

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
OCALA DIVISION**

**LISA R. KELLEY and SHARON  
PARKER, individually and on behalf of  
all others similarly situated**

**Plaintiffs,**

**v.**

**Case No: 5:13-cv-451-Oc-22PRL**

**TAXPREP1, INC.**

**Defendant.**

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**ORDER**

This matter is before the Court on Defendant TaxPrep1, Inc.'s motion for sanctions against Plaintiff Sharon Parker for spoliation of purportedly critical evidence. (Doc. 71). While not disputing that she discarded documents possibly related to this litigation, Parker contends that the motion should nonetheless be denied because the missing evidence is not crucial and she lacked the requisite bad faith to justify dismissal of her claims. I agree.

**I. BACKGROUND**

This Fair Labor Standards Act ("FLSA") case arises out of Plaintiff's employment with Defendant, a tax preparation company that operates various stores.<sup>1</sup> Plaintiff alleges that Defendant misclassified her as an exempt "Office Manager" and improperly denied her overtime compensation for the years 2011, 2012, and 2013 in violation of the FLSA. Specifically, Plaintiff contends that she was not exempt under the executive exemption because, *inter alia*, she did not

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<sup>1</sup> This lawsuit was filed by Parker and co-Plaintiff, Lisa R. Kelley. Because the instant motion is brought solely against Parker, this Order will not discuss Kelley.

“customarily and regularly direct the work of two or more other employees” while employed with Defendant as required by 29 C.F.R. § 541.100(a)(3). Parker further alleges that Defendant’s violation was willful because Defendant had knowledge that its stores were not properly staffed prior to 2013, thus justifying application of the expanded three-year statute of limitations period and liquidated damages.

At her deposition in January 2015, Parker testified that during the summer of 2014 – one year after filing this action, and months after purportedly producing “all documents in Plaintiffs’ possession, custody, or control that pertain to the unpaid wages claim in the Complaint” pursuant to the Court’s scheduling order – she cleaned out her closet and got rid of emails and other documents. (Parker Deposition at 7-8).<sup>2</sup> Parker explained that she “got rid of stuff that [she] didn’t really think was pertinent to anything” (Parker Deposition at 8), but she acknowledged that some of the documents probably related to staffing or job duties. (Parker Deposition at 9).

Defendant has now moved for sanctions against Parker for “her bad faith incurable spoliation of critical evidence” and requests that the Court dismiss Parker’s claims for (1) overtime compensation beyond the two-year statute of limitations period; and (2) liquidated damages.<sup>3</sup>

## II. DISCUSSION

Spoliation is the intentional destruction of evidence or the significant and meaningful alteration of a document or instrument. *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*,

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<sup>2</sup> A copy of the deposition transcript is attached to Defendant’s motion as Exhibit E. (Doc. 71-5).

<sup>3</sup> In its reply, Defendant notes that on May 5, 2015, months after the close of discovery, Parker turned over 200 pages of e-mails related to this action from a Yahoo account. (Doc. 84 at 2-4). At the hearing, Defendant explained that while it was not seeking sanctions for this late disclosure, it was further evidence of Parker’s bad faith discovery conduct. If Defendant finds that it needs to conduct additional discovery related to these late-disclosed emails, it may file an appropriate motion.

341 F.3d 1292, 1308 (11th Cir.2003). Federal law governs the imposition of sanctions for spoliation of evidence, but the Court's opinion may be informed by state law, as long as it is consistent with federal law. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir.2005). The elements of a spoliation claim are: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages. *Green Leaf Nursery*, 341 F.3d at 1308. In addition, sanctions for spoliation are appropriate only when there is evidence of bad faith and lesser sanctions will not suffice. *Flury*, 427 F.3d at 944. Defendant, as the moving party, has the burden of proof. *Managed Care Solutions, Inc. v. Essent healthcare, Inc.*, 736 F.Supp.2d 1317, 1322 (S.D. Fla. 2010).

The Court has broad discretion to impose sanctions derived from its inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases. *Flury*, 427 F.3d at 944 (citing *Chambers*, 501 U.S. at 43). Available sanctions include, but are not limited to, the following: default judgment, adverse inference or rebuttable presumption instructions to the jury, striking pleadings, and an award of fees and costs incurred by the injured party as a result of the spoliation. *See id.* at 945. "Factors to be considered when determining the seriousness of the sanctions to impose against a party for failure to preserve critical evidence in its custody vary according to (1) the willfulness or bad faith of the party responsible for the loss or destruction of the evidence; (2) the degree of prejudice sustained by the opposing party; and (3) what is required to cure the prejudice." *St. Cyr v. Flying J. Inc.*, 3:06-cv-13-33TEM, 2007 WL 1716365, at \*4 (M.D.Fla. June 12, 2007).

Here, even assuming that the documents discarded by Parker were relevant to this case, Defendant's motion is due to be denied because Defendant has failed to show that their destruction significantly impaired Defendant's ability to defend this action. Defendant is essentially arguing that Parker got rid of emails and other documents that would help Parker prove up her case – i.e., emails with her regional manager putting Defendant on notice that Parker was not managing other employees, and thus, was not properly classified as exempt. While Parker can still testify at trial that she had such communications with her regional manager, the regional manager will have the opportunity to refute her claims. While this could lead to a credibility determination by the factfinder (or as Defendant says “a she-said, he-said” dispute), it does not prevent Defendant from defending this claim. Indeed, whether Parker was managing other employees likely can be established through other evidence such as time sheets or payroll records. Moreover, even if Parker had turned over email communications that she sent to her regional manager, Defendant would still have had some burden to insure that they were the entire universe of relevant communications. And, although searching the web-based email program may be time-consuming, it is not impossible, especially when, as here, Defendant would be searching the system for emails over a finite period of time between Parker and her regional manager.<sup>4</sup>

Finally, Defendant has failed to show that Parker discarded the documents in bad faith. Indeed, Parker's deposition testimony – i.e., that she only “got rid of stuff that [she] didn't really think was pertinent to anything” – suggests negligence, rather than the requisite bad faith, especially since Defendant contends that the discarded documents were actually helpful to Parker's

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<sup>4</sup> For these reasons, I also deny Defendant's *sua sponte* request at the hearing, that the Court require Parker to pay for Defendant's costs to search the email system.

position (and thus, their disposal hurt Parker too). *See e.g., Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997)(mere negligence in discarding documents is not enough to show bad faith).

Accordingly, Defendant's motion for sanctions (Doc. 71) is **DENIED**.

**DONE** and **ORDERED** in Ocala, Florida on July 27, 2015.



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PHILIP R. LAMMENS  
United States Magistrate Judge

Copies furnished to:

Counsel of Record  
Unrepresented Parties