IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 8:12-CV-01325-VMC-MAP

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et. al.,

Plaintiff/Plaintiff-Intervenors,

v.

SUNTRUST BANK,

Defendant.

PLAINTIFF EEOC'S MOTION FOR AN ADVERSE INFERENCE JURY INSTRUCTION BASED ON DEFENDANT'S BAD FAITH DESTRUCTION OF VIDEO SURVEILLANCE EVIDENCE

[*Memorandum of Law Incorporated Herein*]

Pursuant to the Court's inherent power, Plaintiff United States Equal Employment Opportunity Commission ("EEOC") respectfully moves this Court to enter an order sanctioning Defendant SunTrust Bank ("SunTrust") as a result of SunTrust's intentional spoliation of video surveillance evidence in the form of an adverse inference instruction to the jury. SunTrust failed to preserve video evidence that was plainly central to EEOC's sexual harassment claims, after SunTrust had a duty to preserve the evidence and after SunTrust reviewed and used the evidence for its own legal defense. SunTrust's destruction of the video evidence, under the circumstances presented here, demonstrate bad faith.

As set forth below, this Court should enter an order sanctioning SunTrust and imposing a rebuttable presumption that the destroyed video footage would have shown

evidence unfavorable to SunTrust, including Ken Sisson, Branch Manager at SunTrust's Gulf Gate Branch, sexually harassing EEOC Claimant and Intervenor Delia Timaru-Paradis on a near-daily basis from April 7, 2010 through her termination on July 7, 2010 and EEOC Charging Party, Jena Lynch, on a near-daily basis from April 7, 2010 through her termination on July 10, 2010.[1] In the alternative, EEOC requests that the Court permit EEOC to introduce evidence at trial, as presented herein, concerning SunTrust's video surveillance system, SunTrust's policies relating to the use and preservation of video surveillance footage, and SunTrust's failure to preserve the video footage at issue.

I. STATEMENT OF FACTS IN SUPPORT OF SANCTIONS

A. SunTrust Has a Video Surveillance System That Records Activity at its Gulf Gate Branch.

SunTrust's Florida branches, including the Gulf Gate Branch, are equipped with cameras "aimed at the entrance/exit and the teller stations." D.E. #94 at 3. SunTrust's security officer, Cynthia Rodgers, has access from her computer at SunTrust's corporate office in Sarasota, to surveillance video from cameras in all of SunTrust's Sarasota branches. See D.E. #83-8 Jones Dep. 63:25-65:9.[2] SunTrust's written document retention policies emphasize the critical importance of video surveillance evidence to SunTrust's investigations of claims. SunTrust's training on conducting investigations, as

[1] EEOC's reference to "EEOC Claimants" herein refers to Delia Timaru-Paradis, Marcia Vescio, Heather Caldwell, and Jena Lynch. Timaru-Paradis, Vescio, and Caldwell also intervened in this action through private counsel. (*See* D.E. No. 5, 7, 13.) EEOC seeks an adverse inference jury instruction only as to the sexual harassment that would have been captured by SunTrust's video surveillance system beginning April 7, 2010, after Vescio and Caldwell's employment with SunTrust had terminated, and would therefore only depict Sisson's harassment of Timaru-Paradis and Lynch through their respective dates of termination in July 2010. (*See* Ex. 14 Employment Dates.)

[2] References to D.E. #83-[_] refer to exhibits submitted in support of EEOC's Motion to Compel Redacted Litigation Hold Memorandum, D.E. #83.

evidenced by training materials from SunTrust's Legal Department in September 2010, included several reminders to SunTrust employees to "[i]dentify and obtain all related documents or other evidence (e.g., policies, email, security video)." Ex. 1, at SUNTRUST.EEOC 007611, 007622 (emphasis added).[3]

As described in SunTrust's document retention policy, SunTrust maintains surveillance images, including "video images of camera views at branches and buildings," electronically on each individual camera unit's hard-drive, for a period of ninety (90) days. See D.E. #83-5. Further, in the circumstances presented here, where SunTrust reviewed and analyzed the video surveillance as part of an investigation and in response to threatened litigation, SunTrust's document retention policies indicate that the company had an obligation to maintain the video surveillance for at least two additional years, if not longer.[4]

B. Several Women Complained to SunTrust About Sexual Harassment Perpetrated by Branch Manager Ken Sisson.

Ken Sisson began working in SunTrust's Gulf Gate branch as Branch Manager in or around November/December 2008. *See* ST SOF[5] ¶ 1. Soon thereafter, female

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[3] Likewise, SunTrust's Human Resources Investigation Guidelines identify security videos as a source of information when conducting investigations. Ex. 18, at 9, 13.

[4] When video surveillance images are used by "Investigators," SunTrust policy requires that they be maintained for a period of two years. (*Id.*). The other records that "Investigators" are to maintain include case files used in fraud documentation, which are to be kept for a period of two years after the closure of the case. (Id.) Further, SunTrust's Human Resources Department is required to keep "records" relating to "Employee Relations/Investigation Files" from the date the investigation is closed, and for a period of eight years. (Ex. 19 at 10.) Likewise, SunTrust's Legal Department is required to keep "records relating to threatened or asserted litigation or government investigation" "until the matter is closed plus 6 years," and more generally, "records related to providing determining legal requirements and providing advice within the company" "until completion of the project plus 10 years." (*Id.* at 14.)

[5] "ST SOF" refers herein to SunTrust's statement of undisputed facts, submitted as part of SunTrust's Motion for Summary Judgment, D.E. #107.

subordinate employees began to complain about sexual harassment by Sisson. In June 2009, Heather Caldwell complained to Kevin Osborne, Sisson's direct supervisor and SunTrust's Area Manager. *See* ST SOF ¶¶ 15, 30. Additionally, in September, 2009, SunTrust Human Resources Advisor, Shelley Jones, was aware of or received complaints about Sisson's conduct from Angela Rojas, Linda Schubert, and an anonymous caller through SunTrust's hotline (later learned to be Marcia Vescio). See Exs. 2, 3, 4. As set forth in detail in EEOC's Response in Opposition to SunTrust's Motion for Summary Judgment, Ken Sisson would routinely, on a daily basis, stand within an inch and half of his employees, make unwelcome sexual comments to them while working, stare at them in a sexual way, and/or touch their bodies without consent. *See* D.E. #124, pp. 6-21.

C. Additional Complaints of Sexual Harassment and Other Violations of the Law Put SunTrust on Notice of Potential Sexual Harassment and Overtime Litigation as of July 6, 2010 and Lead to SunTrust's Identification of Video Surveillance Footage as Relevant to the Investigation of these Complaints.

Like other female SunTrust employees, Delia Timaru-Paradis, an EEOC Claimant and Intervenor in this case, advised Shelly Jones, SunTrust's Human Resources Advisor of sexual harassment at the Gulf Gate branch.. On July 6, 2010, Paradis told SunTrust that: 1) she had been subjected to sexual harassment from Branch Manager, Ken Sisson; 2) she had worked unpaid overtime; and 3) she had contacted an attorney. See D.E. #83-1; D.E. #83-2. On July 14, 2010, eight days after meeting with Timaru-Paradis, Jones acknowledged in writing that she was aware Timaru-Paradis had contacted an attorney. *See* D.E. #83-2 at SUNTRUST.EEOC 000581. Consistent with SunTrust's investigation and document retention policies, Jones also made notes to review the following evidence

relevant to Timaru-Paradis' complaints: "camera, computer log-in, notebook." Id. (emphasis added).

Soon thereafter, on August 13, 2010 while Jones was investigating Timaru-Paradis' allegations, SunTrust received a Charge of Discrimination filed by former employee Heather Caldwell with the Florida Commission on Human Relations, also alleging sexual harassment by Sisson. *See* Ex. 5. Caldwell's Charge specifically alleged that she and other women had been sexually harassed by Sisson, who had become "sexually aggressive towards [Caldwell]" in addition to consistently making comments of a sexual nature about her body. *Id.* The Charge also explicitly advised SunTrust of its obligation to preserve relevant documents under Florida law. *Id.* On August 23, 2010, Jones emailed Theresa Hammond, SunTrust's in-house counsel, about Caldwell's Charge of Discrimination, and confirmed that she anticipated litigation from other female employees who complained about Ken Sisson's sexual harassment because she knew that Timaru-Paradis, Caldwell, Vescio, and Lynch "are all still in communication." See Ex. 6 at SUNTRUST.EEOC 002338.[6] Timaru-Paradis filed her Charge of Discrimination with EEOC on July 26, 2010, and SunTrust was sent notice of the Charge on or around September 9, 2010. *See* ST SOF p.2 n.4; Ex. 9. The notice of the Charge sent to SunTrust explicitly advised SunTrust of its legal obligation to preserve records relevant to the Charge under federal law. *See* Ex. 9 at EEOC001424 ("the respondent … shall preserve all personnel records relevant to the charge or the action until final disposition of

[6] Vescio and Lynch signed charges with EEOC soon thereafter,on September 17, 2010 and November 2, 2010 respectively. *See* Exs. 7, 8.

the charge or action.") Timaru-Paradis' Charge also specifically alleged sexual harassment by Sisson, including physical harassment such as grabbing Timaru-Paradis' buttocks. *See* Ex. 9.

In addition to all prior complaints about Sisson that would have put SunTrust on notice of potential litigation, SunTrust did in fact anticipate litigation from former female employees who alleged sexual harassment by Sisson and, as a result, issued litigation hold memoranda or created documents in anticipation of litigation beginning on November 13, 2009. See D.E. #79-9, Docs. 988, 1143-1145, 11897-11899, 11905-11906 (Vescio litigation hold issued on August 19, 2010)[7]; *see also* D.E. #79-9, Docs. 356-357, 918-920, 923-925 (Paradis litigation hold issued on September 21, 2010, but discussed as early as August 19, 2010)[8], 1739-1742 (Lynch litigation hold issued on November 17, 2010), 2343-2345 (Caldwell litigation hold issued on August 24, 2010).

D. Consistent with SunTrust Policy, SunTrust Realized the Crucial Nature of Video Surveillance Footage to Timaru-Paradis' Allegations and Pulled it For Review.

As of July 6, 2010, when Timaru-Paradis informed Jones that she was being sexually harassed by Sisson and that she had contacted an attorney for that purpose as well as unpaid overtime, SunTrust had access to video surveillance footage going back ninety (90) days, or since at least April 7, 2010.

[7] Notably, SunTrust anticipated litigation from Vescio as early as November 13, 2009, but waited over nine months before issuing a litigation hold. *See* D.E. #79-9, Docs 988, 1143, 1144, 1145.

[8] Even if SunTrust did not take steps to preserve video evidence when it received notice that Paradis had retained counsel, SunTrust issued a litigation hold for Paradis on September 21, 2010. As of that date, pursuant to its 90 day document retention policy, SunTrust would have still had two weeks of video footage of Paradis at the Gulf Gate Branch.

SunTrust initiated an investigation of Timaru-Paradis' complaints, (*see* D.E. #83-3 at SUNTRUST.EEOC 000012), and, as part of the investigation, SunTrust extracted video surveillance footage from its Gulf Gate Branch cameras and reviewed it. On July 29, 2010, Corporate Security Officer Rodgers emailed Jones with her review of Timaru-Paradis' work start and end times based on watching videotape footage pulled from the security cameras. See D.E. #83-4 at SUNTRUST.EEOC 000587. According to Rodgers' specific findings relating to Timaru-Paradis' allegations, Timaru-Paradis was not at a morning meeting on June 1, 2010 and left earlier than she claimed on her time sheet on June 4, 2010. Id. Jones then asked Rodgers to review the camera footage for a second time in reference to Timaru-Paradis' overtime claims on August 17, 2010. See id., at SUNTRUST.EEOC 000585. SunTrust's Investigation Summary at the conclusion of its investigation into Timaru-Paradis' claims found that her overtime claim was unsubstantiated, noting that her time records did not match her actual work schedule, but that a "[r]eview of cameras in office by Security partner, Rodgers, showed Timaru-Paradis' times in and out of the office were consistent with her time records" and that there was no evidence of any FLSA violations. D.E. #83-3 at SUNTRUST.EEOC 000013.

Although Jones' summary about Timaru-Paradis' investigation discussed the video surveillance in reference to the FLSA violation, Jones made no reference to the video surveillance in reference to the sexual harassment claims, including whether Sisson could be seen on the video footage. At that point, Jones knew that Timaru-Paradis' complaints involved Sisson making sexual comments, demonstrating "unwelcome

behavior" toward Timaru-Paradis and touching her. *Id.* Jones also knew that Sisson had made unwelcome comments towards Jena Lynch, and in fact, she anticipated litigation on behalf of Jena Lynch. (*Id.*; Ex. 6). Further, Jones acknowledged that the video surveillance would have been relevant to Timaru-Paradis' claims regardless of whether or not the videos actually showed evidence of sexual harassment. D.E. #83-8 Jones Dep. 204:9-205:7.

E. EEOC Requested Video Surveillance Footage in Discovery, and Video Was Responsive to Document Requests During Investigation of the Charges, but SunTrust Intentionally Destroyed It So It Could Not be Produced.

Video footage of the Gulf Gate branch would have been responsive to requests for information and documents made during EEOC's administrative investigation of these charges, since August 13, 2010, but SunTrust did not produce it during the investigation. *See* Ex. 10 at EEOC001726-1727 (documents reviewed as part of SunTrust's investigation into Timaru-Paradis' complaints); Ex. 5 at EEOC000996, ¶ 5).

EEOC filed suit against SunTrust on June 13, 2012, alleging that Sisson sexually harassed Vescio, Lynch, and Timaru-Paradis since 2008 or 2009 at the Gulf Gate Branch. See D.E. #2, ¶¶11-36. SunTrust was served with the lawsuit, and therefore had notice of actual litigation, as of June 13, 2012. *See* D.E. #2. During litigation, SunTrust failed to include the video surveillance footage in its Initial Disclosures, which were served in November, 2012. *See* Ex. 11. Notwithstanding, EEOC requested production of video footage from the Gulf Gate Branch in its request for production of documents. *See* Ex. 12, No. 16. SunTrust's responses to EEOC's requests dated February 11, 2013 advised – without explanation – that "[s]uch videos no longer exist." Ex. 13, No. 16. Notably,

SunTrust did not explain how the video came to no longer exist or identify the policy which permitted its routine destruction. When EEOC moved to compel SunTrust's litigation hold documents in order to discover SunTrust's preservation attempts with regard to the video surveillance, (*see* D.E. #83), SunTrust admitted that "there was video surveillance that existed at one time but is no longer in existence." D.E. #94 at 2. In fact, as set forth above, SunTrust reviewed it as part of their investigation of Timaru-Paradis' July 6, 2010 complaints. See D.E. #83-4 at SUNTRUST.EEOC 000587 (email dated July 29, 2010 summarizing review of video records); D.E. #83-3 at SUNTRUST.EEOC 000013 (Allegation Five) ("Review of cameras in office by Security partner, Rodgers, showed Timaru-Paradis' times in and out of the office were consistent with her time records."). SunTrust also advised that it "did not take affirmative steps to prevent such videos from being taped over or otherwise deleted in accord with its normal document retention policy" because it did not believe that the videos would have shown "any interactions" since they were "not aimed at locations in the branch where Paradis claims the alleged touching occurred." See D.E. #94 at 4. SunTrust, however, utilized the video evidence for its own purposes between July 6, 2010, when Timaru-Paradis complained to Shelly Jones, and August 17, 2010, when Security Officer Rodgers reviewed the video footage to confirm Timaru-Paradis' work start and end times. *See* D.E. #83-4.[9] Thereafter, having determined that the video surveillance was no longer

[9] Since the video surveillance footage was used for investigative purposes, and in response to threatened litigation, it should have been retained for a minimum of two years pursuant to SunTrust's records retention policies. (Ex. 19; D.E. 83-5), and therefore should have been retained up through and including July/August 2012, assuming litigation was not anticipated at that time. Because EEOC filed suit in June, 2012, destruction would not have been a lawful option.

useful to SunTrust, SunTrust either destroyed the evidence and/or allowed it to be destroyed pursuant to its document retention policy.

F. The Destroyed Video Evidence Was Plainly Central to this Action.

The video evidence to which SunTrust had access, over which SunTrust had exclusive possession and control, and which SunTrust allowed to be destroyed based on its determination that it was not relevant, would have depicted areas of the bank branch where Sisson harassed both Timaru-Paradis and Lynch on a daily basis between April 7, 2010 and their respective dates of termination in July 2010.[10]

Timaru-Paradis began her employment with SunTrust in 2008 as a financial services representative, and was transferred to the Gulf Gate Branch in 2010. D.E. #83-7 Timaru-Paradis Dep. 41:1-9, 68:10-23. Lynch was hired as a teller in 2008 and transferred to the Gulf Gate Branch in 2009. See D.E. #124-1 Lynch Dep. 13:3-10; Ex. 14. SunTrust admitted in its Opposition to EEOC's Motion to Compel that "cameras are aimed at the entrance/exit and the teller stations." D.E. #94 at 3. Both Timaru-Paradis and Lynch testified extensively as to how Sisson harassed them both physically and verbally at or around the teller lines, or the entrance to the bank. Timaru-Paradis testified that some of Sisson's harassment, which began soon after she started at the Gulf Gate branch, occurred around the teller line, especially since Sisson spent time overseeing the tellers daily. *See* D.E. #125-1 ¶¶ 9, 12-15; D.E. #83-7 Timaru-Paradis Dep. 252:7-252:21. Sisson would touch and caress her arms, shoulders, and neck constantly, and massaged her neck and shoulders in a sexual way that made Timaru-

[10] Timaru-Paradis was terminated on July 7, 2010 and Lynch was terminated on July 10, 2010. *See* Ex. 14.

Paradis uncomfortable. *See* D.E. #125-1 ¶¶ 25, 32-33; D.E. #83-7 Timaru-Paradis Dep. 322:5-323:4, 339:15-340:8. Although the harassment began in 2009, Timaru-Paradis testified that the harassment continued between May 2010 and her termination in July 2010. *See* D.E. #83-7 Timaru-Paradis Dep. 322:5-323:4, 339:15-340:8. Timaru-Paradis also testified that in addition to caressing her thighs when she was talking to a customer, between May and July 2010 Sisson passed by her when she was standing at or near the teller line and grabbed and rubbed her thighs, pretending that she had something on her pants. Id. at 237:9-22, 287:8-15, 339:15-341:11. Further, on June 2, 2010, Sisson confronted and harassed Timaru-Paradis when she was returning to the branch from speaking with a client in the parking lot. Sisson had been waiting for her at the entrance to the branch and when she approached the entrance, Sisson grabbed her shoulders and interrogated her, asking her if she had any "plans" that night to meet with the client, implying that she was involved in a sexual relationship with him. Timaru-Paradis then pushed his hands away from her shoulders and told him not to touch her again. *See* D.E. #125-1, ¶ 56.

Sisson harassed Lynch in similar ways, beginning weeks after she started working at the Gulf Gate branch. *See* D.E. #124-2, ¶¶ 6-7, 9, 10. On a near-daily basis, whenever Sisson wanted to speak to her, Sisson would approach her either from behind or from the front while she was standing at the teller, and stand extremely close, within an inch and a half, from her body, would frequently make sexual comments or remarks to Lynch, and would stare at her in a sexual way that made her uncomfortable. See D.E. #124-1 Lynch Dep. at 19:1-20, 20:10-23, 61:2-19; D.E. #124-2, ¶¶ 10-14, 21-31). As set forth above, in

this "he said she said" scenario, the video surveillance footage would have captured the very incidents of which Lynch and Timaru-Paradis complained. This is particularly critical here since Sisson denies all allegations made against him and SunTrust had adopted this position in defense of the claims. *See* D.E. #127-4 Sisson Dep. 15:11-21; Ex. 15 at EEOC000524; Ex. 16 at EEOC001236-1237; Ex. 17 at EEOC001602.

G. Notwithstanding SunTrust's Unilateral Decision to Destroy the Evidence, SunTrust Isolated, Printed and Preserved a Still-Shot Photograph for Use in Its Defense of this Litigation.

SunTrust's response to EEOC's document request for video of the Gulf Gate branch was that the video no longer existed. Ex. 13, No. 16. However, during this litigation, SunTrust produced a still photograph extracted from that video dated April 30, 2010 purporting to depict Timaru-Paradis hugging a client. D.E. #83-6. According to SunTrust's document retention policy, the latest that footage from April 30, 2010 could be pulled was 90 days later, or July 29, 2010 – the day Security Officer Rodgers emailed Jones with details about Timaru-Paradis work schedule.

II. LEGAL ANALYSIS

Federal district courts possess the inherent power to regulate litigation and to sanction litigants for abusive practices. *Roadway Exp., Inc. v. Piper* 447 U.S. 752, 765 (1980); *Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 F. Supp. 2d 1273, 1277 (S.D. Fla. 1999); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 126 (S.D.Fla. 1987). The power is broader and more flexible than the authority to sanction found in the Federal Rules of Civil Procedure. *Banco Latino*, 53 F.Supp. 2d at 1277; *Telectron* 116 F.R.D. at 125 (citing *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 951 (9th Cir. 1976)). It is

well-settled that Courts have the authority to sanction a party who destroys relevant and discoverable evidence. *See e.g. Telectron* 116 F.R.D. at 107.

A litigant is under a duty to preserve evidence which it knows, or reasonably should know, is relevant in an action. *Banco Latino,* 53 F.Supp. 2d at 1277; *Telectron,* 116 F.R.D. at 126. Sanctions may be imposed upon litigants who destroy documents while on notice that they are or may be relevant to litigation or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence. *Banco Latino,* 53 F.Supp. 2d at 1277. Similarly, Rule 37 of the Federal Rules of Civil Procedure authorizes the imposition of sanctions that are "intended to prevent unfair prejudice to the litigants and insure the integrity of the discovery process." *Gratton v. Great Am. Commc'n,* 178 F.3d 1373, 1374 (11th Cir. 1999).

In this Circuit, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith. *Bashir v. Amtrak,* 119 F.3d 929 (11th Cir. 1997); *see also, Aramburu v. Boeing Co.,* 112 F.3d 1398, 1407 (10th Cir. 1997) (no bad faith found where calendar page reflecting employee's attendance was lost where employer presented calendar pages from year before and year after lost page as well as a computer record showing the employee's absences for the year of the missing calendar page and there was no other evidence that the missing calendar page was anything other than simply lost); *see also Coates v. Johnson & Johnson,* 756 F.2d 524, 551 (7th Cir.1985); *Telectron, Inc. v. Overhead Door Corp.,* 116 F.R.D. 107 (S.D.Fla.1987). The adverse inference must be predicated on the bad faith of the party destroying the records. *See Vick v. Texas Employment Comm'n,* 514

F.2d 734, 737 (5th Cir. 1975) ("…records were destroyed under routine procedures without bad faith"). "Mere negligence in losing or destroying the records is not enough for an adverse inference, as it does not sustain an inference of consciousness of a weak case." *Vick,* 514 F.2d at 737.

> . . ."[B]ad faith" does not mean malice, that is, intentional misconduct. While evidence of intentional destruction of evidence would surely show "bad faith," it is not a condition precedent. Indeed, proof of malicious destruction of evidence would rarely be available where one party has full control of the evidence. Instead, I believe that "bad faith" exists in a case like the case at bar, where (1) the evidence is plainly central to a potential claim that might arise and the party knows it or reasonably should know it, (2) the lack of the evidence will significantly benefit the party who fails to preserve it, (3) the evidence of what happened is unsettled and probably would be significantly clarified if the lost evidence still available, and (4) the reasons given by for not preserving the critical evidence are suspiciously irrational.

Britton v. Wal-Mart Stores E., L.P., No. 4:11CV32-RH/WCS, 2011 U.S. Dist. LEXIS 86901, *38 (N.D. Fla. June 8, 2011). Thus, under the "adverse inference rule," courts within the Eleventh Circuit cannot infer that the missing videotape footage contained evidence unfavorable to SunTrust "unless the circumstances surrounding the tape's absence indicate bad faith, e.g., that [SunTrust] tampered with the evidence . . . or purposely lost or destroyed the relevant portion of the [videotape footage] . . . under the particular circumstances of the instant case. . ." *Bashir,* 119 F.3d at 931. The facts in this case merit a finding of bad faith spoliation of evidence.

A. SunTrust Had a Legal Obligation to Preserve the Video Footage.

SunTrust had a clear legal obligation to preserve the video footage it used in its investigation of Timaru-Paradis' complaints. First, Jones had knowledge of several sexual harassment complaints against Ken Sisson and anticipated litigation about it,

which she communicated to SunTrust's legal department. SunTrust had a legal obligation to preserve the video surveillance evidence on July 6, 2010 when Timaru-Paradis complained to Jones, and told her that she had retained an attorney in connection with her complaints of sexual harassment and unpaid overtime. See *Simon Prop. Group Inc. v. Lauria*, No. 6:11-cv-01598-Rld-31KRS, 2012 U.S. Dist. LEXIS 184638, at *19 (M.D. Fla. Dec. 13, 2012) ("A party has an obligation to retain relevant documents when litigation is reasonably anticipated."); Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 126 (S.D. Fla. 1987) ("Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation . . . ."). Not only did Jones reaffirm her knowledge that litigation was imminent on July 14, 2010, in her notes referring to Timaru-Paradis' attorney, but Jones emailed SunTrust's counsel and notified her that she anticipated litigation from additional women. *See, e.g., Crown Castle USA Inc., et al. v. Nudd Corp.,* Case. No. 05-CV-6163T, 2010 U.S. Dist. LEXIS 32982, *30 (W.D.N.Y. Mar. 31, 2010) (duty to preserve relevant evidence arose when, among other things, defendant retained outside counsel "for purposes of litigation.").

Second, SunTrust received several Charges of Discrimination in August and September 2010, which again named Sisson as the harasser and explicitly put SunTrust on notice that it had a legal duty under federal and state law to preserve all evidence relevant to the claims alleged in the Charges. In addition to the formal Charges of Discrimination, SunTrust had previously received numerous previous complaints about Sisson, from Caldwell in June 2009 and from Rojas, Schubert, and Vescio in September

2009, and SunTrust's privilege log indicates that it anticipated Vescio litigation as early as November 2009. Nevertheless, SunTrust claims to have allowed the video evidence to be destroyed because it wouldn't show Timaru-Paradis being touched by Sisson.

Lastly, SunTrust did in fact anticipate litigation around the time that the video was still available and being reviewed by Rodgers, and created documents in anticipation of litigation or issued litigation holds to preserve documents in anticipation of litigation related to Sisson's sexual harassment from Vescio as early as November 13, 2009, from Caldwell on August 24, 2010, from Timaru-Paradis as early as August 19, 2010, and from Lynch on November 17, 2010. See D.E. #79-9, Docs. 356-357, 918-920, 923-925, 988, 1143-1145, 1739-1742, 2343-2345, 11897-11899, 11905-11906.

B. The Video Evidence was Clearly and Critically Material to the Sexual Harassment Allegations Against Ken Sisson Made by Numerous Female SunTrust Gulf Gate Branch Employees.

The video evidence was plainly central to potential sexual harassment claims that SunTrust knew existed as of July 2010, and knew constituted a larger pattern of complaints against the same harasser since June 2009. The destruction of the video significantly benefits SunTrust because the video would likely have captured instances of harassment alleged by EEOC claimants, which is particularly critical because SunTrust denies that harassment occurred, and thus the video evidence would be objective evidence capturing the events in question. Moreover, SunTrust's explanation for the video's destruction demonstrates bad faith, because SunTrust was on notice of potential litigation, reviewed and utilized the evidence for its own legal defense, and then allowed the evidence to be destroyed. Like in *Flury v. Daimler Chrysler Corp.*, SunTrust was

"the only party in a position to preserve the [evidence] and failed to do so," and EEOC is "precluded from obtaining much more reliable evidence tending to prove or disprove the validity of" SunTrust's denials. 427 F.3d 939, 946 (11th Cir. 2005).

It cannot be disputed that the video surveillance footage at issue is centrally relevant to the sexual harassment claims at issue – it would have been unquestionable evidence of Sisson's harassment of Timaru-Paradis, Lynch, and perhaps other women as well, as it would have shown how, where and to what degree Sisson sexually harassed them, including but not limited to, staring at them, leering at their breasts and buttocks, trapping them behind the teller line and physically touching Timaru-Paradis, between April and July 2010. Indeed, like the review of Timaru-Paradis' whereabouts in the video, the video footage would have revealed how long Sisson remained out of his own office and in the teller area or within a particular teller's area, or how many times per day he approached a particular female teller. It would have shown how physically close Sisson got to female employees and whether his proximity to them inappropriately exceeded the bounds of cultural and business norms. It would have also revealed whether – as female employees have testified – Sisson hovered around the teller lines when female Hooters employees came into the branch, watched them and/or approached them. *See* D.E. #124-1 Lynch Dep. 59:13-61:13, 63:22-64:15. It would have also corroborated Sisson's practice of approaching attractive female customers (and not males or older, allegedly unattractive females) when they entered the bank to assist them. Where the harassment was in the form of unwelcome sexual comments and innuendo, the video would have shown the female employee reactions to Sisson's harassing comments.

SunTrust admits it did not take any affirmative action to preserve the video footage—notwithstanding its own reliance on that evidence—because it unilaterally decided that the videos would have shown "any interactions" between Timaru-Paradis and Sisson since the videos were "not aimed at locations in the branch where Paradis claims the alleged touching occurred." See D.E. #94 at 4. Curiously, SunTrust's carefully worded explanation does not rule out the video footage capturing the evidence – other than touching –that female employees have long complained about at SunTrust as described above.

SunTrust cannot unilaterally decide what is and is not material in a sexual harassment case, knowing that litigation is imminent, and delete what it "believes" does not support EEOC's claims, especially in the kind of case where physical interactions between employees are central to the claims. The video is even more crucial in this case because SunTrust –and Sisson himself –take the position that its female employees are not telling the truth. Despite the serial nature of the complaints of sexual harassment against Ken Sisson between September 2009 and late summer 2010, SunTrust denies that it occurred. *See* D.E. #127-4 Sisson Dep. 15:11-21; Ex. 15 at EEOC000524; Ex. 16 at EEOC001236-1237); Ex. 17 at EEOC001602. As a result, the video would have been more than just evidence of the degree of harassment, but evidence that the harassment occurred at all. *See Simon Prop. Group, Inc. v. Lauria*, No. 6:11-cv-01598-Orl-31KRS, 2012 U.S. Dist. LEXIS 184638 at *20-22 (M.D. Fla. 2012). The facts of this case are easily distinguishable from cases where destroyed or missing evidence was found not to have been crucial because there was other evidence sufficient to prove the same facts that

were missing due to the destruction of evidence. *See, e.g., Floeter v. City of Orlando*, No. 6:05-cv-400-Orl-22KRS, 2007 U.S. Dist. LEXIS 9527, *20 (M.D. Fla. 2007) (missing email "would have been cumulative and [is] not crucial" where seven other explicitly sexual emails and supporting witness testimony existed to prove harassment). Further, SunTrust's reasoning cannot excuse their destruction of the video because, even if the video had shown only appropriate interactions between Timaru-Paradis and Sisson, since that evidence would still be critical to this action as it would have provided evidence of the interactions between Sisson and his female subordinates, not to mention providing a serious boost to SunTrust's legal defenses. In fact, Shelley Jones, SunTrust's HR Advisor, admitted that video surveillance would have been relevant to Timaru-Paradis' claims regardless of whether or not the videos actually showed evidence of sexual harassment. D.E. #83-3 Jones Dep. 204:9-205:7. SunTrust's training policies emphasizing the importance of videos in investigating claims and Jones' early actions in this case to pull and preserve the footage confirm that SunTrust was aware of the critical nature of the evidence. Unlike other cases where claims may be proved through other means, video surveillance evidence in this case would have been the only way to capture and visually show the jury direct evidence of the sexual harassment. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (relying upon "existence in the record of a videotape capturing the events in question" rather than "Respondent's version of events"). SunTrust's destruction of the video footage prejudices EEOC, as it forces EEOC to resort to a "he-said, she-said" scenariothat could have been avoided had SunTrust not deleted the evidence.

C. SunTrust Destroyed the Video While it Was on Notice of Its Duty to Preserve the Video Footage.

It is unclear as to the date when SunTrust destroyed the video footage at issue. However, it could not have been destroyed before August 17, 2010 when Security Officer Rodgers reviewed the footage for a second time pursuant to Jones' instructions. By that time, SunTrust had received complaints from Angela Rojas, Linda Schubert, and Vescio, as well as receiving formal charges from Caldwell on August 13, 2010 specifically complaining about Sisson.[11] Thus, even if SunTrust claims that it merely allowed the video to be destroyed pursuant to an automatic policy (after it affirmatively used the video evidence):

> "once a party is on notice that specific relevant documents are scheduled to be destroyed according to a routine document retention policy, and the party does not act to prevent that destruction, at some point it has crossed the line between negligence and bad faith. At that point, we must find that the reason for the destruction becomes because the party knew that relevant evidence was contained in the documents and wanted to hide the adverse information…"

Wiginton v. CB Richard Ellis, No. 02-C-6832, 2003 U.S. Dist. LEXIS 19128, at *23-24 (N.D. Ill. 2003); *see also Britton v. Wal-Mart Stores E., L.P.*, No. 4:11CV32-RH/WCS, 2011 WL 3236189, *13 (N.D. Fla. June 8, 2011).

D. The Destruction of Centrally Relevant Video Surveillance Evidence Significantly Benefits SunTrust and Evidences Bad Faith.

Finally, SunTrust's destruction of the video footage at issue, considering the totality of the circumstances, evidenced bad faith under the law of the Eleventh Circuit. SunTrust had "full control of the evidence" and its reason "for not preserving the critical

[11] Again, pursuant to SunTrust's own policies, it appears that the video should have been retained for a minimum of two years, and as such, the video could not have been permissibly destroyed until July 2012 – after EEOC had filed this complaint.

evidence are suspiciously irrational." *Britton*, 2011 U.S. Dist. LEXIS 86901, at *38. SunTrust's destruction of the video footage at issue, and "inability" to produce it in this litigation evidences bad faith, as SunTrust allowed the video to be destroyed after it reviewed and utilized the evidence to defend against Paradis' overtime claims. *See, e.g., Bashir*, 119 F.3d at 932-933 (no bad faith where tape was destroyed under routine procedures and witnesses that testified as to tape's content had no motive or opportunity to tamper with the evidence).[12] Indeed, SunTrust purposefully reviewed specific footage for its own litigation needs, then destroyed the video, or allowed it to be destroyed, without providing EEOC a chance to review it. The facts of this case are easily distinguishable from cases where deletion of evidence pursuant to an automatic retention policy has been found to not constitute an affirmative destruction of evidence. See Managed Care Solutions, Inc. v. Essent Healthcare, Inc., 736 F. Supp. 2d 1317, 126, 1332 (S.D. Fla. 2010) (declining to find bad faith where emails were deleted pursuant to an automatic email retention policy that deleted emails older than 13 months when not part of a litigation hold); *Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 F. Supp. 2d 1273, 1277 (S.D. Fla. 1999) (destruction of investigative file was not premised on bad faith where it was maintained for two years and then disposed of pursuant to standard company procedure).

[12] *See also Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (no bad faith found where calendar page reflecting employee's attendance was lost where employer presented calendar pages from year before and year after lost page as well as a computer record showing the employee's absences for the year of the missing calendar page and there was no other evidence that the missing calendar page was anything other than simply lost); *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975) ("…records were destroyed under routine procedures without bad faith").

Further, unlike the factual scenario analyzed in *Bashir*, where the individuals driving the train and responsible for its speed had no possession or control over the train's speed tape and could not tamper with it, SunTrust personnel admittedly identified the need to review camera surveillance video footage relating to Timaru-Paradis' complaints and watched it for its own review and analysis. Moreover, the fact that SunTrust has taken the position that the footage would not have been relevant because the video would not have shown Sisson touching Timaru-Paradis, does not mitigate a finding of bad faith. In *Woodard v. Wal-Mart Stores E., LP*, 801 F. Supp. 2d 1363, 1372-75 (M.D. Ga. 2011), Wal-Mart employees viewed a store videotape in a slip and fall case before the video went missing and testified that no fall was depicted on the video, the floor where the fall was alleged to have occurred was not depicted and no falling box that allegedly caused the fall was seen. Based on this testimony, Wal-Mart argued that any prejudice caused by the missing video was cured. The court rejected Wal-Mart's position because "[o]f course, the video might have showed any other number of things relevant to a premises liability case that Bedeau might not have taken note of at the time." *Woodard*, 801 F. Supp. 2d at 1373. In analyzing the existence of bad faith, the court noted that Wal-Mart's position was that the loss of the video was an inadvertent or honest mistake, and not intentional, but the Court – in considering all of the circumstances – determined that an inference of bad faith was justified because, unlike the disinterested witnesses in *Bashir*, Wal-Mart employees spoke to the video's contents *after* the tape was lost and had an opportunity to tamper or lose it. The Court held that:

> On balance, the circumstances of the disappearance of the videotape are sufficient to support an inference of bad faith and to justify putting the issue

> to the jury. By its own admission, Wal–Mart's policies comprehend the need to evaluate and retain any videotape evidence of a trip-and-fall incident and then forward it to CMI. In that process, the videotape disappeared, and Wal–Mart has offered only speculation as to how that occurred. Wal–Mart can offer the testimony of only one person, Bedeau, as to the contents of that tape. Bedeau, however, is also the primary person with the opportunity to alter or lose the tape, and his statements as to its contents were given at a time when the tape was already lost. Given that a question of fact remains as to whether Wal–Mart lost or destroyed the videotape in bad faith, the appropriate sanction in this case is a jury instruction on spoliation.

Id. at 1376.

As in *Woodard*, SunTrust's failure to preserve the videotape, after using it for its own purposes, can only be explained as bad faith. Under the circumstances presented here, a jury could reasonably conclude that SunTrust's conduct with respect to the video footage at issue warrants an inference that the footage would have been detrimental to SunTrust's defense and helpful to EEOC's case. *See Woodard v. Wal-Mart Stores E., L.P.*, 801 F. Supp. 2d 1363 (M.D. Ga. 2011); *see also Stanton v. Nat'l R.R. Passenger Corp.*, 849 F. Supp. 1524, 1528 (M.D. Ala. 1994).

Finally, SunTrust's use of the evidence on August 17, 2010, when Rodgers was asked to view the video for a second time, and subsequent destruction, suggests bad faith, as SunTrust also appears to have violated its own document retention policies. *See Stanton v. Nat'l R.R. Passenger Corp.*, 849 F. Supp. 1524, 1528 (M.D. Ala. 1994) (question of fact for jury where it was Amtrak's procedure to save speed tape after an accident but it was not saved and defendants could not explain the circumstances surrounding its destruction).

E. An Adverse Inference Jury Instruction is the Appropriate Sanction in this Case.

Once bad faith spoliation is established, a court may impose, among other sanctions, a jury instruction on spoliation of evidence which raises a presumption against the spoliator. Flury, 427 F.3d 939 at 945. There are different types of adverse inferences on which a jury can be instructed, "ranging in ever-increasing levels of harshness," from: 1) instructing a jury that certain facts are deemed admitted and must be accepted as true; 2) imposing a mandatory, albeit rebuttable, presumption; and 3) permitting a jury to presume the lost evidence is favorable to the moving party, but also permitting the jury to consider rebuttal evidence and allowing the jury to decide whether to draw an adverse inference. See Commercial Long Trading Corp. v. Scottsdale Ins. Co., No. 12-cv-22787, 2013 U.S. Dist. LEXIS 36031, at *6 (S.D. Fla. Mar. 15, 2013).

Here, EEOC requests that the Court issue the third type of adverse inference, and impose on the jury an instruction on spoliation, which permits the jury to presume the video would have been favorable to EEOC, but also permits the jury to consider rebuttal evidence.[13] *See Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 1289 (M.D. Fla. 2009) (giving a rebuttable presumption that radios with missing accessories would yield evidence adverse to defendants).

F. Alternatively, the Court Should Permit the Introduction of Evidence Concerning the Missing Video Footage at Trial.

Should the Court deny EEOC's motion for an adverse inference instruction as a sanction, EEOC requests that the Court permit EEOC to introduce as evidence at trial

[13] Specifically, the jury should be instructed that it may presume that the video would have shown Sisson sexually harassing both Timaru-Paradis and Lynch from April 6 to July 10, 2010, and specifically getting uncomfortably close to both Timaru-Paradis and Lynch while they worked on a daily basis, staring at them in a sexual way, caressing Timaru-Paradis on the arm, shoulders, and neck in a sexual way, and grabbing Timaru-Paradis on her thighs and shoulders on at least one occasion from April to July 2010.

facts pertaining to SunTrust's video surveillance system, SunTrust's policies relating to the use and preservation of video surveillance footage, and facts relating to the use and failure to preserve the video footage at issue here. See Managed Care Solutions, Inc. v. Essent Healthcare, Inc., 736 F. Supp. 2d 1317, 1334 (S.D. Fla. 2010) (refusing to grant adverse jury instruction but noting that plaintiff was not foreclosed from introducing evidence of defendant's failure to retain relevant documents at trial).

Evidence of SunTrust's destruction of the video footage is relevant and admissible under the Federal Rules of Evidence. *See* Fed. R. Evid 401 (evidence is relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence" and "is of consequence in determining the action"); Fed. R. Evid. 402 (relevant evidence is admissible unless proscribed by federal law or rules). Although relevant evidence may be inadmissible if its "probative value is substantially outweighed by a danger of, among other things, "unfair prejudice," (*see* Fed. R.Evid. 403), SunTrust's actions in this case are no different from other cases where courts have ruled that the circumstances surrounding the spoliation of records is not precluded from being presented to the jury. *See Commercial Long Trading Corp.*, 2013 U.S. Dist. LEXIS 36031, at *28. There is no prejudice to SunTrust from the adversarial presentation of the facts relating to the video footage at issue that is unfair.

III. CONCLUSION

For the foregoing reasons, EEOC requests that the Court grant its motion for an adverse inference jury instruction, or alternatively, allow EEOC to introduce relevant evidence of spoliation at trial

Local Rule 3.01(g) Certificate

Pursuant to Middle District Local Rule 3.01(g), EEOC conferred with counsel for SunTrust regarding the instant motion. Counsel for SunTrust objects to the relief requested herein.

Dated: November 22, 2013

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the foregoing has been furnished via CM/ECF on November 22, 2013, upon the following:

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