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

**LISA R. KELLEY and SHARON PARKER,**

**Plaintiffs,**

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

**TAXPREP1, INC.,**

**Defendant.**
_____/

**PLAINTIFF SHARON PARKER'S OPPOSITION TO DEFENDANT'S MOTION FOR SANCTIONS AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff Sharon Parker opposes Defendant's Motion for Sanctions against Sharon Parker for Spoliation of Critical Evidence (Doc. 71) (hereinafter "Motion for Sanctions") and requests the Court deny the Motion for Sanctions on the following grounds:

**I.**

**INTRODUCTION**

This action for violation of the Fair Labor Standards Act ("FLSA") was filed by Parker on August 20, 2013. The Complaint alleges that Defendant violated the FLSA by requiring Parker, who was misclassified as an exempt "Office Manager," to work more than a forty (40) hour a workweek with no overtime compensation. Parker contends that she was not exempt under the executive exemption to the FLSA because, among other things, she did not "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 testified that she got "rid of a lot of stuff that [she] really did not think was pertinent to anything" when she cleaned out her closet last Summer. (Doc. 71-5- Depo. of

Parker at 8:2-10.) Parker did not know for certain what all she got rid of during this process. (Id. at 9:12-25.) At one place in her deposition, Parker indicated that some of what she got rid of may have included e-mails from an employee of the defendant named Roxanne Rose. (Id. at 10:1-6.) In any event, Parker testified that she did not believe that any materials she discarded when she cleaned out her closet were important to this case. (Id. at 8:11-17; 18:12-21.) Parker also mentioned that she thought she at one time had text messages, incorrectly referred to by her as "Snapchats," with her former supervisor, Ed Redrow, which related to her having to perform work off the clock and which she was not able to produce from her phone. (Id. at 8:18-25.) Finally, Parker mentioned a December 2013 communication between her and one of Defendant's officers, Craig Forness, about an office manager contract for 2014, which she did not know if she kept and was not able to produce. (Id. at 11:10-11; 14:8-25.)

The Defendant has moved the Court to impose sanctions on Parker and dismiss certain of her claims on the grounds that Parker deliberately and in bad faith discarded e-mails and other electronic messages which the Defendant alleges are crucial to its defense. Specifically, the Defendant contends that, without the e-mails and electronic messages mentioned in the previous paragraph, it is not able to defend itself against her claims for willful violation of the FLSA. Defendant concedes that in 2013 it knew its offices were understaffed in the sense that there were not two or more employees there for an "Office Manager" to "customarily and regularly direct." Defendant argues, however, that it did not know about the understaffing in 2011 and 2012 and that the e-mails and electronic messages are the crucial evidence needed to prove that point and avoid the three-year statute of limitations and liquidated damages. (Doc. 71 at p. 9, last ¶.) This is an odd position to take in light of the fact that Defendant has filed a Motion for Partial Summary Judgment (Doc. 67) on the merits of the willfulness and bad faith issues stating

that the evidence on both is so strong in its favor that it should prevail as a matter of law. Defendant seeks the same remedy in its Motion for Sanctions that it does in its Motion for Partial Summary Judgment, namely—"an Order dismissing Parker's claims for overtime compensation beyond the two-year statute of limitations period and for liquidated damages." (Doc. 71 at p. 12.)

The Defendant's Motion for Sanctions is due to be denied. First, the Defendant has not proven that Parker acted in bad faith when she cleaned out her closet and got rid of materials that she did not think were pertinent or important to this case or in connection with her inability to provide some communications with Ed Redrow and Craig Forness. Second, the Defendant cannot prove that any of the material that was cleaned out of Parker's closet or the Ed Redrow or Craig Forness communications were crucial, or even relevant, to Defendant's statute of limitations or good faith defenses. Finally, any communications from Roxanne Rose or Craig Forness should still be available to the Defendant on its inter-office e-mail system known as JH-Net.

## II.

## MEMORANDUM OF LAW AND ARGUMENT

### A. STANDARD FOR SPOLIATION SANCTIONS

Spoliation is the intentional destruction, concealment, mutilation, or material alteration of evidence. Southeastern Mech. Servs, Inc. v. Brody, 657 F.Supp.2d 1293, 1299 (M.D.Fla. 2009). Federal law governs the imposition of spoliation sanctions. See Flury v. Daimler Chrysler Corp., 427 F.3d 929, 944 (11th Cir. 2005). However, the Court may look to state law principles for guidance so long as those principles are consistent with federal spoliation principles. Id.

Under Florida law, "spoliation is established when the party seeking sanctions proves (1) that the missing evidence existed at one time; (2) that the alleged spoliator had a duty to preserve the evidence; and (3) that the evidence was crucial to the movant being able to prove its prima facie case or defense." Floeter v. City of Orlando, Case No. 6:05-cv-400-Orl-22KRS, 2007 U.S. Dist. Lexis 9527, at 15 (M.D. Fla. 2007). In addition to these three requirements, in the Eleventh Circuit, sanctions for spoliation of evidence are appropriate "only when the absence of that evidence is predicated on 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." Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (internal quotations omitted).

"To address spoliation, a court may impose sanctions ranging from dismissal of the spoliator's case to an inference that the missing evidence would have been unfavorable to the spoliator." Victor v. Makita U.S.A., Inc., Case No. 3:06-cv-479-J-33TEM, 2007 U.S. Dist. Lexis 83427 at *5-6 (M.D. Fla. Nov. 9, 2007). In determining the seriousness of the sanction to impose, factors to be considered include: "(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., No. 3:06-cv-13-33TEM, 2007 U.S. Dist. Lexis 42502 at *12-13 (M.D. Fla. June 12, 2007). However, "[t]o justify even the mild sanction of an adverse inference, though, the Court must find bad faith." Bashir, 119 F.3d at 931.

Finally, while outright dismissal of a party's claims is within the trial court's sound discretion, "dismissal is the most severe sanction that a federal court can impose." St. Cyr, 2007 U.S. Dist. Lexis 42502 at 15. Therefore, "dismissal is appropriate only where alternative lesser sanctions will not suffice." Id. In order for the extreme sanction of dismissal to be appropriate,

the evidence must show that the party's conduct amounted to "flagrant bad faith" that was in "callous disregard" of the party's obligation under the Federal Rules of Civil Procedure. Id. at 17.

**B. SPOLIATION SANCTIONS ARE NOT APPROPRIATE IN THIS CASE**

**1. Parker is not guilty of bad faith destruction of evidence in this case.**

Sanctions for spoliation of evidence are appropriate "only when the absence of that evidence is predicated on bad faith." Bashir v. Amtrack, 119 F.3d 929, 931 (11th Cir. 1997). Accordingly, a showing that Parker was merely negligent in discarding e-mails and other messages would simply not be enough for the imposition of sanctions to be appropriate. *Id.* Here, the evidence of record cited by the Defendant fails to show that Parker acted with the requisite "culpable state of mind" necessary in order to impose spoliation sanctions against her. See Selectica v. Novatus, No. 6:13-cv-1708-Orl-40TBS, 2015 U.S. Dist. Lexis 30460 at *7 (M.D. Fla. Mar. 12, 2015).

The following deposition testimony shows that Parker was acting in good faith when cleaning out her closet:

Q. Okay. When did you cease keeping the documents?

A. Probably when I cleaned out—when I cleaned out my closet, **I got rid of a lot of stuff that I didn't really think was pertinent to anything**?

Q. When was that?

A. Probably during the summer.

Q. Summer of 2014?

A. Yeah.

Q. Did your attorneys advise you that you had an obligation to retain any and all documents at the beginning, at the time you filed this case?

A. Yes. **But what I got rid of, I did not believe to be pertinent. I mean there wasn't anything really there.** I got no e-mails like Lisa got or anything like that.

(Doc. 71-5- Depo. of Parker at 8:2-17) (emphasis added.)

Q. Okay the documents that were in your closet that you cleaned out, were there any documents in your closet or that you possessed that, in any way, related to staffing or labor or duties or anything in this case?

A. I don't know for certain. There—there could have been probably.

Q. Okay.

A. I had—I had a lot of—a lot of e-mails. And one reason was—was emails from Roxanne and that, and I just—I got rid of them. **I kept everything that I thought was important.**

(Id. at 9:19-10:1-6.)

Q. And the documents that you did have before you cleaned out your closet in 2014 included things like e-mails from Roxanne Rose you think?

A. There were probably e-mails from Roxanne and—and other people, but I—

Q. Who were the other people?

A. I don't know. And it would have been people that sent me something that I thought was dumb and just got rid of it. **I didn't—it didn't—it wasn't important to me or this case.**

(Id. at 18:12-21.)

Parker testified as follows about communications with Ed Redrow:

Q. So you didn't receive any e-mails about staffing or labor or anything like that?

A. I had Snapchats from Ed Redrow that told me—we talked to Ed about the office in Inverness, when I would go with him to the school to deliver things, as to—for, in essence, a bid person for donations. And we would take stuff to schools to donate. We had the open house with Lisa, and that. Just, mainly, any contact I had with Ed was via telephone or text message.

Q. Did you have any communications with Ed via phone or text message

regarding staffing, labor, or any of your duties at Taxprep?

A. Yes. I would try to get—the store I worked at is approximately a mile from another location of Mr. Forness', a Walmart. Now, I would try to get Ed to give me a break and give me some time off and send somebody else there and he wouldn't. He would send them to Walmart, but he never sent anybody to relieve me. And he and I got into this a couple times.

Q. How did you get into that, via text message?

A. Probably via phone.

Q. And what year was that?

A. He started to work in '12, so it would have been tax year '13.

Q. So that was just in tax year 2013?

A. Um-hmm.

(Id. at 8:18-8:25.)

Parker produced all the text messages from Ed Redrow that she could get off her phone at the time of her deposition:

Q. You mentioned Snapchats with Ed Redrow?

A. Yes.

Q. These are the documents that you are currently producing to us?

A. Yes.

Q. Other than the documents you are about to produce is there anything that you meant when you referred to Snapchats?

A. No.

(Id. at 17:12-20.)

The Ed Redrow text messages Parker produced began on June 24, 2013 and continued through April 17, 2014. Parker explained that any text messages before June 24, 2013 were not on the phone because her "phone ran out of room." (Id. at 69:6-16.) There is no evidence

whatsoever that Parker intentionally deleted any messages from the phone.

Lastly, Parker mentioned an e-mail from Craig Forness that came in December 2013. Parker stated that on December 28th, she turned on the computer and had an e-mail from Craig Forness offering her a contract. (Id. at 12:22-25.) After receiving the e-mail Parker told Craig Forness that she did not think it was a fair and just contract and that was the end of the conversation. (Id. at 13:1-3.) Parker did not, at the time of her deposition, know whether or not she had kept this correspondence. (Id. at 11:5-14.) There is, however, no evidence that she intentionally destroyed it.

Parker's testimony demonstrates that she did not have the requisite culpable state of mind necessary for the court to find that she acted in bad faith. There is no evidence that she discarded e-mails or other messages out of any desire to gain an advantage over the Defendant or be untruthful about her communications with its employees.

**2. None of the evidence that Defendant claims is missing was crucial, or even relevant, to Defendant's statute of limitations or good faith defenses.**

To prevail on a motion for sanctions, Defendant must demonstrate that it is unable to prove its defense owing to the unavailability of the allegedly spoliation evidence. See Point Blank Solutions v. Toyobo, Case No. 09-61166, 2011 U.S. Dist. Lexis 42239, *86 (S.D. Fla. April 5, 2011). "Indeed, spoliation sanctions typically involve the destruction of evidence that is absolutely crucial to the action." Id.; see also Managed Care Solutions, Inc. v. Essent Healthcare, Inc., 736 F. Supp. 2d 1317, 1327-28 (S.D. Fla. 2010)(denying plaintiff's motion for sanctions, including entry of default judgment, because allegedly spoliated evidence "not crucial" and "cumulative at best," and because plaintiff would still be able to prove its case through additional already obtained evidence); Floeter, 2007 U.S. Dist. Lexis 9527, at *19-20 (denying plaintiff's motion for sanctions where missing e-mails, although relevant to plaintiff's

case, were not "crucial" to the presentation of plaintiff's case).

In its Motion for Sanctions, Defendant argues that the allegedly missing evidence is crucial to its being able to establish that it lacked knowledge that its stores were understaffed in 2011 and 2012. The communications with Ed Redrow and Craig Forness occurred in 2013 and thus would have no relevance to what Defendant knew in 2011 or 2012. This leaves whatever documents Parker got rid of when she was cleaning out the closet and there is no evidence that any such documents were relevant or crucial to Defendant's knowledge of understaffing in 2011 or 2012. To the contrary, Parker has testified that she only got rid of things in the closet that were "not pertinent" or "not important."

None of the cases cited by the Defendant where a court made a finding of bad faith are factually similar to this case. See e.g, Southeastern Mech. Servs. Inc., 657 F.Supp.2d at 1302 (spoliation sanction of an adverse inference instruction imposed by the court where defendants purposefully whipped their Blackberries completely clean); Flury, 427 F.3d at 947 (spoliation sanction of dismissal warranted in a products liability case alleging a defective vehicle where the Plaintiff allowed "the most crucial and reliable evidence" in the case, the subject vehicle, to be destroyed); Graff v. Baja Marine Corp., 310 F. App'x 298 (11th Cir. 2009) (spoliation sanction of excluding the results of Plaintiff's experts destructive testing imposed in a products liability case where Plaintiff's experts destroyed part of a boat's gimbal housing which was "the critical piece of evidence" in the case).

There is no evidence of bad faith, intentional deletion of e-mails as in Southeastern Mach. Servs., Inc. The evidence suggests only that papers were discarded when the closet was cleaned out. In fact, since her deposition was taken, Parker has found work e-mails on an old Yahoo account and is producing those e-mails to Defendant. Further, unlike the product liability

defendants in Flury and Graff who could not defend the case without the destroyed product, the Defendant here can and has defended itself against Plaintiff's claims for willfulness and liquidated damages. Defendant has filed a Motion for Partial Summary Judgment claiming that the undisputed evidence proves it did not act willfully or in bad faith with respect to an FLSA violation.

In contrast to the cases cited by the Defendant, this case seems more analogous to the Santana v. RCSH Operations, LLC, No. 10-61376-CIV, 2011 U.S. Dist. Lexis 21785 (S.D. Fla. Feb. 18, 2011). There, an employee of Ruth's Chris Steakhouse filed suit against his employer, in part, based on violations of the FLSA. During depositions, the employee admitted that he had discarded paperwork on which he had calculated his damages. Based on this testimony, the employer filed a motion for sanctions with the court claiming this paperwork was crucial to its defense. The court denied the employer's motion and refused to impose any spoliation sanctions finding the employer "failed to demonstrate that the paper Plaintiff discarded was crucial to its defense." Id. at *12. The court further noted that simply because the spoliated evidence may have been relevant to the employee's claim did not automatically necessitate the further finding that it was crucial to the employer's defense of that claim. Id.

Similar to the employer in Santana, the Defendant has failed to show that Parker acted in bad faith or that the e-mails she discarded are crucial to the Defendant's defense of Parker's claims.

**3. Any communications from Roxanne Rose or Craig Forness should still be available to the Defendant on its inter-office e-mail system known as JH-Net.**

Here, the evidence of record clearly establishes that the Defendant has access to the very e-mails that it claims are crucial to it being able to defend against Parker's claims. Lisa Kelley testified that Defendant communicated with its employees via JHNet, which is a Jackson Hewitt

e-mail application. (Doc. 69- Dep. of Kelley at 31:14-21.) Kelley testified that the area manager sent e-mails to the effect that the office manager had to be the only person working at a location and that those e-mails were still on JHNet. (Id. at 65:22-66:7). Finally, Kelley testified that e-mails from general manager, Roxanne Rose, about the office managers being the only ones working and about productivity schedules were still on JHNet. (Id. at 89:2-22.)

Defendant's corporate representative, William Forness, also testified during deposition as follows:

> Q. Okay. All communications between my clients and any representative of the company to the extent those are on JHNet, would you have access to them?
>
> A. Uh-huh. Yes.
>
> Q. Have you seen the communications between my clients and any representatives of the company concerning the employment contracts?
>
> Q. No. Except this right here which I didn't know I was copied on.
>
> A. But you could locate and obtain any of those communications?
>
> Q. Any communications. **You find me a date, I can get you a complete copy of everything.**

(Depo. of TaxPrep1 at 83:5-18[1]) (emphasis added).

Given Mr. Forness's testimony, Plaintiff is somewhat perplexed at the Defendant's contention in its motion that "no documents whatsoever exist regarding communications Parker sent and received concerning staffing at Defendant's stores or her labor or job duties." (Doc. 71 at 9). Obviously, Mr. Forness disagrees with this contention:

> Q. If I wanted to know every communication that mentioned the name Sharon Parker or Lisa Kelley for '11, '12, '13, the only way to do that it sounds like would be to go through every single e-mail for those dates?

[1] Plaintiff is filing the deposition of William Forness as corporate representative of TaxPrep1 with the Court in Opposition to Defendant's Motion for Summary Judgment.

A. By sender and date.

Q. Sender and date.

A. That's where it all is. We can go back to their e-mails right now if you wanted to. **We have all their e-mails.**

Q. You've got all Lisa Kelley sent e-mails so you would have - -

A. And received e-mails. **I've got everything they did in our organization. I've got that.**

(Id. at 92:13-22).

As the above testimony shows, Defendant's contention that it has been prejudiced by Parker's discarding of some of her work emails is simply without merit. Mr. Forness's testimony indicates that the Defendant has access to all the e-mails that were ever sent or received by Parker while working for Defendant. It appears all the Defendant must do to gain access to these crucial documents is simply look the e-mails up by sender and date in the Defendant's own computer network.

**III.**

**CONCLUSION**

The Defendant has failed to show that Parker spoliated evidence in bad faith. Parker did not have the requisite state of mind for a finding of bad faith. Nothing Parker discarded was crucial to Defendant's ability to defend the case. Defendant has access to any emails that are needed to defend the case.

WHEREFORE, Plaintiff respectfully requests this Honorable Court enter an Order denying the Defendant's Motion for Sanctions.

/s/ Dan Talmadge
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**CERTIFICATE OF SERVICE**

I certify that on May 4, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to :

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