revealed several highly relevant yet previously undisclosed Facebook message exchanges between LaDuke and Dahl. LaDuke’s Gmail archive also contained some relevant exchanges which were not previously disclosed, and the metadata showed significant gaps indicating a substantial discrepancy in the volume of emails during the relevant time periods. From mid-October 2015 to the present there are at least 30 times as many emails sent or received per day that appear in the archive. Before that time period, the number is much smaller – at just one email (on average) per day. When prompted for an explanation by the Court for the glaring disparity, HTE’s response was that it likely had to do with their document retention policy and the increase in communication when Enbridge began work on the Line-3 Pipeline due to the environmental advocacy HTE engages in.

Emails produced in earlier discovery responses were missing from the archive.

These email exchanges include:

- An email exchange that took place on July 16, 2020, where LaDuke emailed Hall, counsel for Campbell, requesting details for her deposition.
- An email exchange taking place on January 25, 2019, between LaDuke and HTE's board members.
- An email exchange that was forwarded to HTE's counsel and disclosed during the first round of discovery on May 5, 2020, but was suspiciously not present in the archive.

Additionally, prior to LaDuke's deposition, Campbell produced six emails from her own records that she kept from her time when she was employed at HTE. LaDuke confirmed the accuracy and authenticity of the documents during her deposition. The six emails were not produced during the first round of discovery or preserved in the archive located on the hard drive.

As an affirmative defense, HTE claims it did not place Campbell on unpaid leave or terminate her employment for illegal reasons. HTE maintains that she was placed on unpaid leave and ultimately terminated because she defamed the organization to donors. HTE provided Campbell with a letter to this effect, but this letter was not provided by HTE in discovery.

When prompted by the Court for an explanation for the discrepancies for the missing documents, HTE did not have a response.

Analysis

Spoliation Sanctions – Electronically Stored Information (ESI)

Rule 37.05 of the Minnesota Rules of Civil Procedure provides:

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, the court:

- (a) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(b) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

- (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.

Minn. R. Civ. P. 37.05 (2018) (**emphasis added**). “It is axiomatic that the imposition of sanctions for destruction of documents is within the trial court’s discretion.” *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 550 (D. Minn. 1989) (citing *Perkinson v. Gilbertson/Robinson, Inc.*, 821 F.2d 686, 689 (D.C. Cir. 1987)). Courts rely on their inherent power to “regulate litigation, preserve and protect the integrity of proceedings before it, and sanction parties for abusive practices. *Id.* at 551 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980)). Purposeful impairment of the opposing party’s ability to discover information justifies invocation of these powers. *Id.* (citing *Coleman v. Smith*, 814 F.2d 1142, 1145-46 (7th Cir. 1987)).

Minnesota Courts have identified three factors to consider when determining what sanctions are appropriate when a party’s failure to produce evidence is intentional: “(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party, and where the opposing party is seriously at fault, will serve to deter such conduct by others in the future”. *Miller v. Lankow*, 801 N.W.2d 120, 132 (Minn. 2011) (citing *Schmidt v. Milwaukee Electric Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994)). Here, the above-ordered sanctions are justified under the *Miller* factors. *See* below.

Factor 1: Fault of the Spoliating Party

HTE failed in its duty to preserve ESI in anticipation of litigation, thereby failing to act in good faith. The Advisory Committee Comment to the 2007 Amendment of rule 37.05 provides, “[t]his rule . . . prevents the imposition of sanctions for spoliation of evidence where the loss of information arises from the routine operation of a computer system. The good-faith part of this test is not met if a party fails to take appropriate steps to preserve

data once a duty to preserve arises.” Minn. R. Civ. P. 37.05, Advisory Committee Comment – 2007 Amend.

Here, HTE was first put on notice on February 7, 2015, when it sent a cease-and-desist letter to Campbell. The letter was sent in anticipation of litigation because the document contemplated legal action against Campbell for defamation when it prohibited her from speaking about the organization to donors. HTE was also put on notice on February 26, 2015, when HTE’s counsel sent a “Defamation Notice” to Campbell threatening litigation. HTE was put on notice again on February 27, 2015, when LaDuke explicitly told Campbell via text message that she was filing a defamation lawsuit against her. On July 2, 2015, Campbell placed HTE on notice by notifying them she was represented by counsel with respect to her employment at HTE. Finally, on January 29, 2016, Campbell filed her complaint against HTE with the MDHR, also putting HTE on notice to preserve ESI. There are five dates where HTE was put on notice of potential litigation where it had a duty to preserve ESI and failed to do so. The good faith test is not met under Rule 37.05.

HTE intentionally destroyed ESI requested by Campbell in an effort to deprive her of helpful and useful information in this litigation. Evidence presented in the metadata shows discrepancies in the data and the Court is not satisfied with the explanations provided by HTE. Any data retention policy was pre-empted by its duty to preserve ESI in anticipation of litigation (*see above*). Despite its role as an environmental advocate and timing of the Line-3 Pipeline, the Court is not convinced that LaDuke, who is the Executive Director of HTE, was only receiving an average of one email per day. The disparity is too large to ignore, and the numbers here indicate HTE has engaged in foul play.

Campbell presented evidence of emails and Facebook messages that she received, saved as part of her own records, or were provided in the first round of discovery that did not exist in the archive located on the hard drive. Campbell presented evidence of emails and Facebook messages that LaDuke referenced in her deposition relating to reasons why Campbell was placed on leave and ultimately terminated. Those documents were not produced by HTE. These examples are not all-inclusive, but provide an insight into the culpability of HTE, and indicate a high degree of fault.

HTE's intentional destruction of ESI and its failure to act in good faith justify more severe sanctions.

Factor 2: Degree of Prejudice

The degree of prejudice suffered by Campbell is unquantifiable and extreme in this case. The level of prejudice is based on “the nature of the item lost in the context of the claims asserted and the potential for remediation of the prejudice.” *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). To the extent that the parties are able to identify the missing ESI, monetary sanctions may be imposed for the cost, time, and effort, it took to piece together the information that was missing from LaDuke's Gmail archive. Of far more concern is the missing ESI that cannot be identified. Due to the numerous examples of conspicuously missing documents, a strong inference can be drawn that many more documents that cannot be identified are also missing. The missing evidence that Campbell is unable to identify with any degree of certainty would prevent her from making arguments critical to proving her claims. HTE must also be prevented from raising any claims or defenses relying upon evidence that HTE destroyed. Therefore, imposition of both monetary sanctions and adverse inference instructions to the jury would be appropriate to remedy the extreme prejudice suffered by Campbell.

Factor 3: Least Severe Sanctions as Deterrent to Future Misconduct

Default judgment and dismissal are the most severe form of sanctions for spoliation. As a matter of policy, courts favor adjudication of cases on the merits, and therefore disfavor remedies involving summary dismissal. *Capellupo* at 552. This consideration drives the type of sanctions to be employed, and while Courts may wield their inherent power as they see fit, dismissal is considered an “extreme sanction.” *Id.* (holding summary dismissal is reserved for “egregious offenses” against an offending party).

Capellupo is a Minnesota Federal District Court case with nearly identical facts to the case at-hand. It is a sex discrimination and employment retaliation case involving the defendant's willful destruction of electronic documents and other evidence critical to proving the plaintiff's claims. *Id.* at 546-47. The District Court declined to extend default judgment as a sanction for spoliation. *Id.* at 553. For this reason, the Court is unable to enter default judgment in favor of Campbell. If, however, summary judgment is a “tangential result” of the Court's other sanctions, the Court is within its discretion to issue

such sanctions. *Patton* at 118. Thus, the strong policy objective favoring adjudication on the merits may yield to a court's ability to fashion sanctions which may be collaterally dispositive. Trial courts have wide latitude to craft sanctions for spoliation. *Patton* at 119. Here, to the extent that any documents are unrecoverable, an adverse inference instruction will be given to the jury. *See* Minn. R. Civ. P. 37.05(b). Given the facts, these are the least-restrictive sanctions the Court can and will impose to serve as a deterrent for other future bad actors.

Conclusion

An adverse inference jury instruction and monetary sanctions conforming with the *Miller* factors are appropriate in this case. Plaintiff's Motion for Spoliation Sanctions is **granted**.

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