

# **ELECTRONIC DISCOVERY AND THE DUTY TO PRESERVE ELECTRONIC DATA**

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# INTRODUCTION

- **THE ELECTRONIC WORKPLACE**
- **VOLUME OF ELECTRONIC DATA**
- **CREW 2008 REPORT**
  - Record Chaos: The Deplorable State of Electronic Record Keeping in the Federal Government
- **HUGE VERDICTS**

# What Is Data?

Electronic discovery refers to the discovery of electronic documents and data. Electronic documents include e-mail, web pages, word processing files, computer databases, and virtually anything that is stored on a computer. Technically, documents and data are “electronic” if they exist in a medium that can only be read through the use of computers. Such media include cache memory, magnetic disks (such as computer hard drives or floppy disks), optical disks (such as DVDs or CDs), and magnetic tapes.

## Is Data Different From Paper?

- *Public Citizen, Inc. v. Carlin*, 2 F.Supp.2d 1, 13 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999) (“Simply put, electronic communications are rarely identical to their paper counterparts; they are records unique and distinct from printed versions of the same record.”)
- *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993)
- Fed. R. Civ. P. 34 (comment): “Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper.”

# How Can Electronic Data Be Used in EEOC Cases?

- Just Like Paper Documents
- Further Explanation Regarding Paper Documents
- Statistical Evidence
- Comparative Evidence

# Requirement to Preserve Electronic Data

- By Regulation: 29 C.F.R. § 1602.14
- By Federal Rules of Civil Procedure: Rule 37
- By Other Statutes

# Spoliation

*West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 1999):

“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.”

# Excuses That Don't Work

1. Regular Data Retention Policy
2. Ignorance of Pending Complaint
3. Paper Versions Produced
4. Burden of Production



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**P. O. Box 19848**  
**Washington, D.C. 20036**

February 14, 2007

Mr. Jeremy Wright  
Kator, Parks & Weiser, P.L.L.C.  
812 San Antonio Street, Suite 100  
Austin, Texas 78701

Dear Mr. Wright:

Thank you for your letter dated January 12, 2007, to Chair Naomi C. Earp. In your letter you alert the Equal Employment Opportunity Commission (EEOC) to changes in the United States Postal Service's (USPS) data retention policy, effective January 15, 2007, which results in the purging of USPS's emails in most cases within thirty days and in some cases as little as seven days. You contend the USPS's new policy will adversely impact USPS's employees' ability to pursue claims of discrimination, and the EEOC's responsibility to eradicate workplace discrimination, because evidence will be lost. The Chair has asked this office to respond directly to you.

In order to better respond to your concerns, our office contacted the USPS, National EEO Compliance & Appeals Programs for an explanation. Their response was that they are aware of their obligations under the law to preserve evidence in a discrimination case. They also indicated that even though emails may be purged from Inboxes, it may still be recoverable.

You should also be aware that if an agency fails to retain evidence necessary for the investigation of allegations of discrimination, the agency at hearing, on appeal, or in civil court may be subject to the imposition of an adverse inference that the lost or deleted information was negative to the agency's position. This in some cases may lead to a finding of discrimination and an award to the complainant based upon this adverse inference.

We hope this information is helpful to you.

Sincerely,

Robert Barnhart, Director  
Compliance and Control Division

cc: Patricia M. Richter, Manager  
National EEO Compliance & Appeals Programs  
475 L'Enfant Plaza, S.W., Suite 9431  
Washington, D.C. 20260-4135

## Consequences for Failing to Preserve Electronic Data

- **EEOC Regulation: 29 C.F.R. § 1614.109(f)(3)**

When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to an order of an administration judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances:

## Consequences for Failing to Preserve Electronic Data

- (i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
- (ii) Consider the matter to which the requested information or testimony pertains to be established in favor of the opposing party;
- (iii) Exclude other evidence offered by the party failing to produce the requested information or witness;
- (iv) Issue a decision fully or partially in favor of the opposing party;
- (v) Take such other actions as appropriate.

# Consequences for Failing to Preserve Electronic Data

- **EEOC Adverse Inference**
- Agency's Burden of Production
- Content of Missing Data
- Spoliation as Evidence of Pretext

## EEOC Decisions

- *Stokes v. HHS*, EEOC No. 01933987 (1994): adverse inference where the agency failed to maintain rating or ranking sheets; “appellant satisfies his burden in establishing that the agency’s actions were based on his race and in violation of Title VII.”
- *Gennetten v. Navy*, EEOC No. 01973098 (1999): adverse inference should have been drawn against the agency for failure to maintain selection documents; EEOC finding of discrimination and order that complainant be retroactively placed in position.
- *Bayda v. DOJ*, EEOC No. 01955738 (1997): adverse inference where agency destroyed documents “as a matter of routine”; EEOC finding of discrimination

# Other Penalties

- **Unlawful Destruction of Records**

- *United States v Salazar*, 455 F.3d 1022 (9th Cir. 2006)

- **Obstruction of Justice**

- *United States v. Lundwall*, 1 F.Supp.2d 249 (S.D.N.Y. 1998)

- **Sarbanes-Oxley Act of 2002**

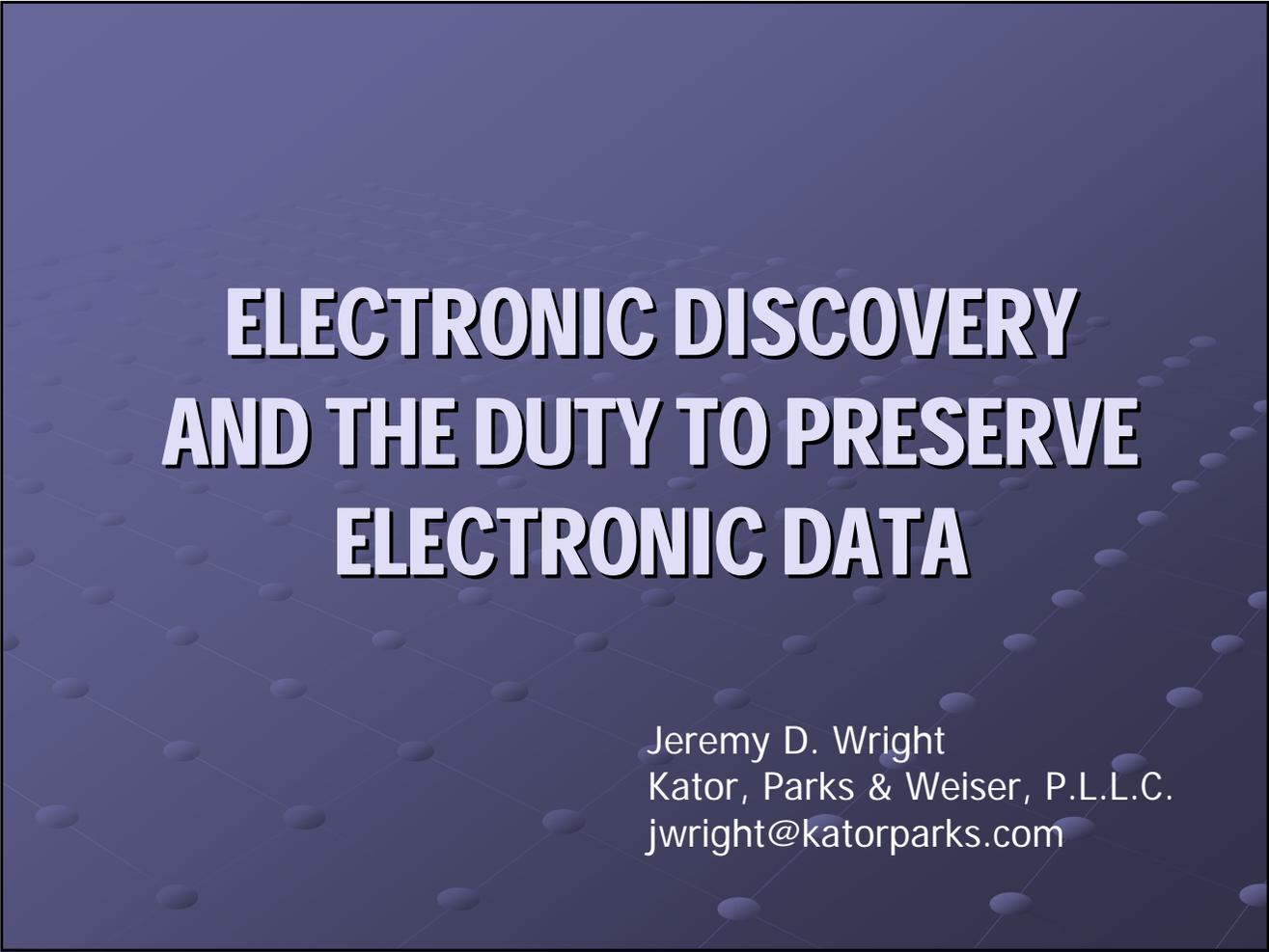
- **Rules of Professional Conduct**

# Zubulake v. UBS

- Duty to Preserve – When?
- Duty to Preserve – Who?
- Duty to Preserve – What?
- Counsel's Failure
- Sanction

# What You Need To Do

1. “Litigation Hold” on Electronic Data
2. Contact All “Key Players”
3. Collection of Electronic Data from All Sources
4. “Mirror Image” of Computer System?
5. Take Duty to Preserve Seriously!



# **ELECTRONIC DISCOVERY AND THE DUTY TO PRESERVE ELECTRONIC DATA**

Jeremy D. Wright  
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[jwright@katorparks.com](mailto:jwright@katorparks.com)

January 12, 2007

**VIA FACSIMILE AND FIRST-CLASS MAIL**

Hon. Naomi C. Earp  
Chair, U.S. Equal Employment Opportunity Commission  
1801 L Street, N.W.  
Washington, D.C. 20507

**RE: Changes to U.S. Postal Service Data Retention Policy**

To the Honorable Naomi C. Earp:

We have recently become aware that the U.S. Postal Service is altering its data retention policy on January 15, 2007. The Postal Service's new policy will purge most e-mail data within thirty days, and some electronic data within seven days. This new policy will have a grave impact on Postal Service employees' ability to pursue complaints of discrimination, and will thwart the Commission's duty to prevent discrimination in the federal sector. We ask that the Commission intervene immediately to prevent the Postal Service from destroying vast amounts of electronic data that might serve as evidence of discrimination.

**A. The Postal Service's New Policy**

According to a Postal Service memorandum, the Postal Service's new policy will be effective on January 15, 2007. *See* Attachment 1 (January 5, 2007 U.S. Postal Inspection Service National Communication). The new policy mandates that all electronic data in employees' e-mail Inbox folder be purged after 30 days. All electronic data in employees' e-mail Journal, Sent Items, and Deleted Items folders is to be deleted after 30 days. And all electronic data in employees' e-mail Drafts folder and Junk Email folder will be purged in just 7 days. *See* Attachment 1.

The Postal Service has candidly admitted that a "big reason for e-mail house cleaning is a new 'E-Discovery' law that requires USPS to index all e-mails and other electronic documents. This is very costly and time consuming. The more e-mails there are, the longer it will take, and the more it will cost." Attachment 2 (January 10, 2007 entry in USPS News Link, entitled "Going, going, gone!").

**B. The Commission's Regulations**

The Commission's regulations and the revised Federal Rules of Civil Procedure require that employers retain all electronic data that is related to a claim of discrimination. The Postal

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Service's new data retention policy clearly violates these legal requirements.

The Commission's regulations unambiguously require that electronic data be maintained for a period beyond merely 30 days. Section 1602.14 of Title 29, Code of Federal Regulations, requires that an employer retain for at least a period of one year,

any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship).

If a charge of discrimination is filed, Commission regulations require that an employer "preserve all personnel records relevant to the charge or action until final disposition of the charge or the action." 29 C.F.R. § 1602.14.

In addition to the Commission's regulations, the revised Federal Rules of Civil Procedure clearly require that electronic data related to a claim of employment discrimination be retained until final disposition. The revised Federal Rules, which went into effect on December 1, 2006, explicitly include "electronically stored information" that is "relevant to the claim or defense of any party" as discoverable information. *See* Fed. R. Civ. P. 26 and 34.

### **C. Key Evidence Will Be Lost**

Under the Postal Service's new data retention policy, invaluable evidence related to complaints of discrimination will be lost. Commission regulations require that an aggrieved individual initiate a complaint of discrimination within 45 days. *See* 29 C.F.R. § 1614.105(a). Therefore, even before an individual has filed a timely complaint of discrimination, the Postal Service's new policy requires that relevant electronic data be purged.

Once the Postal Service becomes aware that a discrimination complaint has been or will be initiated, EEOC regulations and federal caselaw require that the Postal Service maintain all electronic data that is relevant to the complaint. *See, e.g., Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). Under the Postal Service's new policy, relevant electronic data will be automatically destroyed before individual management officials are notified about the filing of a complaint.

The Postal Service's new policy will thwart the parties' abilities to fully investigate and present their claims under Title VII, the Age Discrimination in Employment Act, and the

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Americans with Disabilities Act. The Commission will be unable to review the complete record of relevant evidence due to the Postal Service's new policy, which is apparently being instituted for this very purpose.

The value of the evidence that will be lost due to the Postal Service's new policy cannot be overstated. In many circumstances, electronic data has been the primary source of evidence supporting discrimination complaints. *See, e.g., Bui v. U.S. Postal Service*, EEOC No. 07A40002 (2004) (finding retaliation where "supervisor sent an e-mail to other co-workers seeking to have [the complainant] reprimanded for making a false EEO allegation, and threatened legal action for slander"). Under the Postal Service's new electronic data retention policy, key evidence relating to complaints of discrimination will be purged.

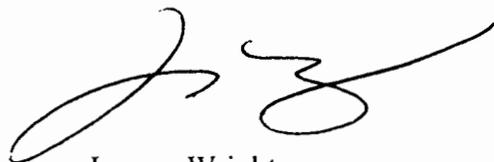
**D. Immediate Action Is Needed**

In order to protect the integrity of Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, we urge the Commission to take immediate action to halt the Postal Service's new electronic data policies. The Postal Service's new policy contravenes the Commission's regulations, and improperly prevents valuable evidence from being discovered in anti-discrimination litigation.

This critical problem may go beyond the Postal Service. Other federal agencies, and other employers across the nation, may take similar steps to erase electronic data in order to prevent disclosure under the revised Federal Rules. We urge the Commission to take action to prevent all employers from adopting electronic data retention policies to hide critical evidence.

Thank you for your attention to this important matter. If you need additional information about this or any other matter, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeremy Wright", with a stylized, cursive script.

Jeremy Wright

cc: Hon. Leslie E. Silverman  
Vice Chair, U.S. EEOC  
*via facsimile only*

**KATOR, PARKS & WEISER**  
P.L.L.C.

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Hon. Stuart J. Ishimaru  
Commissioner, U.S. EEOC  
*via facsimile only*

Hon. Christine M. Griffin  
Commissioner, U.S. EEOC  
*via facsimile only*

Hon. John E. Potter  
Postmaster General  
U.S. Postal Service  
475 L'Enfant Plaza, SW  
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*via facsimile and first-class mail*

Mary Ann Gibbons  
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Patricia Richter  
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# U.S. POSTAL INSPECTION SERVICE

## NATIONAL COMMUNICATION

Date: 1/5/2007 Category: General  
From: Business Operations Support Contact Name: Nicole Johnson  
Case #: Contact Phone: 202-268-6545  
Subject: eMail Retention Policy

### Restricted Information

Effective January 15, 2007, the Postal Inspection Service will implement new eMail retention periods established in Management Instruction MI AS-870-2006-1, dated November 2006. The goal of the new retention periods is to significantly reduce the number of email items stored within Postal Service resources that are no longer needed for legal or business purposes.

FOLDER TYPE	RETENTION PERIOD
Inbox - including user-created subfolders within the Inbox	30 days
Journal	30 days
Sent Items	30 days
Deleted Items (personal and public folders)	30 days
Calendar	18 months
Exchange Server Folders under Mailbox, but not under Inbox	18 months
Tasks and Notes	1 year
Dunk Email (you may not have this) and Draft folders	7 days



### To create Exchange Server folders under your Mailbox – [Last Name, First Name]:

- In Outlook, go to File, New, and then Folder
- Type name of folder, select the type of items to be included in the folder, then click on Mailbox - [Last Name, First Name]
- Click OK.

To accommodate the increased number of messages that we are anticipating being stored in Exchange Server folders, and to be aligned with Postal Service eMail quota, mailbox sizes for all Inspection Service employees will be increased to 400MB on or before January 15, 2007.

For messages that are truly needed beyond the 18-month limit, or for any message you wish to store outside of your mailbox, you can create Personal Archives, also known as .pst files. They will be stored on your hard drive, but will appear in Outlook.

# Going, going, gone!

## Automatic e-mail retention periods start Jan. 15

The time is now to clean out your Outlook e-mail folders.

Mandatory e-mail policy changes take effect Jan. 15 — including a 30-day retention period for your Inbox e-mails. Items older than the retention period will be purged. That means if you don't take steps to manage your Outlook items now, they might be gone when you get back to work next week.

USPS currently stores and supports 16.5 terabytes of e-mail files. That's 10 times the e-mail storage of most leading companies. Five years ago, USPS was averaging 3 million e-mails daily. It's now 9.3 million per day.

The new retention periods will reduce e-mail storage by 75 percent, which will in turn reduce costs for storage, provide for faster backups and restorations and improve performance for the entire e-mail system.

Another big reason for e-mail house cleaning is a new "E-Discovery" law that requires USPS to index all e-mails and other electronic documents. This is very costly and time consuming. The more e-mails there are, the longer it will take, and the more it will cost.

<b>Folder Type</b>	<b>Retention Period</b>
Inbox – including user-created subfolders within the Inbox Journal Sent Items Deleted Items (personal and public folders)	30 days
Calendar User-created folders under Mailbox, but not under Inbox	18 months
Tasks and Notes	1 year
Junk Email (you may not have this) and Draft folders	7 days

The goal is to eliminate — not archive or move — unneeded files. And these retention periods will help you do that automatically. Now is the time to identify and save items you really do need to keep. Go to the [Information Technology website](#) for tips on managing your Outlook files.