United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. UHS OF CENTENNIAL PEAKS LLC, dba CENTENNIAL PEAKS HOSPITAL, and its successors, Respondent.	OSHRC Docket No. 19-1579

ORDER ON COMPLAINANT'S MOTION FOR SANCTIONS AND ENTRY OF SANCTIONS

On August 30, 2019, Respondent was served with a Request for Production of Documents, which included, amongst other things, a request for "video recordings related to each act of workplace violence" that had been documented or memorialized by Respondent in related reports, records, or logbooks for a period of roughly three years. *See Compl't Motion for Sanctions* at Ex. 2. According to Respondent, all videos during the relevant time period were deleted pursuant to Respondent's electronic storage policy, which overwrites saved video after a period of roughly 30 days. *Id.* at Ex. 3. To date, whether due to Respondent's data retention policy, its reluctance to provide video, or due to Respondent's newly discovered inability to extract video from the CCTV system, Respondent has not produced any video that is responsive to Complainant's request.

Even though the Court granted Complainant's *Motion to Compel* as to the videos, Complainant contends Respondent did not produce responsive videos or satisfactory responses regarding the videos that were deleted. Accordingly, Complainant filed the present motion seeking sanctions including, but not limited to, an adverse inference the videos in question would illustrate

Respondent failed to adequately abate the hazard of workplace violence and Complainant's recommendations were, in contrast, effective at abating the hazard. *See Compl't Motion* at 17-18. Respondent contends it did not have a duty to retain video at any point prior to receiving the discovery request and the content of the videos were not as vital, nor as useful, as Complainant claims.

Based on what follows, the Court finds Respondent had notice of its duty to maintain the video evidence once it received notice of an employee complaint regarding workplace violence and the ensuing administrative inspection. Although it did not actively destroy evidence, Respondent's failure to intervene in the regular course of data destruction to maintain a small subset of video clips was in bad faith. Accordingly, the Court finds it appropriate to impose sanctions. However, given the evidence in question is, in some ways, replicable through first-hand testimony and alternative documentation, the Court finds applying an adverse inference that ostensibly proves the entirety of Complainant's *prima facie* case runs afoul of the strong preference for a hearing on the merits. The sanctions imposed below will reflect both Respondent's degree of culpability, the importance of the evidence that was destroyed, and, consequently, the degree of prejudice suffered by Complainant.

I. Background

This case was initiated by an employee of Respondent filing with OSHA an anonymous complaint about workplace violence at Respondent's facility. *See Compl't Motion for Sanctions* at Ex. 1. Complainant reviewed the complaint and determined it had sufficient merit to warrant an inspection specifically targeted at the hazard of workplace violence between patients and staff. On December 7, 2018, Complainant initiated an inspection of Respondent's workplace, targeting the specific hazard identified in the anonymous complaint. Approximately six months later, still within the statute of limitations, Complainant issued a Citation and Notification of Penalty, alleging a

violation of the general duty clause "in that employees were exposed to physical threats and assaults by patients." Citation and Notification of Penalty at 6. Complainant filed a Notice of Contest, and the matter was ultimately assigned to this Court.

As noted previously, Complainant sent Requests for Production to Respondent, including requests for videos of workplace violence between patients and staff. Respondent failed to provide the requested videos and responded any video data recorded more than 30 days prior had been overwritten. Complainant subsequently filed a motion to compel numerous documents, including the disputed videos. *Compl't Motion for Sanctions* at Ex. 2. The Court granted Complainant's motion for all video recordings documenting incidents of workplace violence and ordered Respondent to otherwise explain why such videos no longer exist. The parties engaged in informal discussions, wherein Respondent's counsel indicated at one point Respondent had saved some videos and stated her belief the videos would be helpful to Respondent's case. *Compl't Motion for Sanctions* at Ex. 5. Ultimately, Respondent failed to provide any video of workplace violence incidents, notwithstanding multiple documented instances of workplace violence occurring in the period between the beginning of the inspection and Complainant's request for production. Complainant filed the present motion, seeking sanctions for Respondent's destruction of the videos, or spoliation.

II. Analysis

In general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has . . . applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (citation omitted). This case arises in the Tenth Circuit and it is likely where it would be appealed. Therefore, the Court will apply Tenth Circuit law, recognizing other circuit courts of appeals have also spoken on this issue and may have

slightly different standards. The Court could not locate any Commission case law on the issue of spoliation and the parties have not identified any.

Under Tenth Circuit law, spoliation sanctions are proper when (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was 'imminent,' and (2) the adverse party was prejudiced by the destruction of the evidence." *Zbylski v. Douglas County School District*, 154 F. Supp. 3d 1146, 1162 (citing *Turner v. Public Service Co. of Colorado*, 563 F.3d 1136, 1149 (10th Cir. 2009)). The basic situation involving spoliation goes like this: one party requests specific documents or records, which the other party has destroyed. The requested information has evidentiary value and cannot be replaced. The party requesting the records can, after exhausting other avenues, seek sanctions to compensate (if possible) for the loss of the evidence. *See Zbylski*, 154 F. Supp. 3d at 1158 ("Spoliation" results from "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.") (citations omitted).

In order to prevail on such a motion, however, Complainant must first prove Respondent's behavior warrants sanctions. *Id. at* 1160 ("A moving party has the burden of proving, by a preponderance of the evidence, the opposing party failed to preserve evidence or destroyed it."). If the Court determines Respondent's behavior is sanctionable, it must nonetheless engage in a complex, fact-intensive analysis to determine what level of sanctions appropriately accounts for both Respondent's conduct and the value of the evidence destroyed. *See Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 167 F.R.D. 90, 102 (D. Colo. 1996) (Magistrate Schlatter). The Court has broken up this discussion into a series of discrete sections to address the separate but related issues of Respondent's culpability and the degree of harm suffered by Complainant as a result of the destruction. *See id.* at 102 ("A review of the cases reflects that the two factors of "mental state" and "harm" are intertwined, and one of them can hardly be discussed without a simultaneous

examination of the other."). As noted above, the Court finds Respondent failed in its duty to retain evidence once it was on notice of future litigation. While the Court finds these actions warrant sanctions, the Court also finds the evidence destroyed was not so vital as to warrant an inference sufficient to establish Complainant's entire *prima facie* case as a matter of law. The sanctions the Court finds are appropriate and within its discretion can be found at the conclusion of the Order.

A. When Did Respondent Have a Duty to Preserve Video?

The duty to preserve is broader than the duty to produce in discovery. *Food Lion, Inc. v. United Food and Commercial Workers Int'l Union*, 103 F.3d 1007, 1012 (D.C. Cir.1997). In determining whether a party has a duty to preserve, courts have considered factors such as: (1) the likelihood a certain kind of incident will result in litigation; and (2) notification received from a potential adversary. *See Zbylski*, 154 F. Supp. 3d at 1163; *see also* Advisory Committee Notes to Fed. R. Civ. P. 37(e) (eff. Dec. 1, 2015) ("In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and the information would be relevant."). In other words, there is no hard-and-fast rule defining when adequate notice triggers the right to preserve evidence.[1] Instead, a duty to preserve arises when a party "has notice that the documents might be relevant to a reasonably-defined future litigation." *Id.* However, it need not be the case "that a party's obligation to preserve information arises only after it understands the *precise* nature of the *specific*

1. There has been no evidence Respondent triggered any type of litigation hold for relevant discoverable evidence related to the cited hazard. While not in and of itself determinative, the absence of a litigation hold is relevant to assessing whether there was spoliation. *See, e.g., Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012).

litigation at issue." *Id.* Instead, it is sufficient the party knew or should have known evidence in its possession was relevant to future litigation. *Id.*

There are multiple cases where courts have accepted something less than a specific request for documents during the pendency of an active lawsuit to qualify as adequate notice to a party of

its obligation to preserve evidence. *See, e.g., McCargo v. Texas Roadhouse, Inc.*, No. 09-CV02889-WYDKMT, 2011 WL 1638992, at *4 (D. Colo. May 2, 2011) (duty to preserve triggered by filing of formal internal complaint illustrating intent to pursue legal action, not the formal filing of discovery or even lawsuit); *Zbylski*, 154 F. Supp. 3d at 1163. For example, in Zbylski, *supra*, the court found the school district's duty to preserve was triggered when it placed one of its teachers on administrative leave. *Zbylski*, 154 F. Supp. 3d at 1164. The court found, at that time, the district had adequate notice or should have been on notice it might be subject to future litigation "based on the cumulative nature of the prior incidents and reports of inappropriate conduct toward students (both of non-sexual and sexual nature) . . . ." *Id.* While administrative removal is a formal proceeding against the teacher, no specific, formal document was issued to the district either by the teacher or affected students requesting the preservation of specific notes and documentation in personnel files.[2] *Id.* Nonetheless, the court found the obligation attached prior to the initiation of any litigation or specific request. *See e.g., id.* at 1162 ("This court respectfully rejects the notion that a party's obligation to preserve information arises only after it understands the *precise* nature of the *specific* litigation at issue.").

Similar to *Zbylski*, no formal litigation had been initiated against Respondent at the time of the complaint-based inspection. The *Zbylski* court found the administrative act of removal placed the district on notice it could be subject to reasonably foreseeable litigation from either the teacher

2. Many of the documents in question in *Zbylski* were destroyed by the former principal shortly after she had retired.

or the students affected by the actions leading to the teacher's removal, and therefore determined the duty preserve attached at that point. Likewise, this Court finds Respondent should have been aware of the likelihood of future litigation based on the fact that (1) Complainant was conducting an administrative inspection pursuant to (2) an anonymous, employee complaint alleging workplace violence, which (3) Respondent already had a self-imposed obligation to retain video

of under certain circumstances, and (4) Respondent's affiliates, who were also represented by the same counsel, had been cited or were being inspected for the same or similar hazards.[3] While there was no specific "incident" *per se* involving employees and patients that should have put Respondent on notice of its obligation to retain video recordings for future litigation, the Court finds the targeted nature of this particular complaint-based, administrative inspection, coupled with the ancillary facts involving Respondent's counsel and affiliates, was sufficient to apprise Respondent of the possibility of reasonably anticipated and fairly well-defined litigation. *See Zbylski*, 154 F. Supp. 3d at 1163. The Court concludes Respondent has a duty to preserve the videos in question for the timeframe previously established by the Court. Complainant has established the first prong of Tenth Circuit law on the issue of spoliation.

3. Respondent's argument that litigation involving other UHS entities should not be considered because it "ha[s] no relationship" with those entities, with the exception of legal counsel, is both contrary to the record in this case, which indicates more than a passing relationship with respect to the UHS corporate office to which it and the other UHS affiliates report, and, to use its own words, is "patently wrong." Respondent has provided no convincing reason why the Court should not consider the fact that numerous UHS-owned facilities were being pursued by OSHA for the same workplace hazard and being represented in those matters by the same counsel. Respondent had knowledge through its attorney – which attorney was the same in all these matters – by the following cases which had been initiated by OSHA and which were before the Commission *before* the current case was initiated: *UHS of Westwood Pembrooke, Inc. dba Lowell Treatment Center*, Docket No. 15-0964 (OSHRC); *UHS of Doylestown LLC dba Foundations Behavorial Health*, Docket No. 16-1909 (OSHRC); *UHS of Westwood Pembroke, Inc*., Docket No. 17-0737 (OSHRC); *UHS of Westwood Pembroke, Inc. dba Lowell Treatment Center*, Docket No. 17-1302 (OSHRC); *UHS of Westwood Pembroke, Inc. dba Lowell Treatment Center*, Docket 17-1304 (OSHRC); *UHS of Delaware, Inc. and Premier Health Solutions of Florida, Inc. dba Suncoast*, Docket No. 18-0731 (OSHRC); *ARBOUR Hospital/UHS Delaware, Inc.*, Docket No. 18-1116 (OSHRC); *UHS of Denver dba Highlands Behavorial Health System*, Docket No. 19-0550 (OSHRC). Finally, in *Scalia v. UHS of Fuller, Inc. and UHS of Delaware*, No. 1:19-mc-91541-FDS, Document No. 42 (D. Mass. January 6, 2020), Magistrate Judith Gail Dein entered an order directing Respondents to preserve "any existing video surveillance footage…" in that case. U. S. District Court Judge F. Dennis Saylor adopted Magistrate Dein's order. *Id.*, Document No. 43 (D. Mass. July 9, 2020). The counsel representing the Respondents in that case are the same firm representing Respondent in this case.

B. Is Complainant Prejudiced?

The second prong of the Tenth Circuit analysis is a determination of prejudice to Complainant in this case. "In weighing and determining the appropriateness and severity of sanctions, judges should examine the materiality and value of the suppressed evidence upon the ability of a victim to fully and fairly prepare for trial." *Id.; see also Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir. 1990) (holding a judge confronted with the decision whether to

impose sanctions must "take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms."). Alternatively, a court may also ask whether the suppressed evidence is cumulative, insignificant, or of marginal relevance and, therefore, whether it can be replicated or accounted for in other ways. *See id.* In other words, has Complainant suffered prejudice to the extent the sanctions it proposes are warranted? As compared to the relatively high degree of culpability on Respondent's behalf, the Court finds Complainant has suffered a modest, yet not insubstantial, degree of prejudice. Even after consideration of Respondent's culpability, however, the Court finds the prejudice suffered by Complainant does not warrant the casedeterminative sanctions sought in paragraphs 2 and 3 (insofar as it suggests dismissal as a possible remedy) of Complainant's prayer for relief.

The Federal Rules of Civil Procedure also provides guidance on the determination of prejudice which aligns closely with the Tenth Circuit. "An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation." Advisory Committee Notes to Fed. R. Civ. P. 37(e) (eff. Dec. 1, 2015). The rule leaves judges with discretion to determine how best to assess prejudice and what curative measures are necessary. *Id*. *See also Barbera v. Pearson Educ., Inc*., 906 F.3d 621, 628 (7th Cir. 2018) (upholding magistrate judge's sanction for destroyed email chain). The Court is tasked with determining the weight to give to the parties' evidence and to evaluate its credibility. *See DVComm, LLC v. Hotwire Comm., LLC, et al*., Civ. A. No. 14-5543, 2016 WL 6246824, at *1 (E.D. Pa. Feb. 3, 2016) (imposing sanctions after evaluating the credibility of alleged spoliators).

According to the parties, the principal issue in this case is abatement, i.e., whether Respondent's attempts to abate the hazard were sufficient, and whether Complainant proposed a feasible and effective means to abate the hazard. *See U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-1774 (No. 04-0316, 2006) (Where an employer has undertaken measures to address a hazard, the Secretary must establish that the employer's measures were inadequate); *Pelron Corp*., 12 BNA

OSHC 1833, 1836 (No. 82-388, 1986) (Secretary may establish an employer's existing safety procedures were inadequate by demonstrating there were "specific additional measures" required to abate the hazard). Thus, insofar as Complainant seeks to impose an adverse inference that "all now-destroyed video footage of incidents of workplace violence would have shown Respondent's response to the hazard was insufficient and/or that the abatement measures described by the Complainant would have prevented or lessened the severity of the injuries to that employee", such a sanction would, more or less, establish Complainant's *prima facie* case as a matter of law. *See Compl't Motion* at 17-18. While Respondent's behavior certainly justifies the imposition of harsh sanctions, the *de facto* suppressed video segments (as described in more detail below) were not so essential as to present an unduly prejudicial obstacle to Complainant's ability to prove its case.

The now-deleted videos purportedly contained recordings of incidents of workplace violence between employees and patients at Respondent's facility. As to the relevance and materiality of the videos, Complainant contends they would have: (1) resolved discrepancies between statements of employees and management; (2) illustrated how "Code Greens", which are calls for assistance with aggressive patients, are initiated; (3) shown how many employees respond and how quickly to a Code Green; and (4) illustrated whether Complainant's proposed abatement at the nurse's stations was effective. In response, Respondent argues the missing videos will have minimal impact on Complainant's ability to prove its case, whereas imposing the negative inference discussed above would deprive it of its day in court. *See, e.g., Gates*, 167 F.R.D. at 106 ("Sanctions which preclude the admission of certain evidence or provide for a negative inference in the place of destroyed evidence operate in the same fashion as a default judgment. They intrude into the 'truth-finding process' of a trial and represent 'grave steps' for a trial judge to take." (*quoting Jackson v. Harvard University,* 900 F.2d 464, 469 (1st Cir. 1990)). The Court will address

each of the identified purposes for the requested evidence, their importance to Complainant's *prima facie* case, and whether other evidence can fill the gap left in the record.

As to Complainant's ability to resolve any putative discrepancy between the statements of management and employees, the Court finds the disputed video could potentially resolve basic discrepancies, such as: (1) how many people there were; (2) whether everyone responded at roughly the same time; and (3) whether employees utilized appropriate measures in response to the workplace violence incident. The problem for Complainant is that the quality of the evidence sought is, according to the sworn declaration of Sean Forster, interim CEO of Respondent, insufficient to prove what Complainant contends the video would have shown. *See Resp't Opposition* at Ex. A. Respondent put forth evidence the CCTV system is incapable of recording sound and does not provide zoom features to allow closer review of workplace violence incidents. *See id*. Without sound, it is possible the Court would be unable to tell whether a Code Green had been called, which also impacts any objective assessment as to how quickly someone should have responded to an incident.

Unlike *McCargo*, where the occurrence of the behavior complained of was itself in question and only the video would illustrate whether a particular act occurred. *See McCargo*, 2011 WL 1638992. The concerns in this case are more granular: the fact of workplace violence is not so contentious as whether Respondent has implemented adequate procedures to abate it, which could potentially have been identified in the videos. Most of what Complainant has identified above are questions directed towards the veracity of putatively conflicting testimony. Without the evidence in question, then, this case ends up like the lion's share of cases that come before the Court: reliant upon the first-hand recollections of the employees present at the worksite and, potentially, photographs of the condition or copies of the work policy governing the complainedof behavior.

The missing video clips were recordings of events involving employees, whose identities are known, and the details of which have been independently documented. *See Compl't Motion* at Ex. D. Thus, in lieu of the videos, Complainant should still have access to first-hand accounts from the employees engaged in the documented instances of workplace violence, as well as the documented summaries of those incidents. Such first-hand testimony can still address Code Green response times, staffing, and the effectiveness of existing nurse's stations. These employees can speak to the efficacy of current and proposed abatement, as well as their personal experience with any particular incident of workplace violence. Likewise, experts in the field can presumably review policies, procedures, static photos of workspaces like a nurse's station, and first-hand testimony to assess whether existing and/or proposed abatement is both feasible and effective. All of that being the case, just because Complainant is still capable of proving its case does not mean Respondent should not be held responsible for the consequences of its actions. *See In re: Ethicon, Inc*., No. 2:12-cv-00497, 2016 WL 5869448, at *4 (S.D.W. Va. Oct. 6, 2016) (prejudice under Rule 37(e) may be found when the destruction causes a party to "piece together information from other sources").

Respondent has put forth evidence to suggest the substantive purposes for which Complainant sought to introduce the videos would not necessarily be achieved given the aforementioned issues with sound and zoom. While this may be the case, there are many things Complainant misses out on by not being able to use the evidence, including concrete illustrations of a workplace hazard that exposed employees to serious injuries and which Respondent was both aware of and recognized as hazardous. This missing evidence prejudices Complainant even if it is possible to prove its case by other means. *Id.*

The Court finds Complainant carried its burden that Respondent had a duty to maintain the videos in question, Respondent failed in that duty, and Complainant was prejudiced as a result.

The Court now turns its attention to what sanctions are appropriate.

C. Source of the Duty and Basis For Sanctions – Federal Rules of Civil Procedure

As noted earlier, the determination of whether a particular sanction is appropriate is based on Respondent's conduct after it should have reasonably anticipated the present litigation and the value and type of evidence lost. The Court will rely on the Federal Rules of Civil Procedure, which have provisions that govern discovery of electronic stored information, such as the videos in question.[1] The Federal Rules of Civil Procedure also provide the steps for the Court to engage in a complex, fact-intensive analysis to determine what level of sanctions appropriately accounts for both Respondent's conduct and the value of the evidence destroyed. *See Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 167 F.R.D. at 90.

---

1. Videos: Subject to Discovery, Materiality of Videos and Preservation

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. . . . Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. Proc. 26(b)(1); 29 C.F.R. § 2200.52(b) (Commission rule permitting discovering of relevant, nonprivileged information). When a party does not preserve relevant, discoverable electronically stored information, such as the videos, before imposing sanctions, courts consider whether: (1) the videos "should have been preserved in the anticipation or conduct of the litigation," (2) the videos were "lost because a party failed to take reasonable steps to preserve it," and (3) the videos "cannot be restored or replaced through additional discovery." Fed. R. Civ. Proc. 37(e).

---

[1] The Federal Rules of Civil Procedure are applicable to Commission proceedings absent a Commission rule on the subject. Commission Rules also has a similar section. *See* 28 U.S.C. § 661(g). *See also* Commission Rule 52(v). 29 C.F.R. § 2200.52(v). *See also Williams Enters., Inc.*, 4 BNA OSHC 1663, 1665 n.2 (No. 4533, 1976).

The Court finds, based on its discussion of prejudice to Complainant above, the destroyed video evidence was relevant and discoverable. As previously discussed, the videos would have illustrated many things, including the physical implementation of Respondent's workplace violence policy, which includes events occurring before and after the issuance of the Citation. *See, e.g., SeaWorld of Fla., LLC v. Perez,* 748 F.3d 1202, 1215 (D.C. Cir. 2014) (finding that evidence of post-citation actions supports finding that the proposed means of abatement were feasible). Accordingly, the spoiled evidence was material, relevant and subject to being retained. The Court has previously found Respondent should have preserved the videos, so it will proceed with its discussion of factors (2) and (3) discussed in Fed. R. Civ. Proc. 37(e). *See* Section II, B.

2. Failure to Take Reasonable Steps to Prevent Destruction

The next consideration under Rule 37(e) is whether Respondent took reasonable steps to prevent the destruction of videos that ought to have been preserved. Fed. R. Civ. P. 37(e). The evidence shows Respondent was not only capable, but had a road map of how to prevent the destruction of relevant videos within its own video retention policy. Respondent had a process in place to view videos of incidents where patients or staff were injured. The video retention policy called for the preservation of videos related to physical altercations and liability claims:

"Video footage … should be maintained and copied … (i) If such footage is related to Probable Claim Report (PCR) matter and/or for liability claims as warranted; … (iv) For any allegations of rape, assault or other physical altercations involving patients or residents … ." *See Compl't Motion* at Ex. 3. Respondent, from the arguments presented in their brief, took no steps to preserve videos of staff assaults that occurred from November 7, 2018 to September 18, 2020 ("Production Period") as previously Ordered by this Court.[5] The deletion of the videos was not accidental or the result of circumstances beyond Respondent's control. Respondent had the capability to preserve video clips involving workplace violence and had done so several times in the past for

training and evaluation purposes. They can, and do, record from their video feed incidents pertaining to workplace violence and have protocols in place to preserve such evidence. Respondent has an incident evaluation process and routinely preserves videos related to violence between patients and staff.

Respondent claims the video system automatically overwrites any video in thirty or fewer days unless someone actively intervenes. But, Respondent's policy also specifies that within thirty days of an incident involving a physical altercation with a patient or a liability claim, video of the incident should be saved. Instead, relying on precedent dealing with non-electronic evidence, Respondent points to the lack of affirmative action to destroy the evidence. Although this matter does not involve tossing something into the trash, the effect was still the same. Respondent let the videos get overwritten rather than saving the data on another disk. *See In re Krause,* 367 B.R. 740, 766 (Bankr. D. Kan. 2007) (sanctioning debtor who continued routine deletion of emails and failed to deactivate "wiping" software which routinely removed information), *aff'd*, 637 F.3d 1160 (10th Cir. 2011); *Philips Elecs. N. Am. Corp. v. BC Tech*., 773 F. Supp.2d 1149, 1197 (D. Utah 2011) (sanctioning defendant who had a duty to preserve ESI by preventing it from getting lost, inadvertently overwritten, or wiped out). Since Respondent took no steps to preserve videos related to the cited hazard, there is no basis for finding that "reasonable steps to preserve" occurred.[2]

5. However, the deposition testimony of Kara McArtor, Respondent's former Risk Management Director, stated during her deposition that it was her responsibility to download video footage related to an adverse event and report and send it to UHS and she thought videos were retained by Respondent in a risk management folder on the shared drive after the request from OSHA. *See* Exh. 7 attached to Comp't Br., Deposition of Kara McArtor, Nov. 12, 2020 at 173-175.

3. The Evidence Cannot be Restored or Replaced

[2] Fed. R. Civ. P. 37(e) is limited to providing relief for electronic stored information that was destroyed and cannot be restored. There is no basis for finding that the destroyed evidence can be restored.

In the Court's Order to Compel, dated September 18, 2020, Respondent should have preserved videos related to incidents of workplace violence that occurred between November 7, 2018 and September 18, 2020. The information Complainant could have obtained from the destroyed video evidence cannot be replaced through other discovery. *See Jenkins v. Woody,* No. 3:15-cv-355, 2017 WL 362475, at *16-17 (E.D. Va. Jan. 21, 2017) (imposing sanctions where video was deleted, and it could not be restored or replaced).

The destroyed videos relate to multiple issues, particularly: (1) the existence of a hazard in the workplace; (2) employee exposure to that hazard; (3) whether the hazard could cause serious injury or death; (4) Respondents' knowledge of the hazard; (5) adequacy of Respondents policies and procedures to reduce or eliminate the hazard; and (6) abatement of the hazard. The written records and availability of certain witnesses are not an adequate remedy for the destruction of the videos in this matter. *See Woodward v. Wal-Mart Stores E., LP,* 801 F. Supp. 2d 1363, 1373

(M.D. Ga. 2011) (finding that employee testimony about an event "hardly works" to address the loss of video); *Storey,* 2017 WL 2623775, at *5 (discussing the "unique and irreplaceable nature" of video evidence); *Moody v. CSX Transp., Inc.,* 271 F. Supp. 3d 410, 429-30 (W.D.N.Y. 2017).

In *CSX,* the railroad failed to preserve ESI from the train's event recorder. 271 F. Supp. 3d at 429-30. The ESI would have conclusively established whether a bell rang before the train began to move. *Id.* The court found the plaintiff was prejudiced by the destruction even though there was other evidence as to whether there was a sound was emitted, and the event recorder might not have supported the plaintiff's claim. *Id*. CSX and other cases illustrate prejudice under Rule 37(e) may be found when the destruction causes a party to "piece together information from other sources." *In re: Ethicon, Inc*., *supra*; *Abdulahi v. Wal-Mart Stores E., L.P.,* 76 F. Supp. 3d 1393, 1396-97 (N.D. Ga. 2014) (other evidence consisting of emails and testimony did not remove prejudice caused by the employer's destruction of video footage). The destroyed videos would

have been favorable to Complainant's claims in some respects, and now Complainant must piece together those facts through other evidence. As this Court has previously found the loss of the videos prejudiced Complainant. So, Rule 37(e)(1)'s threshold requirements are met. Complainant is entitled, at least, to the relief necessary to cure the prejudice resulting from Respondents' actions.

4. Fed. R. Civ. P. 37(e) Provides Two Avenues for Relief

Fed. R. Civ. P. 37(e) makes it plain when a party, such as Respondent, fails to take reasonable steps to preserve video evidence, the Court may take action to cure the prejudice that results. A court may remedy the prejudice caused by a failure to act; no affirmative act of destruction is required. Fed. R. Civ. P. 37(e) provides in pertinent part:

> (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.
>
> *See* Fed. R. Civ. P. 37(e).

Rule 37(e)(1) allows for curative measures when lost electronic stored information causes prejudice to another party. In contrast, Rule 37(e)(2) provides for more severe sanctions when the loss of electronic stored information occurred with "intent to deprive another party of the information's use in litigation." Fed. R. Civ. P. 37(e). *See also* Advisory Committee Notes to

Fed. R. Civ. P. 37(e) (eff. Dec. 1, 2015) ("The better rule for the negligent or grossly negligent loss of [ESI] is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.").

5. Further Relief under Fed. R. Civ. 37(e)(2) is Available.

Beyond addressing prejudice caused by the destruction of evidence under Rule 37(e)(1), courts may also impose more severe sanctions if a party acted with the intent to deprive the opposing party of the information's use in the litigation. Fed. R. Civ. Proc. 37(e)(2). In other words, assessing whether the destruction of evidence was the result of bad faith. Complainant has requested definitive rulings the destroyed videos would have shown Respondent's response to the cited hazard was insufficient and the proposed abatement Complainant proposes would have prevented or lessened the severity of the injuries to employees. *Compl't Motion* at 17-18.

Complainant also requested dismissal of Respondent's contest of the Citation as a sanction. *Id.*

Complainant contends Respondent acted with the intent to deprive because Respondent failed to prevent the destruction of relevant and discoverable electronically stored information after litigation was not only anticipated but had commenced. *Compl't Motion* at 12-13. Respondent offered no convincing explanation for why it departed from its own written video retention policy. *See Brown v. Chertoff,* 563 F. Supp. 2d 1372, 1381 (S.D. Ga. 2008) (awarding sanction for spoliation when Government was culpable for violating its own policies and for failing to take notice that litigation was likely). Nor does Respondent explain *any* steps it took to preserve videos of the hazard during the Production Period ordered by this Court. *See Ottoson v. SMBC Leasing & Fin., Inc.*, 268 F. Supp. 3d 570, 582 (S.D.N.Y. 2017) (finding sanctions appropriate when it could be inferred that party either took no steps to preserve emails or simply failed to produce them).

Intent is rarely proved by direct evidence. *See e.g., Paisley Park*, 330 F.R.D. at 236-37 (evaluating defendants' conduct before deciding to issue sanctions); *BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, No. 15 C 10340, 2018 WL 1616725, at *2 (N.D. Ill. Apr. 4, 2018) ("[A] combination of events, each of which seems mundane when viewed in isolation, may present a very different picture when considered together."); *CSX*, 271 F. Supp. at 431–32 (finding intent based on defendants' actions in the litigation that allowed evidence to be overwritten and destroyed). Respondent knew OSHA was investigating the hazard of workplace violence, it knew it had video evidence of the hazard, it knew Complainant sought the videos, it knew they were contesting the allegations in the Citation, and yet Respondent offers no sound explanation for why it failed to preserve relevant information after receipt of written notice of an OSHA investigation and the commencement of litigation.

6. Bad Faith with Intent to Deprive

Because the awarding of an adverse inference requires a finding of bad faith, the Court must determine whether Respondent acted in bad faith when it failed to prevent the destruction of the documents pursuant to the company's internal video retention policy. The assessment of whether Respondent acted in bad faith is important in a case such as this, where Complainant has sought an adverse inference instruction[7] that is tantamount to a dispositive determination of the case. *See Gates Rubber*, 167 F.R.D. at 102 (summarizing factors discussed in *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992) for determining whether sanctions were appropriate). "Where no willfulness, bad faith, or fault is shown from the evidence, a dispositive sanction would be improper." *Id.* at 103. That said, even courts presented with evidence of bad faith are not mandated to impose dispositive sanctions but are instead guided by their discretion and the facts of the case before it. *See id.* (citations omitted).

What, then, constitutes bad faith? According to one court, "After the duty to preserve attaches, the failure to collect either paper or electronic records from key players, the destruction of email, or the destruction of backup tapes is grossly negligent or willful behavior." *McCargo v. Texas Roadhouse, Inc.*, 2011 WL 1638992 at * (D. Colo. 2011) (citations omitted). Moreover, "[b]ad faith, or culpability, 'may not mean evil intent, but may simply signify responsibility and control.'" *Phillips Electronics N.A. Corp. v. B.C. Technical*, 773 F. Supp. 2d 1149, 1203 (D. Utah 2011) (quoting *Phillip M. Adams & Associates, L.L. C. v. Dell, Inc.,* 621 F.Supp.2d 1173, 1193 (D.Utah 2009)).

7. Complainant is also seeking dismissal as a potential sanction. For the purposes of this Order, the Court is treating the adverse inference and dismissal as similar sanctions given the effect the adverse inference would have on this case.

The Court previously determined Respondent had a duty to preserve videos thirty days prior to the date of the inspection.[8] And, as the necessity of the present motion makes clear, Respondent failed to observe that duty. Respondent did not intervene in the regular course of data destruction and allowed video containing recordings of documented instances of workplace violence to be destroyed.[9] Not only was there sufficient notice of a reasonably well-defined potential for litigation, but Respondent already had a system in place to address incidents of workplace violence captured on video. The Court has already addressed the former of these two issues at length in previous sections, thus it will direct its focus to Respondent's data retention policy vis-à-vis incidents of workplace violence between patients and staff.

While Respondent's policy, of itself, does not create a legal duty to retain video, it does illustrate Respondent was already engaged in the habit of reviewing recordings of workplace violence and had procedures to address not-too-dissimilar situations where future litigation was imminent and evidence needed to be retained. *See Compl't Motion* at Ex. 3, 6. Specifically, Respondent has admitted its leadership reviews video footage of workplace violence incidents as

part of its workplace violence program (but does not download them) and can review video with employees as part of its training program. *Compl't* Ex. 6 at 10. Further, the policy itself has a comprehensive set of instructions for dealing with "an incident resulting in employee disciplinary action where the facility is on notice of litigation, threat of litigation, other legal action, or an investigation by an administrative, civil, or criminal authority, through the receipt of notification or other information identifying the possibility of legal action or upon service of a summons and complaint." *Compl't* Ex. 3 at 1. Thus, while it may be true the specific situation presented by the employee complaint and subsequent inspection is not accounted for within Respondent's data retention policy, it is clear the policy itself accounts for situations where Respondent is presented with less clarity and certainty than a specific request for a particular kind of document or video. The policy's statement regarding the considerations made for an employee disciplinary action includes all manner of potential forms of notice, including, as is relevant here, administrative investigations. While the Court does not purport to interpret the intent of Respondent's policy, it does find the policy's focus on the numerous situations under which video should be retained in response to employee disciplinary action illustrates Respondent is sophisticated enough to understand its obligation to retain evidence extends beyond a formal request for its retention, regardless of the legal situation presented.[10]

At bottom, Respondent had an obligation to retain evidence related to workplace violence that was activated by an administrative inspection which, itself, was prompted by an anonymous complaint. The information sought by Complainant was neither burdensome nor disproportionate to the needs of the case. *See Zbylski*, 154 F. Supp. 3d at 1164 ("Once it is established that a party's

8. This period also includes up to 30 days prior to the inspection, which is as far back as the Court would have been able to expect Respondent to be able to produce video under the strictures of its data retention policy. *See Compl't Motion* at Ex. 3.

9. Though the question of burden is, at this point, moot, the Court notes Respondent's claim of undue burden is a bit of an overreach. Rather than retain all video and search at random for acts of workplace violence, the Court would expect Respondent only to extract video insofar as it could be cross-referenced against existing, documentary records or was otherwise contemporaneously extracted and saved consistent with an active obligation to retain.

duty to preserve has been triggered, the inquiry into whether a party has honored its obligation to preserve evidence turns on reasonableness, which must be considered in the context of whether 'what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards.'" quoting *Rimkus Consulting Group, Inc. v. Cammarata,* 688 F.Supp.2d 598, 613 (S.D. Tex. 2010)). Respondent not only has a policy of reviewing video of incidents of workplace violence, but it also has a policy of retention for analogous circumstances that have the potential for future litigation and does not rely on a mechanical request for documents. The failure to retain video evidence while under an obligation to retain that evidence, coupled with the sophistication to understand when your obligation begins under similar circumstances, is tantamount to destroying it. Even if there is no clear-cut evidence of malice, the Court finds the foregoing evidence is more than sufficient to find Respondent engaged in bad faith and sought to deprive Complainant of the videos.

10. If Respondent was not so sophisticated, it had retained counsel to represent them in this case—the same counsel which represents UHS affiliate entities in various other OSHA cases initiated for workplace violence—which counsel should have made clear to Respondent its obligations.

Accordingly, the Court finds Respondent's *behavior* is sanctionable, but the extent of those sanctions must also reflect the importance of the evidence that is now lost and its impact on Complainant's ability to prove his case. *See Gates*, 167 F.R.D. at 104. ("In order to determine the appropriateness of certain sanctions, whether dispositive or otherwise, judges need to balance the degree of misconduct evidenced by a party's mental state against the degree of harm which flows from the misconduct.").

7. What is the Appropriate Sanction?

Although Respondent had the requisite state of mind to permit the imposition of any of the remedies available under Fed. R. Civ. P. 37(e)(2) and the case law governing adverse inferences,

the harshest of sanctions permits are not appropriate here. The "remedy should fit the wrong." Advisory Committee Notes to Fed. R. Civ. P. 37(e) (eff. Dec. 1, 2015).

Based on the foregoing, the Court is confronted with a situation wherein Respondent's failure to retain the videos constitutes bad faith with the intent to deprive and the evidence that was destroyed would be helpful but its absence is not determinative of the case's outcome. As previously discussed, the destroyed videos allegedly had issues with zoom capabilities and sound. With these deficiencies, the Court finds the evidence contained therein may have been insufficient to support or counter a claim regarding abatement and thus finds its value equivocal as to the specific topic of abatement. As such, it is not proper to award an adverse inference as to the specific issues of whether Respondent's policies were adequate or that Complainant's proposed abatement would be reasonable and feasible to reduce or eliminate the hazard in the workplace. Thus, the Court finds an appropriate sanction is one that both recognizes and condemns the behavior of Respondent without determining the outcome of the entirety of the case as a matter of law.

Complainant is not entitled to a dismissal of Respondent's notice of contest of the Citation based on spoliation. Instead, the Court will enter adverse inferences: (1) rejecting Respondent's argument the destroyed videos would have been favorable to it defenses; (2) finding the destroyed videos would have supported, by a preponderance of the evidence, Complainant's claims regarding the existence of a hazard in the workplace over which Respondent has control; (3) finding the destroyed videos would have supported Complainant's claims, by preponderance of the evidence, the hazard was recognized by Respondent; (4) finding the destroyed videos would have supported, by preponderance of the evidence, Complainant's claim of employee exposure;

(5) finding the destroyed videos would have supported, by preponderance of the evidence, Complainant's claim that the hazard could cause serious injury or death; and (6) finding the destroyed videos would have supported, by preponderance of the evidence, Complainant's claim Respondent had actual knowledge of the hazardous condition or activity.

ORDER

As such, the Court issues the following ORDER:

1. At trial, parties are prohibited from discussing, arguing, examining witnesses, or raising in any form or fashion: (i) any content of the destroyed videos or (ii) that the videos were destroyed. Parties are prohibited from eliciting any testimony about the existence of recorded instances of workplace violence or testimony about the contents of previously recorded instances of workplace violence unless such testimony is the product of first-hand knowledge of a participant in the incident. *See Storey*, 2017 WL 2623775, at *5 (issuing sanctions for spoliation of videos, including precluding evidence or argument that the contents of the videos corroborated the defendants' version of events).

2. Video content and analysis discussed or described in records or documents produced during discovery shall not be referenced or testified to by either expert or lay witnesses since the reliability and authenticity of the narrative describing the contents of the videos cannot be verified. *See Storey*, 2017 WL 2623775, at *5 (issuing sanctions for spoliation of videos, including precluding evidence or argument that the contents of the videos corroborated the defendants' version of events). *See also* Fed. R. Evid. Rule 403, 807 and 901.

3. The Court imposes an adverse inference and finds the destroyed videos would have shown that physical threats and assaults by patients in an inpatient psychiatric hospital are recognized hazardous conditions or activities. *See BHC Nw. Psychiatric Hosp., LLC v, Secretary of Labor,* 951 F. 3rd 558, 650-61 (D.C. Cir. 2020).

4. The Court imposes an adverse inference and finds the destroyed videos would have established Respondent had recognized the hazard, since video recordings are part of Respondent's protocols to address the hazard. *See Ed Taylor Const. Co. v. Occupational Safety & Health Review Comm'n*, 938 F.2d 1265, 1272 (11th Cir. 1991); *Georgia Electric,* 595 F.2d at 321 (citation omitted).

5. The Court imposes an adverse inference and finds the destroyed videos would have established employee exposure to the hazard. *RGM Construction*, Co., 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995); *Gilles & Cotting, Inc*., 3 OSHC 2002, 2003 (No. 504, 1976).

6. The Court imposes an adverse inference and finds the destroyed videos would have established that exposure to the hazard could result in serious bodily injury or death. 29 U.S.C. § 666(k). *See also Phelps Dodge Corp.* v. OSHRC, 725 F.2d 1237, 1240 (9th Cir. 1984); *DecTam Corp*., 15 BNA OSHC 2072, 1993 CCH OSHD ¶ 29,942 (No. 88-0523, 1993).

7. The Court imposes an adverse inference and finds the destroyed videos would have led to actual employer knowledge since videos of events were reviewed by management and sometimes used for training. *See ComTran Grp., Inc. v. U. S. Dep't of Labor,* 722 F. 3d 1304, 1307-08 (11th Cir. 2013); *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 902148, 1995) (citations omitted); and *Secretary of Labor v. Kansas Power & Light Co.,* 5 BNA OSHC 1202, at *3 (No. 11015, 1977).

SO ORDERED. *Patrick B. Augustine*

Patrick B. Augustine
Judge, OSHRC

Date: April 19, 2021
Denver, Colorado