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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN Justice

PART 11

AHRONER, JACOB

-v-

ISRAEL DISCOUNT BANK OF NEW YORK, ET AL

INDEX NO. 602192/03

MOTION DATE 12-5-08

MOTION SEQ. NO. 17

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 9, 2009

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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JACOB AHRONER,

Index No. 602192/03

Plaintiff,

- against -

ISRAEL DISCOUNT BANK OF NEW YORK, also known as IDB, EDMOND ESKENAZI, ELENA BASTANTE, JOSEPH CORTES, JULIO BERGER, ARI SHEER and ROGER MAGLIO,

Defendants.

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JOAN A. MADDEN, J.:

In this employment discrimination action, plaintiff Jacob Ahroner ("Ahroner") moves for an order (i) granting sanctions against defendants based on their allegedly willful destruction of certain evidence, including the hard drive of the computer of Ahroner's supervisor, (ii) reimbursing him for fees paid to a computer forensic expert, and (iii) striking defendants' sixth affirmative defense for failure to state a cause of action (motion seq. no. 017). Ahroner separately moves to expand the record to support the motion for spoliation sanctions (motion seq. no. 018).[1] Defendants oppose the motions.

BACKGROUND

In this action, Ahroner alleges that he was subjected to a hostile work environment and discrimination based on his race, age and national origin when employed at the defendant Israel Discount Bank of New York (hereafter the "Bank") in violation of New York State Human

[1]Motion seq. nos. 017 and 018 are consolidated for disposition.

Rights Law (NY Executive Law § 296(1)(a)) and New York City Human Rights Law (Administrative Code of the City of New York § 8-502). Specifically, Ahroner, who is Caucasian and whose ethnic background and religious faith is Jewish, alleges that he was discriminated against as the only non-Hispanic employee in the Bank's Bookkeeping Department.[2] Ahroner further alleges that the Bank breached in implied contract arising out of the employee handbook and violated New York State Labor Law § 198(1-a) by failing to pay him overtime. The complaint was later amended to include a disparate impact claim based on age.

During all relevant periods, defendants Elena Bastante ("Bastante") and Joseph Cortes ("Cortes") were Ahroner's supervisors in the Bookkeeping Department, and reported to defendant Julio Berger ("Berger"), who is a First Senior Vice President at the Bank, responsible for supervision of the Bookeeping Department. Berger reported to defendant Edmond Eskenazi ("Eskenzi") who is the Bank's Division Executive overseeing the Booking Department. Defendant Ari Sheer ("Sheer") was the Bank's President and defendant Roger Malito ("Malito") was the head of Human Resources.

According to the complaint, the discriminatory conduct against Ahroner, who had been employed by the Bank since 1987, began in 1992, when he began to work at the Bank's Bookkeeping Department. It is alleged that the discriminatory conduct, which occurred from 1992 until Ahroner was terminated on November 8, 2002 at age 59, consisted of, inter alia (1) requiring Ahroner to complete his work after hours without making payment for overtime pay or supper money, (2) having attendance sheet showing Ahroner's overtime retyped so as not to

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[2] It is alleged that the only other Caucasian Jewish employee in the Bookkeeping Department was also discriminated against and as a result left the department.

show any overtime hours, (3) threatening to discharge Ahroner if he submitted overtime requests, (4) failing to provide Ahroner with needed equipment, (5) causing Ahroner to perform unnecessary work and additional work, and (6) failing to promote Ahroner or to give him increases in pay. In addition, it is alleged that Ahroner was treated in an abusive fashion, demeaned, segregated from others in the department and ostracized, and that work was created for the purpose of harassing Ahroner and making him work overtime and interfering with his work productivity.

By letter dated November 18, 2002, counsel for Ahroner wrote to Sheer and advised him that his investigation of claims that Ahroner was wrongfully terminated including the timing and circumstances of his termination "compel the conclusion that [the Bank] discriminated against [Ahroner] on the basis of his age and his religion (Jewish)." The letter also stated that "you are placed on notice that [the Bank] must undertake all efforts to preserve from spoliation all documents and other records relating to our client's employment, as well as any unlawful conduct of [the Bank] or its employees. As you may be aware, spoliation gives rise to an inference and instruction that the missing documents would have proved the charging party's case." By letter dated December 3, 2002, counsel for Ahroner wrote to counsel for the Bank advising the Bank that all documents from Ahroner's desk should be returned and that all evidence related to Ahroner claims should be preserved. By letter dated December 6, 2002, counsel for the Bank replied that the Bank was aware of its obligations in this regard.

This action was commenced on July 11, 2003. The discovery process has been extensive and arduous and has involved the court's appointment of a special referee and a judicial hearing officer. Discovery in this action has revealed that Ahroner and another employee of the

Bookkeeping Department were terminated in November 2002, along with twenty-three other employees, allegedly as part of a reduction in force at the Bank. Ahroner maintains that the evidence shows that his termination, along with four other employees ages 52 to 76 serving under Berger was discriminatory, and asserts that shortly before his termination six younger Hispanic employees were hired in the Bookkeeping Department. The Bank maintains that Ahroner's termination was part of an overall plan to help the Bank remain profitable, and that Ahroner's position as a clerk in the Bookkeeping Department was eliminated as his functions were being automated.

Ahroner testified at his deposition that Bastante and Cortes made anti-Semitic comments to him. In addition, Rachel Asseoff, who was another Jewish employee in the Bookkeeping Department, testified that while she did not hear Bastante make anti-Semitic remarks to her, she heard from Hispanic employees at the Bookkeeping Department that Bastante "mumbles those Jews or something like that." However, during their depositions, Bastante and Cortes denied making anti-Semitic comments about Ahroner and the other individual defendants denied being aware that Bastante or Cortes made such comments.

The primary issue on this motion is whether the Bank should be subject to sanctions based on its alleged destruction of relevant emails, back up tapes and the hard drive of Bastante's computer and lists of employees from the Bookkeeping Department used by the Bank in connection with its decision to terminate Ahroner.

Emails, Back-up Tapes and Bastante's Hard Drive

In his second document demand, dated January 4, 2004, Ahroner requested all emails relating to Ahroner. An interim discovery order dated September 29, 2004 directed that the Bank

produce all emails relating to Ahroner's discharge.

After conducting a search for such emails, the Bank produced no emails in response to this request, asserting that its employees searched their files "including computer files and archived files" and were unable to locate responsive documents other than what ...has been previously produced to plaintiff." (December 8, 2004 Affidavit of Susan Rinaldi, First Vice President of Personnel ¶ 3). Between November 2006 and June 2007, the Bank submitted affidavits from various employees, representing that a search for the emails had been conducted and none had been found. Moreover, when questioned at the deposition, Bastante testified that she never received or wrote any emails about Ahroner, except a memoranda concerning his requests for days off. However, she did testified that she received about 200 emails a day, including from Eskenzi and Berger, and that she saved the important ones in both electronic and paper folders. Former President Sheer testified that management discussions regarding the 2002 downsizing were not typically done by email. Berger testified that he searched for, but did not locate, any emails concerning the 2002 downsizing, and specifically that he did send any emails to Bastante regarding the reduction in force or to any of the other managers since the communications with the mangers was done in person. Eskenazi testified that he did not remember receiving any email from Bastante regarding Ahroner or sending her any such emails.

On February 28, 2007, Ahroner took the deposition of Andrew Landi ("Landi"), the Bank's First Vice President of Information Technology ("IT") Bank since January 2004. At his deposition, Landi testified that Bastante's computer, which had been used since approximately 1994, had not been upgraded since 2000 or 2001, but that the Bank was "in the process of an upgrade now," and that the hard drives of the computers were not being preserved unless

requested. (Landi EBT, at 16). Upon hearing this testimony, Ahroner's counsel requested that Bastante's hard drive be preserved. Landi also testified that in general the email was saved not to the hard drive but to the server, of which a back up tape is made which is generally preserved for one year.

In response to questions about archived emails, Landi answered no one asked whether he or anyone under his direction at IT had searched to see if there were any archived emails for the years 2002 or earlier relating to Ahroner. However, when cross examined, he testified that at the time this action was brought he was not the First Vice President of IT, and that his predecessor, Alex Liwag, would have interfaced with the legal department and would have received any instructions to put a litigation hold on certain documents.

On May 10, 2007, the court expanded its September 24, 2004 directive and ordered that all emails, notes and correspondence regarding Ahroner be produced. The court also directed that Bastante's hard drive be preserved and Catherine Rogers, Esq. ("Rogers") Epstein, Becker & Green, then counsel to defendants agreed on the record to preserve it. On May 31, 2007, Rogers wrote to Edward N. Gewirtz, Esq. (Gewirtz"), counsel to Ahroner stating that, as stated on the record in court, the hard drive "had been saved and pursuant to this demand it was searched for responsive electronically stored documents and none was found.[3]"

On August 23, 2007, the court issued an order directing that the Bank produce Bastante's hard drive for inspection and examination by a forensic expert, and that if the parties were unable

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[3]Defendants assert that the language in Rogers' letter that the hard drive "had been saved" can be interpreted to mean that although the hard drive had been saved in the past, this was not a representation that the drive was saved as of May 31, 2007. This interpretation does not make sense in light of subsequent events, as indicated below, including the production of a document from the hard drive in October 2007.

to agree on such expert that the court would select one. The parties were unable to agree on a forensic expert and as directed by the court, each party submitted to the court a proposed expert and the expert's qualifications. In the meantime, by letter dated October 11, 2007, Rogers sent a letter to Gewirtz, enclosing various documents, including a document found on Bastante's hard drive.

On February 1, 2008, the court appointed Peter J. Theobald, of Klein Liebman & Gresen, LLC ("KLG") the forensic expert proposed by defendants "for the purpose of retrieving electronically stored materials of Elena Bastante, with all cost of such services to be paid for by [Ahroner] without prejudice to plaintiff seeking reimbursement from defendants at the conclusion of the case."

Thereafter, the parties entered into a stipulation and confidentiality agreement concerning the procedures for examining the hard drive. Mr. Theobald's inspection of the hard drive was scheduled for March 18, 2008 at the Bank's offices so that Mr. Theobald could make a copy of the hard drive and then examine it at KLG's offices. On the day before the inspection, defendants' counsel, Mary Gambardella Esq. ("Gambardella") then of Epstein, Becker & Green,[4] informed Mr. Gerwirtz by email that Bastante's hard drive was not being made available, but rather,"consistent with the Bank's retention practice, Bastante's hard drive was preserved by taking an image of that hard drive and we asked that it be put aside to ensure no purging until the litigation was completed."

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[4]At the time that these motions were made the defendants were represented by Epstein, Becker & Green. On October 15, 2008, a consent to change counsel was filed substituting Wiggins & Dana as attorneys of record for the defendants. Gambardella now works for Wiggins & Dana and continues to represent defendants.

Despite this specific representation, no image was taken of the hard drive. During an April 16, 2008 telephone conference between Mr. Theobald and Landi, who as noted earlier is the First Vice President of IT for the Bank, Landi told Mr.Theobald that Bastante left the Bank in 2005, and contradicting his deposition testimony, that her computer "was upgraded approximately twice since that time [and that] [d]uring the upgrade her computer hard drive was wiped all data and donated to a charitable organization. The company did not preserve the hard drive before disposing of it." (Theobald, ¶ 9).

With respect to contents of the hard drive or local computer, Mr. Theoobald was informed by Landi that:

> At the time of interest, 2000-2002. Elena Bastante's computer was configured to store her documents and emails on server, Microsoft Exchange mail server was in use, and Microsoft Outlook mail client was used on the desktop. The mail server held all email folders, and the file server held all documents. The [Bank] ...policy was to store documents and emails on the server(s), however, it would have been possible for Ms. Bastante to save a document or email on a local computer. The computer's temporary working files and the user's local profile would have been stored on the local computer's drive. This may have included working copies of emails as they were read and/or composed in Microsoft Outlook. Any records of Internet browsing would have been stored on the local computer's hard drive; this would include records of any personal email accounts using services such as Hotmail, Yahoo mail, etc.

(Theobald Affidavit, ¶ 8).

According to Theobald, Landi informed him that "Ms. Bastante's documents folder on the file server and emails on the mail server are no longer available. Backups on tape are routinely made of the servers and kept for up to one year. [The Bank] did not preserve back up

tapes from the time that the Ms. Bastante was an employee"(Theobald Affidavit, ¶ 10).[5]

Based on Landi's representations, Mr. Theobald concludes that "I feel there is a little possibility of recovering any useful information related to Ms. Bastante's emails and documents related to Mr. Ahroner during the time of interest 2000-2002." (Id. ¶13). Notably, Mr. Theobald apparently made no effort to examine the server to verify Landi's statements.

Ahroner now seeks spoliation sanctions based on the alleged destruction of Bastante's hard drives and back-up tapes and asserts that "upon information and belief" that (1) " the email communications between Eskenazi and Berger would have shown that Ahroner was being disparately treated by Bastante and that Eskenazi and Berger knew that Ahroner was being singled out for disparate treatment by Bastante and was being forced to work overtime without pay, (2) the email communications between Eskenazi, Berger and Bastante would have shown that [the Bank's] proffered reason for terminating Ahroner's employment was a pretext for unlawful discrimination based on, inter alia, his age and based on Bastante's animus towards Jews, and that (3) emails from Bastante and other Hispanic employees in the Bookeeping Department would have shown Bastante's anti-Semitic animus, as would emails sent of Bastante's web based Yahoo mail account...[shown on her business card]."

Ahroner argues that, upon receiving notice of the potential action by letter dated November 18, 2002, from his counsel notifying the Bank's President of Ahroner's claims that he

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[5]Landi also informed Mr. Theobald that "beginning in July 2004 all emails have been archived [and that] [a] small number of emails from prior to July 2004 have been archived" and that a search of the email archives performed by Landi found "a small number (10 to 15) of Ms. Bastante's emails in archives" (Id. ¶¶ 10, 11). The emails found by Landi had been previously located and are of no apparent relevance.

was wrongfully terminated, defendants' counsel had an obligation to take custody of the back-up tapes and defendants' hard drives,[6] suspend their document retention policies, and preserve all relevant documents. See Zubulake v. UBS Warburg LLC, 220 FRD 212 (SD NY 2003); Zubulake v.UBS Warburg LLC, 229 FRD 422 (SD NY 2004). In addition, Ahroner argues that it was not sufficient compliance with discovery to ask the Bank's employees to produce documents which they deemed relevant to the case, and that it was counsel's responsibility to review defendants' email accounts and hard drives and preserve them.

Ahroner argues that based on the destruction of evidence relating to his claims, he is entitled to an inference that these documents, if available, would have proven his claims of hostile work environment and wrongful termination and that senior management at the Bank was aware of the hostile work environment and wrongful termination and did nothing to stop it. Alternatively, Ahroner argues that the affirmative defenses in defendants' answer relating to the missing documents and records should be stricken.

In opposition, defendants counter that the November 18, 2002 letter, and the original complaint filed in 2003, were insufficient to put defendants on notice to preserve emails relating to discriminatory conduct since neither contained allegations of derogatory or discriminatory remarks. Defendants also assert that in any event since the receipt of the November 2002 letter, in-house and outside counsel to the Bank have taken all necessary steps to preserve information regarding Ahroner's claims, including providing detailed instructions to preserve electronically

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[6]While the spoliation motion briefly refers to the alleged destruction of the other individual defendants' hard drives, there is no evidence that these hard drives which Ahroner never sought to inspect were destroyed, so that on this record spoliation sanctions cannot be granted based on their alleged destruction.

stored information containing references to Ahroner, and making an exhaustive search of the Bank's paper and computer files, including instructing all individual defendants to produce electronic communications relating to Ahroner.

In support of these contentions, defendants provided for in-camera inspection four memos related to the preservation of documents. The earliest memo was apparently written by the Bank's associate General Counsel to the then First Vice President of IT, Alex Liwag, prior to the commencement of this action. The next preservation memo was apparently written in or about 2005, and at the time that Bastante and Sheer had left the Bank. The remaining two preservation memos were written on March 1, 2007 and November 2, 2007.[7]

In addition, defendants assert that there is no evidence that any purportedly destroyed evidence would be relevant to Ahroner's claims. Defendants note that seven witnesses from the Bank were questioned concerning alleged anti-Semitic comments testified that they never heard Bastante or Cortes make derogatory to Ahroner concerning his religion, and that the deposition testimony of the individual defendants did not reveal that there were any relevant emails written about Ahroner or the 2002 downsizing that resulted in his termination. Moreover, defendants argue that, based on Landi's testimony, the emails would not be saved on the hard drive but on the back-up tapes that are kept for one year. Defendants also rely on affidavits submitted by

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[7]To the extent the memos among the Bank's lawyers and its employees contain the lawyers' "mental impressions and personal beliefs" procured in the course of litigation they are protected by the work product privilege. Corcoran v. Peat, Marwick, Mitchell and Co., 151 AD2d 443, 445 (1st Dept 1989). However, the fact that the memos were written, which was disclosed in court, and the dates that they were written are relevant to the motion and do not disclose any confidential information. Notably, such memos apparently are not protected by privilege under federal law since in considering whether spoliation sanctions should be issued, the federal courts have described the content of preservation instructions between counsel and employees of a client. See e.g. Zubulake v. UBS Warburg LLC, 220 FRD at 216-217.

Bank employees stating that searches for relevant files including computer files and archived files had been conducted and that all relevant documents had been produced, and that Ahroner's counsel failed to challenge these representations by demanding the inspection of the computer and hard drives in a timely manner.

Employee Lists

The record reflects that the employee lists at issue were handwritten lists of the Bookkeeping employees functions, which were considered in connection with the 2002 reduction in force at the Bank. The existence of these lists came to light during discovery.

Bastante testified at her deposition that the determination as to which employees in the Bookkeeping Department would be terminated was based, in part, on the review of the list which indicates their duties and what they know how to do. Bastante testified that she met with Berger for about two and a half hours to go over the lists. She further testified that the Berger also relied on a "draft list" that was prepared for him by his secretary based on information that she and Cortes supplied to him every year. Bastante testified that she discussed with Berger that Ahroner was doing "the mailing of the fund transfer" and that it was being automated and that "the little work that is now left we have to let it go to him" (Bastante EBT, at 1227-1228). Bastante testified that she did not keep the list.

According to the affidavit and deposition testimony of Cortes, shortly before the 2002 reduction in force he was asked to provide Bastante with a list of tasks being performed by the mailing group in the Bookkeeping Department, including Ahroner, and he asked the employees to list the tasks they performed and that he also listed the tasks they performed. Cortes also states in his affidavit that he gave the list to Bastante, and that he did not keep copies of the list and did

not recall the list being returned. In his affidavit, Berger states that the lists he reviewed during his meeting with Bastante were lists of tasks performed by the employees and did not include job performance reviews, and that he did not keep the list after the meeting.

Ahroner argues that lists are crucial evidence and defendants apparent destruction of the lists should result in sanctions since the record shows that the decision to terminate Ahroner was based on a review of these lists, and that contrary to Bastante's testimony, Ahroner was not performing the "fund transfer" job, that had been allegedly been automated, for more than a year before the 2002 reduction in force and that this job was performed by others. Ahroner thus argues that "without these lists it is impossible to know if Bastante or Cortes or both 'railroaded' Ahroner into being terminated in the reduction in force, by indicating to Berger that Ahroner's work had been 'automated' when in fact it was the other employees work if anyone's had been automated." (Gewirtz Affirmation, ¶19).

Defendants counter that spoliation sanctions are not appropriate based on their inability to produce the lists since the record contains extensive information as to the content of the lists, including deposition testimony and affidavits and that the lists contains only job functions and not any performance reviews. In addition, defendants point to Berger's testimony that he made the decision to terminate Ahroner after speaking to Eskenazi and before he met with Bastante to go over the lists, and that he had independent knowledge of the tasks being performed in the Bookkeeping Department. Defendants also assert that any destruction of the lists occurred prior to Ahroner's termination and thus before defendants had notice of any potential litigation.

DISCUSSION

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally

or negligently, disposes of crucial items of evidence ... before the adversary has an opportunity to inspect them." Kirkland v New York City Housing Authority, 236 AD2d 170, 175 (1st Dept 1997). Moreover, sanctions for the spoliation of evidence have been held to be appropriate even where the evidence at issue was destroyed prior to the issuance of any discovery order seeking such evidence, and where the destruction of evidence has not been shown to be intentional or in bad faith. Id; See also Squitieri v City of New York, 248 AD2d 201 (1st Dept 1998).

On the other hand, when there is no pending litigation or notice of a specific claim, spoliation sanctions have been denied when evidence is destroyed in the ordinary course of business. Smith v New York City Health & Hospitals Corp., 284 AD2d 121 (1st Dept), lv. denied, 97 NY2d 607 (2001)(spoliation sanctions properly denied where the defendant hospital disposed of the subject blood donor records in a manner consistent with regulatory requirements, pursuant to business routine and before plaintiffs' negligent screening theory was in issue); Roberts v Consolidated Edison of New York, 273 AD2d 369 (2d Dept 2000)(denying discovery sanctions where there was no evidence that Village's practice of routinely destroying its work records was either spoliation or an effort to frustrate discovery).

"When parties involved in litigation engage in the destruction of evidence, a number of remedial options are provided by existing New York statutory and common law." Ortega v. City of New York, 9 NY3d 69, 76 (2007). Thus, under CPLR 3126, "if the court finds that a party destroyed evidence that 'ought to have been disclosed..., the court may make such orders with regard to the failure or refusal as are just.'" Id. This provision gives New York courts "broad discretion to provide proportional relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the

spoliator to pay the cost to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at trial of the action." Id. (citations omitted). In addition, "where appropriate a court can impose the ultimate sanction of dismissing the action or striking the responsive pleadings, therefore rendering a judgment on default against the offending party." Id. (citations omitted).

However, the severe sanction of dismissing the action or striking responsive pleadings is not warranted unless the party seeking such sanctions meets its burden of establishing that the evidence destroyed is crucial to the moving parties' case, and that the party suffered prejudice as a result of its destruction. See Balaskonis v. HRH Constr. Corp., 1 AD3d 120 (1st Dept 2003); Riley v. ISS Intern. Service System, Inc., 304 AD2d 637 (2d Dept 2003). At the same time, when the destroyed evidence is not shown to be crucial or its loss prejudicial, lesser sanctions in the form of an adverse inference instruction, a missing document charge or a preclusion order have been found to be a proper exercise of the court's discretion. See Metropolitan New York Coordinating Council on Jewish Poverty v. FGP Bush Terminal, Inc., 1 AD3d 168 (1st Dept 2003); Mclendez v. City of New York, 2 AD3d 170 (1st Dept 2003); Foncette v. LA Express, 295 AD2d 471, 472 (2d Dept 2002).

When the spoliation sanctions are sought for the alleged destruction of electronic evidence as opposed to paper evidence, special issues arise in demonstrating that such evidence was destroyed or ever existed.[8] See e.g, Fitzpatrick v. Toy Industry Association, Inc., 2009 WL 159123 (Sup Ct NY Co. 2009); Lipco Electric Corp. v. ASG Consulting Corp., 4 Misc3d

[8]In March of this year the Uniform Rules of New York Trial Courts concerning preliminary conferences was amended to include a provision relating to this issues. See NYCRR § 202.12(c)(3).

1019(A)(Sup Ct Nassau Co. 2004). In such cases, forensic experts are often retained to retrieve deleted material and/or to determine when the electronic discovery was deleted from the relevant computer and how such data was removed. Ingoglia v. Barnes & Noble College Booksellers, Inc., 48 AD3d 636 (2d Dept 2008); ECOR Solutions, Inc. v. State of New York, Department of Environmental Conservation, 17 Misc3d 1135(A)(Ct. Claims 2007).

In view of the paucity of New York case law specifically addressing issues arising from the alleged destruction of electronic evidence, New York courts examining the issue have relied to some extent on precedent from federal courts in deciding these issues. See e.g, Fitzpatrick v. Toy Industry Association, Inc., 2009 WL 159123; Lipco Electric Corp. v. ASG Consulting Corp., 4 Misc3d 1019(A).

In Zubulake v. UBS Warburg LLC, 220 FRD 212, 220 (SD NY 2003), in addressing spoliation sanctions for the destruction of electronic evidence, the court held that the party seeking sanctions must establish that: "(1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed, (2) that the records were destroyed with a 'culpable state of mind' and (3) that the destroyed evidence was 'relevant' to the parties claim or defense." A "culpable state of mind," as described in the second part of the test includes ordinary negligence. Id.; See also Squitieri v City of New York, 248 AD2d 201. With regard to the third part of the test, the courts have found that relevance of the destroyed evidence can be inferred when it is shown that such evidence was destroyed in bad faith or as the result of a party's grossly negligent conduct. Id.; see also, See also Residential Funding Corp. v. Degeorge Financial Corp., 306 F3d 99, 109 ("[w]here a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude

that the missing evidence was unfavorable to that party.... Similarly, a showing of gross negligence in the destruction or untimely production of evidence will in some circumstances suffice") (citations omitted).

In Zubulake v. UBS Warburg LLC, the court also addressed the obligations of counsel and litigants to preserve electronic data. It wrote that "[o]nce a party reasonably anticipates litigation it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." Id. at 218. In a subsequent motion in the same case, the court wrote that:

> A party's discovery obligations do not end with the implementation of a 'litigation hold'-to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce relevant documents. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.

Zubulake v.UBS Warburg LLC, 229 FRD at 432.

In this case, the record shows that despite defendants' control over the electronic evidence on Bastante's hard drive and on the server and their obligation to preserve it, such evidence was either destroyed or permitted to be written over before Ahroner had an opportunity to review such materials. While the preservation memos show that an initial litigation hold was placed to preserve relevant electronic data before this action was commenced and that further preservation

instructions were subsequently given,[9] there is no evidence of "oversee[ing] compliance with the litigation hold, monitoring the party's efforts to retain and produce relevant documents." Id.

While there is evidence that defendants searched their electronic and papers files and produced responsive documents, such searches do not satisfy the Bank's obligation to preserve electronic data relating to Ahroner's case on "a continuing basis." Zubulake v.UBS Warburg LLC, 229 FRD at 432. In addition, it cannot be said on this record whether all of these searches occurred before the destruction or writing over of electronic evidence. The court notes that Landi testified at his deposition that although he has been in charge of the Bank's IT Department since January 2004, he was unaware of any litigation hold relating to this action, and the record shows that many of the searches done for the emails were performed after that date.

Moreover, contrary to defendants' position, the record establishes that emails existed on Bastante's hard drive based on her testimony that she received 200 emails each day from Eskenazi and Berger and that she saved certain of them electronically.[10] In addition, Bastante's personal email accounts, which she apparently used for business purposes, would have also been stored on her hard drive.[11]

As to the destruction of hard drive on Bastante's computer, the court concludes such

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[9]This litigation hold was apparently directed in response to the November 18, 2002 letter from Ahroner's counsel to the Bank. Contrary to defendants' argument, the November 18, 2002 letter, which contained allegations that the Bank discriminated against Ahroner on the basis of his age and his religion, was sufficient to put defendants on notice to preserve emails relating to discriminatory conduct or derogatory remarks as to Ahroner.

[10]While Landi testified that most email was saved to the server, he also stated that email could be saved to the hard drive.

[11]There is no evidence that information other than emails existed on the hard drive and that has not yet been produced.

destruction was done in bad faith or at the very least was the product of gross negligence, so that the relevance of the email stored on the hard drive can be inferred. See Residential Funding Corp. v. Degeorge Financial Corp., 306 F3d at 109. First, the record is replete with contradictory statements as to whether the hard drive was preserved and when it was wiped clean. While Landi testified during his deposition in February 2007 that the computers were last upgraded in 2001-2002 and were in the process of being upgraded, he told the forensic expert that Bastante's hard drive had been upgraded twice since that 2005 and that during one of these upgrades and on an unspecified date, the hard drive was wiped clean. In the meantime, when the court directed the preservation of Bastante's hard drive on May 10, 2007, counsel for the Bank did not indicate that the hard drive had been compromised or destroyed, but agreed to preserve it. Moreover, in her letter dated May 31, 2007, counsel again stated that the hard drive would be preserved. Furthermore, at the time that the court directed appointment of a forensic expert to examine the hard drive in August 2007, and thereafter while the details of such appointment were being considered, counsel for defendants never informed the court or Ahroner that the hard drive was not preserved, or that there was any issue about obtaining the information from the hard drive. In addition, in October 2007, counsel produced a document from the hard drive.

The first sign that the hard drive may not have been preserved was the March 17, 2008 email from defendants' counsel that the hard drive itself was not available for inspection by the forensic expert on the following day but that an image of it was available. Despite this representation, no image of it was taken. Notably, when Landi spoke to the forensic expert he did not specify which of the "upgrades" of Bastante's computer resulted in the hard drive being wiped clean or the date on which the hard drive had been wiped clean and/or given to charity and

no explanation is made as to why, up until the day before the inspection, defendants' counsel thought that at least the image of the hard drive had been preserved.

Moreover, the Bank's document retention policy does not indicate that wiping hard drives clean in connection with an upgrade and donating them to charity is a procedure that might have occurred in the ordinary course of business. In any event, since the Bank received notice of Ahroner's potential claims on November 18, 2002 and a litigation hold was placed on electronic data relating to Ahroner's claims, defendants cannot avoid spoliation sanctions by asserting that the destruction of the hard drive was in the ordinary course of business.

The court is deeply disturbed that despite the contradictory statements in the record regarding the preservation of the hard drive, defendants make no effort to explain these contradictions to inform the court as to what actually occurred. Inferences to be drawn from the contradictory statements are that, at best, no meaningful effort was made by the Bank to preserve the hard drive and, at worst, the Bank intentionally destroyed the hard drive to avoid disclosing its contents.[12] Here, the court concludes that Bastante's hard drive was destroyed in bad faith or as the result of gross negligence after the litigation hold was placed in November 2002, and after the court specifically directed that it be preserved in May 2007, or at least after the defendants learned in February 2007 that Ahroner was seeking to have the hard drive preserved.

Accordingly, the three-part test provided under Zubulake v. UBS Warburg LLC, for establishing entitlement to spoliation sanctions has been met.[13] First, the record establishes that

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[12]The court notes that nothing in the record suggests that defendants' counsel knew about the destruction of the hard drive or its image prior to the forensic inspection.

[13]With respect to defendants' assertion that the loss of evidence is Ahroner's responsibility, the court recognizes that this action was commenced in 2003, and discovery began

defendants had control over the hard drive and an obligation to preserve it at the time it was destroyed. Additionally, as the hard drive was destroyed in bad faith or as the result of gross negligence, it has been established that the drive was destroyed with a 'culpable state of mind' and the relevance of the emails stored on the hard drive can be inferred. See Residential Funding Corp. v. Degeorge Financial Corp., 306 F3d at 109.

However, since Ahroner has not shown through deposition testimony or other evidence that such emails are crucial to his case or that their loss was prejudicial, sanctions in the form of an adverse inference charge, as opposed to striking defendants' responsive pleading, is an appropriate remedy.[14] Metropolitan New York Coordinating Council on Jewish Poverty v. FGP

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shortly thereafter, and while Ahroner in the November 18, 2002 notified the Bank to preserve records regarding Ahroner's employment, it was not until 2007, near the end of a long and extensive discovery process, that Ahroner specifically sought the preservation of Bastante's hard drive and to inquire about the existence of back-up tapes on the server which might contain emails. See e.g., Fujitsu Ltd v. Federal Express Corp., 247 F3d 423 (2d Cir), cert denied, 534 U.S. 891 (2001)(holding that trial court did abuse its discretion in denying spoliation sanctions where plaintiff did not request an inspection of the damaged ship container that was destroyed by the defendant until prior to making its motion for summary judgment). However, as indicated above, since Ahroner notified defendants in November 2002 to preserve all evidence relating to his claims and defendants agreed to preserve the hard drive in 2007 and only contended that it was destroyed after the forensic expert sought to inspect it, Ahroner's lack of diligence in seeking this information does not preclude the issuance of spoliation sanctions based on the hard drive's destruction.

[14]In opposition to Ahroner's request for an adverse inference charge, defendants cite New York case law holding that in order to be entitled to an adverse inference charge that party seeking such charge "must make a prima facie showing that the document in question actually exists, that is under the opposing party's control and that there is no reasonable explanation for the party's failure to produce it." Wilkie v. New York City Health & Hospital Corp., 274 AD2d 474 (2d Dept), lv denied, 96 NY2d 705 (2000); see also, Jean-Pierre v. Tuoro College, 40 AD3d 819, 820 (2d Dept 2007). It is unclear whether these precedents are applicable here as they concern requests for an adverse inference charge based on the failure to produce a document as opposed to for the spoliation of evidence. But see ECOR Solutions, Inc. v. State of New York, Department of Environmental Conservation, 17 Misc3d 1135(A). In any event, the three-part test applied in these cases has been met here since it has been shown that (1) the emails on the

Bush Terminal, Inc., 1 AD3d 168; Hilfiger v. Commonwealth Trucking, Inc., 300 AD2d 58, 60 (1st Dept 2002). Accordingly, Ahroner is entitled to an adverse inference charge at trial that the emails on the hard drive would not support defendants' defense that Ahroner was terminated as part of an overall plan to reorganize to help the Bank remain profitable and because his position was being eliminated, and would not contradict evidence introduced by Ahroner that he was terminated as the result of discrimination based on his age and religion.

While spoliation sanctions are appropriately granted for the destruction of the emails on the hard drive, the court reaches a different conclusion with respect to the emails that were erased from the server since the relevance of such emails cannot be established based on the deposition testimony or other evidence in the record, and the record is insufficient to establish that their destruction was the result of bad faith or gross negligence. In contrast, in Zubulake, on which Ahroner relies, the plaintiff provided extensive proof that the defendants' employees were deleting relevant emails and some of which were restored on backup tapes "while others have been altogether lost, though there is strong evidence that they once existed." 229 FRD at 426. On the other hand, the court in Fitzpatrick v. Toy Industry Association, Inc., 2009 WL 159123, denied spoliation sanctions based on the alleged destruction of email finding that "plaintiff has not demonstrated the likelihood of the existence of relevant documents or emails...that were not turned over to her."

Under these circumstances, Ahroner's request for spoliation sanctions with respect to the allegedly destroyed electronic data is granted only to the extent indicated above, i.e. that Ahroner will be entitled to an adverse inference instruction at trial with respect to emails on Bastante's

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hard drive exist, (2) they were under defendants' control, and (3) the destruction of the hard drive does not provide a reasonable explanation for failing to produce the emails.

hard drive, and is otherwise denied.

Additionally, based on defendants' destruction of the hard drive and the inability of the forensic expert to inspect it, Ahroner is entitled to reimbursement of any fees paid by him to the forensic expert and any attorneys' fees expended in pursuing the forensic examination of the hard drive. With respect to the attorneys' fees the recovery of such fees shall require the submission of proof of the reasonable amount of such fees as directed below.

The next issue concerns the alleged destruction of the employee lists containing descriptions of the duties of the employees in the Bookkeeping Department. As a preliminary matter, the court notes that it cannot be conclusively determined on this record whether these lists were lost or destroyed in the ordinary course of business or after defendants received notice of Ahroner's potential claims and were under an obligation to preserve such records. At the same time, there is evidence in the record establishing the content of the lists. While Berger testified that he did not rely on the lists is deciding to terminate Ahroner's employment, there is evidence from which a jury could infer that the lists were used to determine which employees were to be discharged.

However, Ahroner has not been shown that the lists are crucial to his claims or that their loss was prejudicial such that the severe sanction of striking defendants' responsive pleadings is warranted. Balaskonis v. HRH Constr. Corp., 1 AD3d at 120 (trial court properly denied plaintiffs' request to strike defendant's pleadings based on the alleged destruction of evidence where there was no indication that "third-party defendant disposed of crucial evidence"). The issue of whether a lesser sanction should be imposed and the nature of the sanction, if any, including inter alia, a missing documents charge is referred to the trial court. Id. at 121 (where the sanction of striking the pleading is denied plaintiff was properly granted leave "to seek a

missing documents charge at the time of trial") .

In addition to seeking spoliation sanctions, Ahroner moves to strike defendants' sixth affirmative defense alleging that Ahroner's claims are barred by the exclusive remedies of the New York State Workers' Compensation Law. This defense is without merit since claims for employment discrimination and failure to pay overtime are not barred by the exclusivity provisions of the Workers' Compensation Law. Hanford v. Plaza Packaging Corp., 284 AD2d 179 (1st Dept 2001). Accordingly, the motion to strike this defense is granted.

Finally, Ahroner's motion to expand the record is denied since it impermissibly seeks a second opportunity to argue his spoliation motion, and to submit new evidence to the court, which would not have changed the court's determination in any event.[15]

In view of the above, it is

ORDERED THAT Ahroner's motion for spoliation sanctions is granted only to the extent that Ahroner will be entitled to an adverse inference instruction at trial with respect to emails on Bastante's hard drive and Ahroner may seek sanctions, including a missing documents charge, with respect to the employee lists at the time of trial, and the motion is otherwise denied; and it is further

ORDERED THAT within ten days of receipt of proof as to the amount paid by Ahroner to Peter J. Theobald, the forensic expert retained to examine Bastante's hard drive, defendants are directed to reimburse Ahroner for such amounts; and it is further

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[15]Since Ahroner referred to, but mistakenly omitted from his spoliation motion, the May 31, 2007 letter written by Rogers regarding the preservation of the hard drive, the court has considered this letter in deciding the spoliation motion even though it was first submitted as an exhibit to a reply affirmation in support of Ahroner's motion to expand the record.

ORDERED THAT within 20 days of the date of this order, Ahroner shall submit to the court an affirmation of services so that the court can determine the reasonable amount of attorneys' fees expended in connection with pursuing the forensic examination of the hard drive, and which shall include detailed time records and the basis for the hourly rate charged, including the experience and qualifications of the attorney(s) working on the matter, and failure to timely comply with this paragraph shall result in a waiver of the request for such fees; and it is further

ORDERED THAT the motion to strike the sixth affirmative defense is granted and the sixth affirmative defense is stricken; and it is further

ORDERED THAT the motion to expand the record is denied.

DATED: July 9,2009

J.S.C.
HON. JOAN A. MADDEN
J.S.C.

FILED

JUL 13 2009

COUNTY CLERK'S OFFICE
NEW YORK