

## **The More Things Change, the More They Stay the Same: How Courts Have Applied the Amended Federal Rules of Civil Procedure in Employment Cases**

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### ***Introduction***

On December 1, 2015, amendments to the Federal Rules of Civil Procedure (“FRCP”) became effective. Of particular note, the amendments revised Rule 26(b), which governs the scope of discovery, and Rule 37(e), which addresses the preservation of electronically stored information (“ESI”). Although the amended rules have only been in effect for ten months, the consequences of these changes have become apparent in how courts address discovery disputes.

This article provides an overview of the key changes to the FRCP and discusses some of the first employment cases that have applied these rules to discovery disputes.

### ***Amendments to the Federal Rules of Civil Procedure***

The new version of Rule 26(b)(1) provides:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Notably, the amended rule eliminates the oft cited “reasonably calculated to lead to the discovery of admissible evidence” language describing the scope of permissible discovery.<sup>1</sup> The amended rules move the proportionality factors from Rule 26(b)(2)(C) to a more prominent seat in Rule 26(b)(1), and add an additional factor for courts to examine. To an extent, courts already considered proportionality in resolving discovery disputes. But by highlighting the proportionality factors and eliminating the “reasonably calculated” language, the Judicial Conference’s Rules Committee (the “Committee”) sought to cut back on costly and time consuming fishing expeditions, especially when the information sought exceeded the needs of the case.

Rule 37(e) was revised to provide that a court may impose sanctions for failure to preserve ESI only if the opposing party is prejudiced by the loss of the information and the violating party acted with intent to deprive the other party of the information. The amended rule also explicitly lays out the actions a court may take if the factors above are met: it may presume the lost information was unfavorable to the party; instruct the jury it may or must presume the information was unfavorable to the party; dismiss the action; or enter a default judgment. The Committee made these changes to bring uniformity to the obligations of a party to preserve ESI

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<sup>1</sup> Fed. R. Civ. P. 26(b) (prior to 2015 Amendments).

because “[f]ederal circuits ha[d] established significantly different standards for imposing sanctions or curative measures on parties who fail[ed] to preserve electronically stored information.”<sup>2</sup> The amendments to the rules also made additional changes, such as requiring the parties’ discovery plan to state each party’s views and proposals for the preservation of ESI and permitting parties to serve requests for production of documents prior to the Rule 26(f) conference.<sup>3</sup>

### ***FLSA Collective Action—Bell v. Reading Hospital (E.D. Pa.)***

In *Bell*, plaintiffs alleged that their employer violated the Fair Labor Standards Act (“FLSA”) by failing to compensate them for “work performed during their unpaid meal breaks.”<sup>4</sup> The collective action had been conditionally certified, and the court considered discovery issues prior to a motion for decertification. The parties had a dispute over document requests by plaintiffs seeking policies and procedures for requesting wages for work performed during unpaid meal breaks. The parties also disputed the proper scope of the 30(b)(6) corporate deposition. Plaintiffs sought to depose a corporate representative who had “department level” knowledge of on-the-ground practices for meal breaks, as opposed to a corporate hospital representative who could only speak to “general hospital” practices. The defendant objected to the requests as overbroad, unduly burdensome, and not proportional to the needs of the case and sought a protective order for the same reasons. Defendants further objected to the 30(b)(6) request because it would require them to consult with, prepare and potentially produce over thirty supervisors for the 30(b)(6) deposition.

The court considered the issue under the new proportionality factors of FRCP 26(b)(1) in tandem with the “similarly situated” analysis required to certify an FLSA collective action. The court found that the discovery sought by the plaintiffs went to the heart of the issues at hand, and would be relevant to determine whether plaintiffs were similarly situated for final certification of a collective action under 29 U.S.C. § 216(b), assuming that defendants would attempt to decertify the class. Focusing on the first proportionality factor, the court found that “the type of information sought by plaintiffs has been considered by other courts in determining whether plaintiffs are similarly situated. Accordingly, this information is important to the issues at stake in this matter, including whether final certification of the class is appropriate, and plaintiffs should not be deprived of a fair opportunity to develop and present its case.” The court appeared to give the most weight to this factor in its analysis, as it referenced the importance of the information sought throughout its analysis of the remaining factors.

The court noted that, while it must consider the relative resources and access to information of the parties, “[t]here is no requirement that parties have to spend equal amounts on discovery, or that a party who has less to produce be somehow limited in what it can request as a result.” The court found that, on the particular facts at issue in the case, it was not disproportionate to require the defendant to produce a larger volume of discovery than the individual plaintiffs. Finally, the court considered the burden on the defendant to conduct the requested discovery. The defendant

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<sup>2</sup> Fed. R. Civ. P. 37, Advisory Committee Notes to 2015 Amendment.

<sup>3</sup> See, e.g., F.R.C.P. 26(d)(2) and 26(f)(3).

<sup>4</sup> *Bell v. Reading Hosp.*, No. 13-5927, 2016 WL 162991, at \*3 (E.D. Pa. Jan. 14, 2016).

argued that complying with plaintiffs' requests would require it to canvass employees in seventeen different departments and thirty five supervisors. Despite the significant time and money this would cost the defendant, the court found that the "requested discovery bears directly on the issue of final certification," all of these employees worked at the same hospital location, and that defendant represented that it would present declarations in its opposition to final certification from many of the same department level supervisors. Therefore, on these facts, the burden to defendant was outweighed by the importance of the discovery.

***Rule 37(e) Sanctions—Marshall v. Dentfirst (N.D. Ga.)***

In this Northern District of Georgia case, plaintiffs alleged that the defendant employer violated the Age Discrimination in Employment Act ("ADEA").<sup>5</sup> The plaintiff worked for the defendant for nineteen years in various roles. She was terminated and subsequently filed a charge with the EEOC alleging that the termination was based on age discrimination. The defendant responded to the charge and argued there was no violation because plaintiff was terminated because "she 'always shopped online' and 'was not properly managing collections and Pre-treatment estimate reports.'" Nonetheless, the plaintiff received a notice of right to sue from the EEOC and subsequently filed an action alleging violations of the ADEA.

In this opinion and order, the court considered plaintiff's request for "documents, information and records related to Plaintiff's management of pretreatment estimate reports ('pretreatments') and her internet browsing history" from the defendant. The plaintiff argued this information was relevant to the defense that the plaintiff was terminated for unsatisfactory performance.

When defendants failed to produce the requested documents because they had not been preserved, the plaintiff asked the court to strike the defendant's answer as a sanction. First, the court found that the plaintiff failed to show both that the requested documents existed at the earliest point defendant should have anticipated litigation, and that the defendant failed to preserve the requested documents. The court further denied plaintiff's motion for sanctions because the plaintiff failed to show she suffered prejudice or that the evidence was crucial to making her prima facie case, even if the defendant did fail to preserve the documents.

The court considered whether the plaintiff suffered prejudice in light of Eleventh Circuit precedent that an employer need only show that the defendant believe in good faith that the employee's work was unsatisfactory to defeat a plaintiff's "pretext" theory of discrimination. In this light, the documents plaintiff requested went to the truth of whether the plaintiff actually shopped online and mismanaged reports, not to whether the defendant *believed* she did these things. In this case, the defendant received complaints about the plaintiff's performance and investigated the complaints by interviewing the employees who complained. There was "no evidence to support that the allegedly spoliated documents were reviewed, relied upon, or even available, during [the] investigation." The court went on to explain that even if the plaintiff could show defendant had a duty to preserve the ESI and she was prejudiced because of it, she failed "to show that Defendant acted in bad faith or with intent to deprive Plaintiff of the use of the information in this litigation" as required to demonstrate a violation of revised Rule 37(e)(2).

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<sup>5</sup> *Marshall v. Dentfirst, P.C.*, 313 F.R.D. 691, 693 (N.D. Ga. 2016).

## ***Conclusion***

These cases illustrate the intersection of the newly amended Rules and the already vast statutory and common law framework in employment cases. It is important to firmly grasp the implications of the amendments to best represent your client's interest in discovery disputes. Although the proportionality of discovery and sanctions for failure to preserve ESI are not new issues for courts in discovery disputes, the amendments to the Federal Rules indicate a renewed directive for parties to actively contain discovery and cooperate with opposing parties. If utilized through specific objections and explanations, the proportionality factors in the amended Rule 26(b)(1) give responding parties ammunition to protect themselves from overbroad and burdensome discovery. By the same token, the changes to Rule 37(e) assure parties that reasonable efforts to preserve ESI will be sufficient, and minimizes the possibility that a party may be sanctioned for a failure to preserve ESI as a result of ordinary negligence.

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