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Subject Submission from <http://www.uscourts.gov/rules/submit.html>

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Comments:

Dear Sir or Madam,

I am writing to oppose the proposed rules changes on discovery of electronic evidence.

I practice almost exclusively in the area of employment discrimination law, in the representation of employees. I understand that Rule 37(f) would be amended to allow routine destruction of electronic evidence. This would have the effect of conflicting with current EEOC regulations, which require the employer to preserve all relevant personnel records. In *Lombard v. MCI Telecommunications Corp.*, 13 F.Supp.2d 621 (N.D. Ohio 1998), the court stated:

Put more simply, the regulation [29 CFR §1602.14] states that, once an employer learns an employee or ex-employee has filed a charge of discrimination against it, the employer cannot destroy or discard any relevant personnel records. "Relevant personnel records" might include records pertaining not only to the complaining employee, but also pertaining to the employee's supervisor, underlings, peers, or any other employee, depending on the facts of the case." Id. 13 F.Supp.2d at 628; see also *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418-19 (10th Cir. 1987) ("Violation of §1602.14 creates a presumption that the missing record contained evidence adverse to the violator".).

The proposed change would create a gaping hole in this regulation, allowing these "personnel records" to be destroyed. Similarly, the regulations implementing the FLSA now require an employer to retain many records concerning compliance with, inter alia, the Equal Pay Act. The regulations require an employer to "preserve any records which he makes in the regular course of his business operation which relate to"

. . . "other matters which describe or explain the basis for payment of any wage differential to employees of the opposite sex in the same establishment . . ."
29 C.F.R. § 1620.32(a). If these records were in the form of e-mail messages, as they often are, then the proposed amendment eliminates the purpose of this regulation.

For example, in many cases, the reason that an employer pays a man more than a woman is contested, with the employer saying it is due to a "factor other than sex." An e-mail message saying, "We are paying him \$5,000 more because of his experience," or "because he is the primary provider for his family," are directly relevant to this main issue, but under the proposed Rule change, the employer could delete either one of them without fear of sanctions.

I strongly oppose the proposed amendment to Rule 37(f) because it gives a green light to the destruction of evidence, allowing an employer to pick and choose which records it deletes, depending on whether they help or hurt its defense, in violation of existing federal regulations.

Thank you for
your kind consideration. Best wishes,

Mark A.
Buchanan

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