IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. GMRI, INC., Defendant.	)	Case No. 15-cv-20561-JAL/JG

EEOC'S REPLY IN SUPPORT OF MOTION FOR SPOLIATION AND RULE 37(e) SANCTIONS RELEVANT TO SUMMARY JUDGMENT AND TRIAL

The United States Equal Employment Opportunity Commission ("EEOC") hereby submits this Reply in response to GMRI, Inc.'s ("GMRI") Memorandum of Law in Opposition (DE # 259 "Response") to EEOC's Motion for Spoliation and Rule 37(e) Sanctions (DE # 246 "Motion").

A. **Paper Application Data**

1. Existence and Loss of Paper Applications. EEOC provided documentary and testimonial evidence from Tampa, KOP, and Costa Mesa demonstrating that the number of applications received far exceeded the number of applications produced. Motion at 5, n. 1-2. GMRI does not contradict this evidence, Response at 9, and instead argues vaguely about a purported distinction between applications and interviews. Each manager, however, testified to the number of *applicants* at the restaurant. *See* Ex. 15 (Tampa) at 55:14-56:24; Ex. 24 (KOP) at 47:22-48:1; Ex. 25 (Costa Mesa) at 81:2-20. This testimony is consistent with (and even more conservative than) the documentary evidence. Ex. 23.[1] Thus, the undisputed evidence demonstrates that GMRI received significantly more applications in Tampa, KOP, and Costa Mesa than it produced.

With respect to Jacksonville and Kansas City, GMRI does not dispute that *all* of the New Restaurant Opening (NRO) hiring occurred with paper applications only, and that these applications were largely destroyed. *See* Motion at 6-7, n. 5; Response at 11. That GMRI produced thousands of post-NRO *electronic* applications does not negate the existence and destruction of paper applications.

2. GMRI Had an Obligation to Preserve Paper Applications. GMRI, a sophisticated corporate entity with experienced Employment counsel, remarkably argues that the EEOC charges and subsequent investigation failed to put GMRI on notice of the duty to preserve because they did not specifically mention "litigation." Response at 6. This argument contravenes GMRI's own document retention policies, which provide for issuance of a litigation hold when there is a *threatened*

[1] Citations to Exhibits 1 through 58 refer to the exhibits attached to EEOC's Motion for Spoliation and Rule 37(e) Sanctions Relevant to Summary Judgment and Trial, DE # 246. New Exhibits (attached hereto) will begin at Exhibit 59.

government *investigation*. Ex. 12 at 8 (Record Hold). *See also Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-18 (S.D.N.Y. 2003) (duty to preserve triggered by filing of charge of discrimination at the latest, and "party must retain all relevant documents . . . in existence at the time. . . and any relevant documents created thereafter."); *Abdulahi v. Wal-Mart Stores East, L.P.*, 6 F.Supp.3d 1393, 1396-97 (N.D. Ga. 2014) (duty to preserve due to pending EEOC investigation).[2]

More specifically, in Tampa, KOP, and Costa Mesa, GMRI was initially required to preserve applications for one year. 29 C.F.R. § 1627.3(b)(1). At the expiration of one year, there was a short window of time where GMRI could have lawfully destroyed some paper applications.[3] GMRI, however, specifically disavowed that applications were destroyed at that time, and affirmed that applications were maintained for years in accordance with GMRI's document retention policy. *See e.g.* Ex. 14, 46:7-15.[4] Thereafter, beginning on August 31, 2011, GMRI had a renewed duty—pursuant to EEOC regulations and EEOC's notice of a nationwide investigation—to preserve applications from Tampa, KOP, and Costa Mesa through final disposition of the charge. *See* 29 C.F.R. § 1627.3(b)(3)[5]; Ex. 5 (Expansion Letter advising GRMI that investigation covers "**the hiring practices of Seasons 52 throughout the nation**") (emphasis added). EEOC then requested the applications on November 2, 2011. Ex. 7.

In Jacksonville and Kansas City, GMRI also had a duty to preserve paper applications for one year, and subsequently through disposition of the charge, in light of the Expansion Letter. That

[2] Citations to Exhibits 1 through 58 refer to the exhibits attached to EEOC's Motion for Spoliation and Rule 37(e) Sanctions Relevant to Summary Judgment and Trial, DE # 246. New Exhibits (attached hereto) will begin at Exhibit 59.

[3] All NRO applications initially had to be retained in Tampa through February 15, 2011, in KOP through March 29, 2011, and in Costa Mesa through August 30, 2011. After those dates, GMRI could begin destroying the earliest received applications.

[4] There is no burden in preserving application materials; Managers could have simply put the documents in boxes in accordance with GMRI's document retention policy. *See* Ex. 12 at 15.

[5] GMRI's Response completely ignores the company's preservation obligations under 29 C.F.R. § 1627.3(b)(3).

GMRI did not take seriously the Expansion Letter is not to say that it was not put on notice of the scope of EEOC's investigation. Moreover, even if GMRI somehow did not understand EEOC's nationwide Expansion Letter, there is no evidence that GMRI shredded the Jacksonville applications prior to July 16, 2013, when EEOC issued the Letters of Determination. Ex. 9. At that point, EEOC advised GMRI of its reasonable cause determination, stating: "The evidence, including statistical data, supports a finding that Respondent engaged in a pattern or practice of not hiring individuals who are over the age of forty **at its Season[s] 52 restaurants throughout the United States**." Ex. 9. (emphasis added). Evidence suggests that Ms. Drafts, a Manager, shredded the Jacksonville applications after this date, as she testified that applications were kept "for a specified number of years [**plural**]," and that the shredding was "closer to the time that she ended" her tenure at Seasons 52 in December 2014. Ignoring this testimony, GMRI purports to have "no knowledge" of shredding, and offered no evidence of when the shredding occurred. Finally, as to Kansas City, even GMRI cannot dispute that EEOC's Complaint created a duty to preserve.

3. EEOC is Prejudiced by Defendant's Failure to Preserve Crucial Application Data.

GMRI next suggests that EEOC cannot demonstrate prejudice with respect to its failure to produce applicant data. GMRI is wrong, as the most important evidence in a pattern or practice/failure to hire case is the applications. At Tampa, KOP, and Costa Mesa, EEOC was forced to rely upon Census data, notwithstanding that paper application data from other locations uniformly shows under-hiring of 40+ applicants, almost always at statistically significant levels. Ex. 21, *Compare* pg. 81 (Exhibit 12) *with* pg. 142 (Exhibit 73). The forced reliance on Census data impacts the standard deviation at these locations, as well as the overall shortfall EEOC can demonstrate. Regrettably, EEOC was deprived of using actual applicant data at Tampa, KOP, and Costa Mesa, and was instead forced to rely on proxy data that almost certainly results in weaker statistical outcomes.

Likewise, in Jacksonville and Kansas City, EEOC had to rely upon electronic data as

opposed to the actual paper data that the restaurants used during the NROs. In its Response, GMRI challenges the assumption that paper data in Jacksonville and Kansas City would have been more favorable to EEOC than the electronic data. However, at each of the locations that accepted both paper and electronic data—with the single exception of Naples—the paper data was significantly more favorable. *Compare* Ex. 21 pg. 72 (Exhibit 3) *with* pg. 81 (Exhibit 12).[6] Exhibit 3 (electronic data) shows that 40+ applicants are *favored* at Coral Gables (4509), North Bethesda (4514), McLean (4515) and Indianapolis (4516); in contrast, Exhibit 12 (paper data) confirms statistically significant *under-hiring* of 40+ applicants at each of the same locations. Ex. 21. Thus, given that the paper data is more favorable at 4 of the 5 restaurants that have both paper and electronic applications, there is no reason to assume that Jacksonville and Kanas City would not follow the same pattern.[7]

Even if Jacksonville and Kansas City were to more closely resemble Naples (the outlier), the Naples data reflects under-hiring of 40+ applicants in both the paper and electronic data. Further, as Exhibit 12 shows, GMRI under-hired 40+ applicants at each of the 8 locations that accepted paper applications, and the relative job offer/hiring rates for older vs. younger applicants is quite similar across locations. Ex. 12; Ex. 59 ¶ 5. Thus, GMRI has not, and cannot deny that, at the very least, paper applications from Jacksonville and Kansas City would have demonstrated under-hiring of 40+ applicants.

While GMRI suggests that paper application data is not critical, in a case that depends largely upon statistical evidence, EEOC should have an opportunity to present statistical evidence from actual applicants—which is always preferable and in this case almost certainly more EEOC

[6] As set forth in EEOC's Motion, the prejudice from lost applications can be seen at Coral Gables, where electronic application data suggests that 40+ applicants were over-hired. Fortunately, because *EEOC* maintained the 800+ paper applications Seasons apparently lost/destroyed, EEOC was able to show a statistically significant under-hiring of applicants. *See* Motion at 7-8.

[7] And, as the reckless spoliator of the evidence, GMRI should not be entitled to a self-serving presumption that the paper application data would have been less favorable.

favorable—to the Court and jury. GMRI's summary judgment arguments and expert report highlight the crucial nature of statistical evidence. For example, GMRI has argued that a store-by-store statistical analysis is required, and highlights the lack of statistically significant under-hiring of 40+ applicants in Costa Mesa, Jacksonville, and Kansas City. *See* DE #258, at 3. The fact is that if paper applications from Kansas City and Jacksonville showed relative job offer/hiring rates to older vs. younger applicants similar to available paper applications, shortfall and standard deviation results reported in Neumark's Report would rise. Ex. 59, ¶¶ 6-10.

In addition, at trial, GMRI will attempt to argue that EEOC's statistical evidence should be adjusted based on Saad's employment path theory. Ex. 21 at ¶¶ 93-101. According to Saad (Ex. 21 at ¶ 100):

> For Kenexa [electronic] applications, a modest adjustment will reduce the shortfall to insignificance. An adjustment of 0.8152 would make the aggregate Z-score in Kenexa not statistically significant. For paper applications, an adjustment of 0.451 would reduce the shortfall to being statistically insignificant. Both of these adjustments are less than the level implied by the NLS study.

If there was an even higher standard deviation/shortfall, however, from the lost/destroyed paper application data, then Saad would have to adjust the data even further in his attempt to wipe out EEOC's evidence of discrimination. Finally, GMRI will likely point out that it does hire some applicants over age 40, and thus, the degree of statistical significance and shortfalls (i.e. a comparison of the number of 40+ applicants hired versus the number of additional 40+ applicants who should have been hired) could be an important issue for the Court or jury.

EEOC also suffered prejudice because each application not retained represents an individual who could have been a claimant and testified in support of summary judgment or trial. Anecdotal evidence is also crucial in a pattern or practice case, and is particularly so here, where GMRI argues that EEOC's anecdotal evidence is quantitatively insufficient, DE #258 at 8, and specifically points

out the lack of anecdotal testimony from Costa Mesa, Kansas City, and Tampa, DE #241 at 19, n.9. Had GRMI not destroyed applications, EEOC would have uncovered additional Stage 1 claimants.

In its Response, GMRI absurdly argues that EEOC cannot demonstrate that it would have found additional claimants but for the destroyed data because the number of applications is not directly proportional to the number of claimants. That is certainly true: EEOC has not argued that there is a precise claimant per applicant formula. What is also true, however, is that EEOC cannot identify claimants from applications that have been destroyed. Thus, for example, in Kansas City and Jacksonville (where *all* of the NRO hiring was done with the destroyed paper applications), of the 2,722 electronic applications produced (Ex. 12, Table 1, pg. 69-70), only 30 individuals age 40+ were interviewed (Ex. 26, ¶ 15), leaving an extremely small pool of potential Stage 1 claimants. Likewise, in Tampa, KOP, and Costa Mesa, a large percentage of the paper applications produced by GMRI were for individuals hired (68.4%, 40.73%, and 46.63% respectively, Ex. 17, Table 1). In contrast, GRMI highlights that EEOC identified 5 claimants from only 1,011 Indianapolis applications. In Indianapolis, however, there were significantly more total applications (1,011) produced than in Tampa (205), King of Prussia (325), and Costa Mesa (322), and only 12.36% of the applications were for hires. Thus, EEOC had a much larger potential claimant pool.

4. GMRI Destroyed the Data in Bad Faith. Finally, GMRI argues that it did not destroy applicant data in bad faith. GMRI, however, failed to comply with federal regulations which require a company to maintain applicant data for one year, and subsequently during the pendency of any charge. 29 C.F.R. §§ 1627.3(b)(1), (b)(3). As set forth in EEOC's Motion, failure to preserve application data in violation of EEOC's regulations is alone sufficient evidence of bad faith. *See* Motion at 13. Moreover, GMRI did not deny that it never issued a litigation hold after the Expansion Letter or Letters of Determination, and instead waited until months *after* EEOC filed its Complaint. Likewise, GMRI's 2011 collection of applications was executed simply by calling the

Managers and telling them to scan the applications. This too is evidence of bad faith. *See id.* at 14. In Jacksonville, the undisputed evidence demonstrates that GMRI shredded applications. And in Kansas City, GMRI admittedly took no steps to collect the applications until January 2016, notwithstanding that EEOC requested the data in June 2015. GMRI misrepresented to EEOC and the Court that it was diligently collecting the data, all the while taking no action until it was too late. Ex. 29. Indeed, even after the Court ordered GMRI to provide "a specific answer as to how [each] restaurant responded to counsel's follow-up request to check if it still had paper applications," DE #87, ¶ 4, GMRI simply advised EEOC that it collected one box of documents from Kansas City, concealing the fact that paper applications were largely destroyed in a fire. *See* Ex. 60 (Letter from A. Scroggins). As such, GMRI acted in bad faith.

B. Interview Booklets

1. Existence of Interview Booklets. GMRI argues that EEOC overstated the use of interview booklets, and suggests it is impossible to know if booklets were destroyed. EEOC's motion, however, presents clear testimony comparing the use of booklets at specific locations with the number of booklets produced. Motion at 8-9, n. 10-11. GMRI failed to rebut this evidence.

2. Data in Interview Booklets. Citing to Andrew Scroggins' declaration, GMRI next argues that EEOC is overstating the information contained in booklets. While Mr. Scroggins is correct that not all booklets are perfectly coded, his selected "excerpt" of coded booklets is misleading. In fact, Seasons 52 coded and produced 782 booklets with an "interview score" and thus, booklets do contain information that would have allowed for an analysis. *See* Ex. 61 (pages 27-39). Regrettably, the parties could not analyze the booklets—not because the coding was deficient—but because the majority of booklets produced were from individuals hired, meaning that there was not a representative sample. Had GMRI saved booklets from rejected applicants, however, the parties could have used the available data.

3. EEOC is Prejudiced by GMRI's Bad Faith Destruction of Booklets. Next, GMRI attempts to understate the significance of the booklets. Saad's Report, however, repeatedly emphasizes the lack of data regarding what happened at interviews. Ex. 21 at ¶ 10, 11, 26, 93. As Dr. Saad explains: "The case record stresses the importance of the interview process, which would reveal the characteristics that systematically differentiate older and younger applicants who appear similar in the application data. We have no measures of the actual interview outcomes, but based on the principles outlined above, we can be sure that there are differences that would correlate to age, all else constant." *Id.* ¶ 93. In fact, Seasons 52 did have data on interview outcomes, but failed to issue a litigation hold, failed to follow its own document retention policies, and failed to comply with federal regulations requiring that the documents be maintained. Instead, Seasons 52—at least in some locations—shredded the booklets, and in other locations, has "no knowledge." Consequently, GMRI can make self-serving assertions about what happened at interviews because information about what actually occurred was destroyed. Further, EEOC cannot test or challenge Saad's assertions about what occurred at interviews with actual interview data. As such, EEOC is entitled to spoliation sanctions.

C. Electronically Stored Information (ESI)

1. ESI Should Have Been Preserved. Defendant first argues that it did not have a duty to preserve ESI notwithstanding EEOC's August 2011 Expansion Letter, putting GMRI on notice that its investigation was nationwide. GMRI's argument is belied by the case law, which establishes that a party has a duty to preserve e-mail from key players, such as Managing Partners. *Zubulake*, 220 F.R.D. at 217-18 ("Thus, the duty to preserve extends to those employees likely to have relevant information- the 'key players' in the case."). That GMRI knew, and understood, this obligation can be seen from the litigation hold issued to Gary Marco, Managing Partner, Coral Gables. Ex. 11 ¶ 21.

2. GMRI Took No Steps to Preserve ESI between August 2011 and February 2014. In its

Response, GMRI tacitly admits that it took *no steps* to preserve ESI between August 2011 and February 2014: GMRI neither suspended the routine destruction of ESI nor issued a litigation hold. Response at 18. Indeed, neither EEOC's Expansion Letter, nor EEOC's 2013 Letters of Determination, triggered any ESI preservation efforts by GMRI.[8]

3. EEOC is Prejudiced. GMRI next argues that EEOC is not prejudiced by the loss of ESI because GMRI identified 130 custodians and produced voluminous ESI. GMRI's proverbial document dump, however, does not excuse its failure to preserve relevant ESI from key players.[9] Indeed, GMRI admits that it could not collect ESI from 29 of the 35 (82%) Managing Partners and Restaurant E-mail accounts. Likewise, GMRI cannot dispute that of the 130 custodians GMRI identified, 113 custodians (87%) have no e-mail that pre-dates February 2014. Ex. 30.

While GMRI vaguely suggests that it has restored or replaced all relevant e-mail—covering 29 locations from August 2011 through February 2014—through the 17 custodians that do have pre-2014 ESI, the low percentage of custodians with e-mail from this time period (13%) suggests otherwise. Moreover, GMRI acknowledges that even for these 17 custodians, it does not have "continuous, uninterrupted ESI from that date forward." Ex. 62 at 1.[10] For instance, GMRI states that it has e-mail for Directors of Operations Carmen Net and Shaina Nestor dating back to 2012, Ex. 62 at 2, yet GMRI produced e-mail from 2013 on which they are copied, but not a records

[8] Notably, GMRI neither argued that its e-mail was not reasonably accessible nor that preserving the data would have caused any burden, much less an undue burden.

[9] By way of example, GMRI produced over 500 Culinary Action Notices, which appear to be food preparation instructions for the culinary team. Ex. 65 (Sample Culinary Action Notices).

[10] As to the 16 Custodians that do have e-mail pre-2014, 4 custodians (identified by GMRI) had no role in this litigation pre-2014 (Burns, Calderon, Hickey, and McNulty). Ex. 66. Another 4 custodians had a role in training (Casler, Edwards, Williams) or advertising (Harrington), but no role in hiring. *See* Ex. 31, Rogs 3, 4, 6. As to the Directors of Operations, the availability of relevant ESI varies by person: Icken (2013); Culley, Nestor, Net, and Dunavan (2012); Norberg (2011). Ex. 62 at 2, 14. Finally, EEOC has e-mail from the Managing Partner/Sacramento (Warren) beginning on 10/9/2013 (9 months after Sacramento opening). Ex. 62 at 2. EEOC has e-mail from 2010 for Gary Marcoe, Managing Partner of Coral Gables. Ex. 11 ¶ 21.

custodian. Exs.63-64. *See also* Ex. 68 (E-mail from 2011 where Mark Norbert is not a records custodian). Likewise, GMRI states that it has e-mail from President Stephen Judge, yet he is copied on, but not a records custodian for, a critical 2010 e-mail suggesting the hiring of a "young/hungry" applicant. Ex. 69. Thus, GMRI's suggestion that EEOC can recover "top-down" messages between Senior Management and Managing Partners at 29 of the 35 restaurants through the few available custodians with limited pre-2014 ESI is incorrect.

In addition, GMRI's Response wholly ignores that EEOC also requested ESI between the Managing Partner and the hiring team at each restaurant, such as the one below:

From: Sarasota Seasons 52
Sent: 10/20/2014 3:32:04 PM
To: Alex O Elshimy GM
Subject: 2nd Interview Host - Possibly Fold and Polish
Show Time As: Free

Recurrence: (none)
Required Attendees: Alex O Elshimy GM

2nd Interview for Host/Fold and Polish

Young guy, some experience, knows Bianca, I think he would be a good fold and polish seems to have a good attitude and smart. Host possibly but think he would work into service better.

Ex. 54; Ex. 67 (Requests 10-11). EEOC cannot recover these communications (Between Managing Partner and hiring team) from the 29 locations with no Managing Partner or Restaurant E-mail.

4. EEOC is Entitled to Spoliation Sanctions. Although GMRI's own policies require a litigation hold, and despite its clear understanding of its litigation hold obligations (as evidenced by the litigation hold in Coral Gables), GMRI failed to issue a litigation hold or take any steps to preserve ESI between August 2011 and February 2014. Even after EEOC's 2013 reasonable cause determination—which explicitly applies to all locations, GMRI, a sophisticated corporate entity, did nothing. Such a failure to act constitutes circumstantial evidence of an intent to deprive EEOC of relevant ESI, and as such, spoliation sanctions are warranted under Rules 37(e)(1) and 37(e)(2).

D. Conclusion. For the reasons set forth in EEOC's Motion and herein, EEOC respectfully requests that the Court enter spoliation sanctions against GMRI.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2017, I filed this document through the CM/ECF system, which will send a notice of electronic filing to all parties.

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