



Oregon Court of Appeals Reminds Litigants That Destruction of Evidence Can Warrant Serious Sanctions

From the desk of Bill Taaffe: Spoliation occurs when, among other things, one party to a lawsuit destroys or otherwise hides relevant evidence from the adverse party. When spoliation is discovered, the consequences imposed by the court vary from a slap on the wrist to an outright dismissal. What does it take for a case to be dismissed for spoliation? Read on to find out.

Case Pointer: In this employment dispute, a trial court dismissed a plaintiff's cause of action because she deleted numerous relevant text messages and emails before discovery. The Court of Appeals reversed the dismissal. It noted that the trial court was required to explain how plaintiff's deletion of relevant messages prejudiced the defendant's defense, but because it failed to provide such an explanation, the dismissal was an abuse of discretion. This case serves as an important reminder to preserve evidence when the threat of litigation is looming and to pursue sanctions when evidence is destroyed by an adverse party.

[Markstrom v. Guard Publishing, 294 Or App 338 \(Oct. 10, 2018\).](#)

Serena Markstrom ("Plaintiff") worked for Guard Publishing ("Register Guard"), a newspaper based out of Eugene, Oregon, for twelve years. Towards the end of her tenure, the relationship became strained and Register Guard placed Plaintiff on a "process improvement plan." Plaintiff, in turn, sent a "notice of grievance" to the Register Guard through her union representative, alleging discrimination and hostile work environment. Sometime later, Plaintiff was terminated for insubordination, dishonesty, and destruction of evidence and company property.

Plaintiff believed that she was wrongfully terminated and filed a lawsuit against the Register Guard. The Register Guard made a discovery request of Plaintiff, demanding all text messages and emails in Plaintiff's possession relevant to the dispute. What soon became clear was that Plaintiff had systematically deleted relevant text messages and emails relating to the circumstances of her termination. The Register Guard, upon this discovery, moved for sanctions due to her destruction of evidence and asked the court to dismiss her lawsuit. The trial court granted the Register Guard's request, dismissing Plaintiff's claim and describing Plaintiff's actions as threatening the integrity of the judicial process.

Plaintiff appealed, arguing that the trial court either abused its discretion in dismissing her case, or that it did not have the discretion to dismiss her action in the first place. The Register Guard argued that Oregon Rule of Civil Procedure 46 B ("ORCP 46 B") provided the trial court with such discretion. Plaintiff argued in response that the actual effects of her actions were not grave enough to warrant dismissal of her action under ORCP 46 B.

The Court of Appeals noted at the outset that it was not sure that ORCP 46 B gave the trial court discretion to dismiss an action due to spoliation of evidence. However, it did not base its decision on that reasoning. Instead, the appeals



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court found that the trial court failed to explain why its dismissal of Plaintiff's claim was a just decision. It noted that "[t]o properly exercise discretion to impose the sanction of dismissal, the court must consider more than the egregiousness of the conduct being sanctioned." Rather, it must judge both the egregiousness of the action as well as the prejudice to the opposing party. Because the trial court failed to explain how the spoliation affected Register Guard, it could not dismiss Plaintiff's action.

Accordingly, the appeals court reversed the trial court's decision and remanded the case to the trial court to determine an appropriate sanction.

What does this mean for you? First, keep an eye out for potential spoliation claims against plaintiffs when engaged in litigation. If there is spoliation, sanctions may be warranted. Second, you should always make sure your insureds preserve evidence if there is any possibility of ensuing litigation. Here, Plaintiff's deletion of text messages and emails was serious enough that a trial court unilaterally dismissed her action. Preservation of evidence is always in your best interest to ensure that an opposing party cannot use spoliation as a means to impair your defense.

View full opinion at <https://cdm17027.contentdm.oclc.org/digital/pdf.js/web/viewer.html?file=/digital/api/collection/p17027coll5/id/19025/download#page=1&zoom=auto>



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