IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-CV-01826-MEH

DEREK M. RICHTER,

Plaintiff,

v.

CITY OF COMMERCE CITY, COLORADO,
TROY SMITH, in his individual capacity,
DAVID CUBBAGE, in his individual capacity; and
KAREN STEVENS, in her individual capacity,

Defendants.

PLAINTIFF'S MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE

I. INTRODUCTION

Pursuant to F.R.C.P. 37(b) and (c) and the court's inherent powers, Plaintiff Derek Richter, moves this court for an order imposing sanctions and granting relief against Defendants Commerce City and Karen Stevens (collectively, "Defendants") for failure to disclose and for spoliation of material evidence.[1] This motion is supported by the accompanying declarations and records.[2]

The imposition of sanctions for spoliation has deep historic roots. *See Goodman v. Praxair Servs.*, 632 F. Supp. 2d 494, 518 (D. Md. 2009).

> The law, in hatred of the spoliator, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer

[1] Pursuant to D.C.COLO.L.Civ.R. 7.1(1)(a) the parties conferred by phone and correspondence from March 30, 2016 to April 5, 2016, but did not resolve the matter.
[2] *See* Jarrard Declaration. Exhibits are cited as marked at deposition, if marked, declaration and deposition testimony is cited to the transcript or original page and internally marked.

> by the very means he had so confidentially employed to perpetrate the wrongdoing….Indeed, the origin of the doctrine of spoliation is often traced back to the 288-year-old case of *Armory v. Delamirie*,… "unless the [goldsmith] did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him." *Id. citing Armory v. Delamirie*, (1722) 93 Eng. Rep. 664 (K.B); I Str. *505.* (Opinion of Chief Justice Pratt).

Given the excess of involvement and control exercised by Defendants' attorneys throughout this matter, there is ample cause for the imposition of stiff sanctions.

II. FACTUAL BACKGROUND

Mr. Richter, a Commerce City Police Officer, initiated this action on August 24, 2015, claiming Defendants took adverse employment actions against him in violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Mr. Richter's complaint alleges that Defendants discriminated against him through a series of actions that began in January 2011. On December 2, 2011, Mr. Richter and a fellow officer and military reserve colleague filed a Military Discrimination complaint with the Defendants' Human Resources office. *Compare* Dkt. 1 at 24 – 25 *and* Dkt.22 at 24-25. Jarrard Decl. at Exhibit A. The law firm of NATHAN DUMM & MAYER P.C. was retained by Defendants to manage Mr. Richter's USERRA complaints and have remained directly involved in all aspects of this case since that time. Stevens Depo. at 86, 89, 96 – 99, 100-103; Saunier Depo. at 14 - 16, 78; Ewing depo. at 29-30, 79, 81- 85, 189, Schaefer Depo. at 148 - 149.

On April 2, 2012, an anonymous complaint was made which included claims against Mr. Richter. Exhibit 30, Stevens Depo. at 96. That complaint predominately discusses allegations of impropriety within the police department and against Chief Saunier and others in city leadership. Exhibits 39 and 50. On May 2, Mr. Richter was informed that an internal investigation had been launched against him and the special

investigator assigned to the complaint was Mr. Tim Leary. Exhibit 30. Mr. Leary was hired by NATHAN DUMM & MAYER P.C. Stevens Depo. at 96.

On May 7, Mr. Richter, with the assistance of his union, filed a grievance regarding the handling of the anonymous complaint and resulting investigation against him. The grievance was denied by Chief Saunier, and appealed. Exhibit 34 and 39. Simultaneous with the grievance, and the internal investigation, another investigation, run by NATHAN DUMM & MAYER P.C. was being conducted by William Hayashi, regarding the anonymous complaint. Exhibit 39. On May 9, Mr. Richter requested that Chief Saunier grant him emergency leave, so as to protect him from discrimination and or retaliation by city leadership and the City Attorney's Office. Exhibit 33.

All told, as of August 7, 2012, the anonymous complaint "was directed by the City Attorney's Office after consultation with the City's insurer, CIRSA, and legal counsel provided by CIRSA [NATHAN DUMM & MAYER P.C.], which was already involved in assisting the City in its response to the Original FOP Complaint to [the City] Council." Exhibit 39.

In September 2012, Mr. Richter sent Chief Saunier another USERRA complaint. Exhibit 43. On September 25, the City's Director of Human Resources, Heather Spencer, sent an email acknowledging that Mr. Richter's May 7, complaint was not yet resolved. Exhibit 45. On September 28, Mr. Richter and a colleague sent Defendants a letter that proposed to waive all legal actions against the City stemming from their grievances. Exhibit 46. On December 28, a lawyer representing Mr. Richter sent a letter to the Commerce City Attorney concerning the violation of Mr. Richter's privacy rights. Exhibit 52. In the opinion of Deputy City Attorney, Karen Steven, "It was pretty much chaos from January 2012 through December 2012." Stevens Depo at 102.

On January 7, June 28 and December 30, 2013, Ms. Stevens and the City responded to Mr. Richter's USERRA complaints through his attorneys. Exhibits F, 47 and 75. Any one of the above listed events should reasonably have caused counsel to halt the destruction of any records related to Mr. Richter's complaints, and likewise, any records kept on Chief Saunier's City owned computers. *Infra.*

Defendants' attorneys in this litigation (the same law firm all along) issued privilege logs listing seven (7) "work product" items from the 2011 through 2013 time period including communications with former Chief Saunier. Jarrard Decl. ¶ 25.

At deposition on March 30, 2016, former Chief Saunier testified that he kept extensive notes regarding Mr. Richter's discrimination complaints, related letters, scanned documents and emails and that he kept those notes on both his IPad and Laptop computer, and those were organized into files and folders. Saunier Dep. 14, 17, 18, 19, 20, 22, 23, 29, 30, 37, 38, 41, 45, 47, 48, 58, 59, 103, 104, 105, 158 and 169. At one point Saunier is asked, "Okay. And then Leary's investigation regarding military discrimination, do you recall any actions that were taken at the conclusion of that investigation?" Saunier answered, "I don't. That's why I made notes." Saunier Depo at 58. Throughout the deposition Saunier could not recall information because he did not have those notes. *Id.* and at 169. During and following that deposition, Mr. Richter's attorneys requested the computer records discussed by Saunier's deposition. *Id.* at 23; Jarrard Decl. ¶ 26. On April 5th, 2016, Defendants' attorney responded:

> The City has conducted extensive investigation and it is our belief that these items are not in the possession of Commerce City. We base this conclusion on interviews with both the IT Director and the Information and Technology Administrator for the Commerce City Police Department.
>
> Although a litigation hold was placed on documents in September, 2015, prior to that, per the Police Department's

> standard practices, any computer records were wiped from Mr. Saunier's devices upon his separation in or about April, 2013. Moreover, thereafter every device associated with Mr. Saunier has been wiped and salvaged. By salvaged, we have learned that the device's hard drive was completely cleared and the device is no longer in the custody of Commerce City. The devices associated with Mr. Saunier were sent to salvage before the filing of the instant litigation. Finally, per Departmental policy, any associated backups were not retained[3] beyond thirty days. Jarrard Decl. at Exhibit I.

However, in a declaration dated May 4, 2016, former Chief Saunier testifies at length regarding the retention policies at the City, his computer devices and the records he kept regarding this case and Mr. Richter. In part:

> 5. As it relates to employee complaints of discrimination or wrongdoing, it is the City's practice and policy to never destroy any records related to such employee complaints, unless it met the criteria set forth by DORA. Common sense dictates this result as such notes may become significant later in a lawsuit. I gained this understanding through my tenure at Commerce City as well as my dealings with Ms. Stevens.
>
> 6. As the Lieutenant in Charge of Support Services and as Interim Chief I followed the Colorado State archives retention schedule….
>
> 7. During my tenure as Interim Chief of Police I utilized, on a daily basis, a City-issued iPad and laptop. I have poor handwriting. As such it is my practice to utilize the iPad and laptop as much as possible. I took notes, on my iPad and laptop, regarding complaints of military discrimination made by Derek Richter and Eric Ewing. I took notes from both Mr. Richter and Mr. Ewing but also took notes about Mr. Richter and Mr. Ewing's complaints of military discrimination in meetings with Ms. Stevens and an attorney named Marni Nathan-Kloster.
>
> 8. I recall discussing (with Marni Nathan and Karen Stevens) Derek Richter, Eric Ewing, and other individuals who made complaints of discrimination relating to their military status. In general these conversations related to complaints those

[3] A practice that is directly contradicted by Mr. Saunier's testimony.

> individuals had regarding shift work, testing for promotional opportunities, and military discrimination in general. During those meetings I took notes on my iPad. I observed Ms. Nathan and Ms. Stevens look at me as I took notes on the iPad.
>
> 9. I never deleted anything substantive (including any notes regarding Mr. Richter or Mr. Ewing) from my iPad. My iPad contained an "app" called "Evernote"…..
>
> 11….. the City had no policy or practice of deleting items stored on the cloud…..
>
> 13…The fact that my iPad cannot be located raises an eyebrow with me because, among other reasons, information regarding employee complaints of discrimination should be retained because it is the City's policy and practice to retain such information as being able to produce such documents, to my understanding, protects both the agency and the officer.

Saunier Decl. Mr. Saunier further declared that the City keeps logs of records that were destroyed and the reasons for said records' destruction. Saunier Decl. ¶ 2. Defense counsel did not produce any destruction logs as part of this lawsuit. Jarrard Decl. ¶ 27.

While on military absence from work, Mr. Richter remains an employee at Commerce City. Stevens Depo. at 71; 38 U.S.C. § 4316(b)(1)(A)-(B).

III. ARGUMENT

A. The Applicable Legal Standards

Pursuant to Rule 37(b) and (c) and its inherent powers, this court may impose sanctions for spoliation of evidence when a moving party suffers prejudice because the nonmoving party has failed to preserve or has destroyed evidence. *See Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc*., 244 F.R.D. 614, 620 (D. Colo. 2007). "A spoliation sanction is proper where (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." *Henning v. Union Pac. R.R. Co*., 530

F.3d 1206, 1220 (10th Cir. Okla. 2008)(*citing Burlington N & Santa Fe Ry. Co*., 505 F.3d 1031, 1032 (10th Cir. 2007)). The moving party has the burden of proving by a preponderance of the evidence that the opposing party failed to preserve evidence or destroyed it. *United States v. Krause,* 367 B.R. 740, 764 (Bankr. D. Kan. 2007).[4]

B. Commerce City had a duty to preserve Saunier's Computer, files, folders notes and records and failed.

There are two ways the duty to preserve evidence can be triggered. First, a duty to preserve records arises when there is a statute or administrative regulation requiring that the records be maintained. *See Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1419 (10th Cir. 1987) (Bad faith destruction may be shown where "an employer has selectively retained certain self-serving documents[5] and discarded the remainder in a particular time period."). In *Hicks*, the Tenth Circuit addressed the defendant's destruction of personnel records, such as daily reports that contained notes regarding job performance, and held that because there was an administrative requirement to retain those records under 29 C.F.R. § 1602.14(a), the plaintiff was entitled to an adverse inference as result of their destruction. *Id*.; *see also Byrnie v. Town of Cromwell, Bd. of Educ*., 243 F.3d 93 (2001) (citing numerous federal decisions holding that destruction of evidence in violation of regulations requiring its retention can give rise to spoliation inference).

Second, a duty to preserve evidence also arises when a party has notice or should have known the evidence may be relevant to potential future litigation. *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 620 (D. Colo. 2007) (*citing Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)). The filing of a formal complaint or demand is not required to trigger notice of pending future litigation. *Id.* at

[4] There is no dispute that Commerce City destroyed all the evidence that was in Saunier's computers. Accordingly, this issue is not further addressed in the motion.
[5] For example the (7) "work product" items from 2011-2013 that Defendants chose not to destroy.

621. Rather, that duty arises when "a reasonable party in the same factual circumstances would have reasonably foreseen litigation." *Micron Technology, Inc. v. Rambus Inc.,* 645 F.3d 1311, 1320 (Fed. Cir. 2011); "*Clark Constr. Group, Inc.*, 229 F.R.D. 131, 136 (2005)(The trigger date is the date a party is put on notice that it has a duty to preserve evidence."). This standard is flexible and fact-intensive, allowing a court "to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry." *Id.* (citation omitted).

Courts have therefore found that notice of a duty to preserve evidence arises when a party knows litigation is likely to result from a certain type of incident and knows that documents in its possession are relevant to that litigation. *See Stevenson v. Union Pac. R. Co*., 354 F.3d 739, 746-48 (8th Cir. 2004). For example, the duty to preserve arises when a party retains outside legal counsel "for matters relating to allegations of discrimination" or when a party designates work product "in anticipation of litigation" in the same case. *Siani v. State Univ. of N.Y.*, 2010 U.S. Dist. LEXIS 82562, 16-17 (E.D.N.Y. Aug. 10, 2010). The *Siani* court noted that work product is protected only when it is prepared "in anticipation of litigation", and, thus, held that, "If it was reasonably foreseeable for work product purposes… it was reasonably foreseeable for duty to preserve purposes" because "'[l]itigation was therefore reasonably foreseeable' as of that date." *Id.* Indeed, "A document is protected by the work product privilege if it was **prepared in anticipation of litigation** by another party or that party's representative, and was intended to remain confidential." *Aull v. Cavalcade Pension Plan*, 185 F.R.D. 618, 624 (D. Colo. 1998). "A party asserting a privilege has the burden of establishing that the privilege is applicable." *Id.* In other words, the flip side to claims for privilege for work product is the duty to preserve related records for litigation.

In another case, like here, where the same attorneys advised a municipality on the same matter for many years, *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 522 (S.D.N.Y. 2010), the court held that when the attorney who advised the municipality failed to place a litigation hold for years, spoliation sanction is available. The court noted that, "Given her position as a Deputy Town Attorney, [the] failure to advise Town staff and consultants of their discovery obligations is inconceivable and troubling." *Id.*

Furthermore, like the present case, the initiation of a parallel proceeding may also put a party on notice of potential litigation. *Doe v. Norwalk Comm. College*, 248 F.R.D. 372, 378 (D. Conn. 2007); *see also McCargo v. Tex. Roadhouse, Inc*., 2011 U.S. Dist. LEXIS 49320 (D. Colo. May 2, 2011) (duty to preserve evidence triggered with filing of formal internal complaint); *see also Byrnie*, 243 F.3d at 108 (employer arguably had notice of prospect of potential litigation when plaintiff expressed concerns about hiring process and later served Freedom of Information Act request); *Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir. 1999) (documents could reasonably be found to be destroyed in anticipation of litigation when fear of future litigation plausibly motivated spoliation).

In the case at bar, Commerce City absolutely knew that litigation was *likely* to result from complaints arising from Chief Saunier's actions as interim police chief, and for those reasons alone, all of Saunier's computers and files should never have been deleted. Indeed, even if Mr. Richter's 2011 and 2012 formal USERRA complaints, the anonymous complaint filed in April 2, 2012, or May 2012 grievances and May 2012 request for emergency leave based on discrimination were not sufficient to trigger the duty to preserve Saunier's related computer records, then the city was under a duty to preserve those records when it was put on notice that Mr. Richter was represented by counsel in early December 2012. Exhibit No. 44. Given the multiple notices of

incidents regarding potential litigation involving Chief Saunier, and/or Mr. Richter, there is no legitimate explanation for not preserving Saunier's notes, let alone for Defendants to wipe out all of Saunier's computer records and files.

Further, the attorneys who advise Defendants throughout this this case knew better. First, when Richter made his first USERRA complaint, Defendants tendered it to their insurance (CIRSA), who, in turn, hired the NATHAN DUMM & MAYER P.C. law firm to take appropriate actions and that law firm has remained directly involved in every aspect of this case since 2011. Stevens Depo at p. 97 – 99, 100-103., Saunier Decl. ¶¶ 6-7. Second, those same attorneys met on many occasions regarding the matters involved in this case, and they saw that Saunier always took notes on the same iPad that the City admits to having now purged. Saunier Decl. at 7-8. The same attorneys have now identified at least seven specific "Attorney/Client Privilege and/or Work Product" items related to this case, including communications with Saunier that span from the date of Mr. Richter's 2011, USERRA complaint up through Chief Saunier's 2013 departure. Common sense dictates that, if *during that time* litigation was reasonably foreseeable for work product purposes, then it was therefore reasonably foreseeable *as of that date* for preservation purposes. *Siani*, 2010 U.S. Dist. LEXIS 82562, 16-17. Further, Defendants' attorneys (a law firm that specializes in municipal defense) have no excuse for failing to place a litigation hold at that time.

C. The City Had A Duty to Preserve Records Regarding Richter's Employment.

Mr. Richter is currently employed by Commerce City. Therefore, under both federal regulations and Colorado Retention regulations, Defendants had a duty to preserve Saunier's notes about Richter and the matters related to this case, as well as other documents regarding Richter's discrimination and denial of promotion claims.

First, 29 C.F.R. § 1602.14 and 29 C.F.R. § 1602.31 specifically required Defendants to preserve personnel or employment records, "for a period of 2 years from the date of the making of the record or the personnel action involved, whichever occurs later.." That requirement extends to "[a]ny other records having to do with hiring, promotion, demotion, transfer, layoff, or termination, rates of pay or other terms of compensation, and selection for training ". *See id.* And those personnel records shall be kept for a period of 2 years from the date of termination.

> We recently considered the availability of an adverse inference from the destruction of records in the context of employment discrimination litigation. We held that where, as here, the employer was required by law to retain the employee's records, *see* 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.14 (requiring retention for one year after termination), bad faith that might otherwise be required, […] need not be shown to permit an adverse inference; intentional destruction satisfies the *mens rea* requirement. The only other requirement is that the party seeking the inference show that the destroyed records were relevant to the party's claim or defense. *Zimmermann v. Assocs. First Capital Corp*., 251 F.3d 376 (2d Cir. N.Y. 2001)[7]

All of the Saunier records relating to Mr. Richter, (a current employee) were destroyed by Defendants.

Saunier also testified that he took notes about Richter's USERRA discrimination complaints and commander's promotion.

> I recall discussing (with Marni Nathan and Karen Stevens) Derek Richter, Eric Ewing, and other individuals who made complaints of discrimination relating to their military status. In general these conversations related to complaints those individuals had regarding shift work, testing for promotional opportunities, and military discrimination in general. During those meetings I took notes on my iPad. I observed Ms.

[7] *c.f. Hicks v. Gates Rubber Co.,* 833 F.2d 1406, 1419 (10th Cir. Colo. 1987)(because employer violated record retention regulation, plaintiff was entitled to the benefit of a presumption that the destroyed documents would have bolstered her case)

> Nathan and Ms. Stevens look at me as I took notes on the iPad. Saunier Decl. at ¶ 8.

These records clearly, therefore, fall within the scope of the federal regulations, and those documents (whether created in 2011 or 2012) should still be retained for at least two years after Mr. Richter's termination, which has not occurred. Destruction of this evidence in violation of a regulation requiring its retention should give rise to a spoliation inference. *See Hicks*, 833 F.2d at 1419, *see also Byrnie*, 243 F.3d at 108-09.

In addition to the federal regulations, Colorado law requires the City to create and follow its own document retention schedule. *See* C.R.S. § 24-72-203 (requiring all agencies to "[e]stablish and maintain a records management program ... and document the policies and procedures of such program"). Chief Saunier testified that the City followed those retention schedules when he worked there. Saunier Decl. at ¶¶ 5-6. Further, the City bound itself to follow the retention schedules published by the State Archivist. *See* https://www.colorado.gov/pacific/archives/approved-municipalities (*last visited* May 4, 2016).[8] Explicitly clear in all the Archivists schedules is the prohibition that "no record shall be destroyed if it is pertinent to any current or pending litigation." *Id.* The retention schedules adopted by Commerce City also require that, **"**Records of notifications of claims regarding potential lawsuits that are forwarded to legal counsel and/or the insurance carrier. … must be retained for 6 years after closure of claim.[9] Also, Defendants are specifically required to follow Schedule 90 involving personnel records:

> No record may be destroyed under this Retention Schedule if it is pertinent to any current, pending or anticipated investigation, audit or legal proceeding. The minimum retention periods specified in this schedule apply to the

[8] A court may judicially notice a fact not subject to reasonable dispute provided the fact "is generally known within the trial court's territorial jurisdiction". FRE 201(b); *Mullis v. U.S. Bankruptcy Ct.,* 828 F.2d 1385, 1388 (9th Cir. 1987).

[9] https://www.colorado.gov/pacific/archives/municipal-records-retention-manual. *See also* Jarrard Decl. at Exhibit H.

> information contained within the record copy, regardless of the physical format of the record copy (paper, microfilm, electronic). Each municipality must decide on the physical format for each type of record, ensuring authenticity, readability and accessibility for the entire retention period. Jarrard Decl. at Exhibit G

Further, § 90.070, Employee Records – provides, that " Documentation of an individual employee's work history maintained because of the employer-employee relationship, such as records … disciplinary and personnel actions and supporting documentation, including … demotion, **promotion** … selection for training **…** performance evaluations" shall be held in retention for 10 years after retirement or separation. *Id.* Mr. Richter is still a current employee, but the records former Chief Saunier testified about were destroyed by the City in 2013. Chief Saunier was also asked at his deposition what records he kept on his iPad related to Mr. Richter, and testified:

> Those situations either had to do with complaints that were going on with the department or that they were involved in, complaints that they would have forwarded, and/or anything that we would have talked about, because we also went through a bargaining position for the contract. And I know -- as memory serves me best, I believe they were part of that. Saunier Dep at 18.

Moreover, by April 2013, Defendants had a further obligation to preserve all records regarding Richter, as they should have known that the documents might be relevant to future litigation. By then, there had been numerous meetings regarding Richter's complaints and the duty to preserve was set. *See Doe*, 248 F.R.D. at 377 (duty to preserve arose when meeting to discuss incident that led to demand letter and lawsuit). While Defendants may now claim that they are not able to locate any of those records, that is only because they destroyed them in 2013.

D. Plaintiff Has Suffered Prejudice as a Result of Defendants' Failure to

Preserve Patently Relevant Evidence.

To demonstrate prejudice, the moving party must present some evidence that the destroyed evidence would have been relevant to the claims or defenses in the case. *See e.g. Henning v. Union Pac. R.R. Co.,* 530 F.3d at 1220. "Generally, the prejudice element is satisfied where a party's ability to present its case or to defend is compromised." *Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d 772, 801 (N.D. Tex. 2011) (internal quotation omitted). "At the same time, courts must be careful that the application of this burden is not too onerous, otherwise the spoliating party might be allowed to profit from its own misconduct." *Id.*

In this case, Mr. Richter has been and will continue to be substantially prejudiced by the Defendants' failure to preserve key documentation that relates to his claims and defendants defenses. First, Saunier testified that he took notes about Richter's discrimination and fail to promote claims. Mr. Richter was denied access to those records to examine former Chief Saunier at his deposition. Indeed, even though Defendants and their attorneys watched Saunier take notes on these matters, they never disclosed the existence of Saunier's notes, because the notes were only first disclosed to the Plaintiff at the deposition - - - a deposition that Plaintiff (not the defense) scheduled.

Second, Defendants have previously indicated that they intend to seek summary judgment on all of Richter's claims, arguing, among other things, that they acted based upon non-discriminatory reasons as set forth in their Answer to the Complaint. Dkt. 28 at 7. Plaintiff requested discovery on those defenses, however, Defendants' did not disclose any of Chief Saunier records, as they longer exist, and/or were consciously destroyed. As a result Richter does not have access to documents to corroborate what is likely to be disputed testimony regarding the City's alleged affirmative defense. Bear

in mind that Chief Saunier was directly involved in Richter's discrimination complaints from 2011 through 2013 and that is why Saunier made his notes. Saunier Depo. at 58.

E. Defendants' Failures to Preserve Relevant, Material Evidence Warrants Sanctions.

Given the circumstances, sanctions are warranted in this case. In the Tenth Circuit, the party seeking sanctions for spoliation need not show that the other party acted in bad faith or intentionally by destroyed evidence. *Hatfield v. Wal-Mart Stores, Inc*., 335 Fed. Appx. 796, 804 (10th Cir. 2009); *see also Henning v. Union Pac. R.R. Co.,* 530 F.3d 1206, 1220 (10th Cir. Okla. 2008) (bad faith is not required for lesser sanctions).

In determining the appropriate measures, this Court has broad discretion. *Id.; see also Estate of Trentadue v. United States,* 397 F.3d 840, 862 (10th Cir. 2005) ("The district court has discretion to fashion an appropriate remedy depending on the culpability of the responsible party and whether the evidence was relevant to proof of an issue at trial.) The Tenth Circuit has identified several factors to consider, including the degree of prejudice to the moving party, the amount of interference with the judicial process. *Id.* The sanctions may include further discovery, cost-shifting, fines, special jury instructions, preclusion, and terminating sanctions. *Medcorp, Inc. v. Pinpoint Techs., Inc*., 2010 U.S. Dist. LEXIS 68532, 6-7 (D. Colo. June 15, 2010).[10] Mr. Richter requests the court order appropriate sanctions, and those are discussed in turn.

F. Mr. Richter is Entitled to an Adverse Inference for Summary Judgment and for Jury Instructions.

An adverse inference instruction is an appropriate sanction where, as here, the moving party shows bad faith on the part of the non-moving party. *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1135, 1149 (10th Cir. 2009). "Bad faith" is defined as something

[10] Judge Mix, noted that the harshest sanctions are justified in cases, like here, where a party wiped out computer hard drives.

done "dishonestly and not merely negligently" and it "implies wrongdoing or some motive of self-interest." *Cache La Poudre*, 244 F.R.D. at 635. Many courts have also held that circumstantial evidence may support such a finding. As one court explained, circumstantial evidence of bad faith will suffice if the following criteria are met:

> (1) evidence that once existed could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator. *Doe v. Miami-Dade County*, 797 F. Supp. 2d 1296, 1303 (S.D. Fla. 2011) (citations omitted).

In this case, the missing evidence is certainly material to Mr. Richter's claims and Defendants' explanation for wiping out all of Police Chief Saunier's computer files begs credulity. Defendants state that with regard to the "folders, files, records and notes associated with Former Interim Chief Saunier's electronic devices"… "any computer records were wiped from Mr. Saunier's devices upon his separation in or about April, 2013" and "thereafter every device associated with Mr. Saunier has been wiped and salvaged." That is simply implausible.[11]

First, who in their right mind innocently deletes the entire contents of a city police chief's computers and sends all of those computers to the salvage yard as soon as that chief leaves their employment? The answer is nobody. It is long established that, "Once 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." *See e.g. Zubulake v. UBS Warburg LLC* 220 F.R.D. 212, 218

[11]Notably, the April 2013, spoliation of Chief Saunier's computer records was within less than a year of "anonymous complaint" and the resulting major investigations, and during the same period when the City and its attorneys were responding to Mr. Richter's attorney regarding his USERRA complaints.

(S.D.N.Y. 2003). "Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents." *Id.* That never happened in this case.

Further, just considering a few of the circumstantial facts in this case: 1) these are public records, 2) employment records directly relevant to pending litigation, 3) the sophistication of Defendants' City Attorney, HR department and IT professionals, 4) the direct involvement of retained outside counsel in these matters, and 5) the retention policy and schedules in place and testified to by Saunier, *then* defendants' notion quickly becomes utterly absurd. *See also supra* at n.11. If there was no conscious volition in the destruction of those records and computers, then the only rational explanation would be an implausible level of incompetence suffered by both counsel and defendants.[12]

Second, to suggest that the defendants were not were not on *notice of potential litigation*, when in fact the defendants involved CIRSA, retained outside counsel to defend against Mr. Richter's USERRA claims, hired investigators, held meetings regarding the same claims, produced "work product" by the same attorneys, responded to letters and complaints from Mr. Richter and his attorneys regarding potential litigation, would be equally unbelievable.

Similar to the prejudice analysis above, since many of the destroyed or missing documents are relevant to the issues likely to be raised in Defendants' response to Plaintiff's pending partial summary judgment, as well as Defendants' anticipated summary judgment motions, the intentional destruction of the evidence described above

[12] A failure to preserve evidence may be negligent, grossly negligent, or willful. *Hart v. Dillon Cos*., 2013 U.S. Dist. LEXIS 95441, 4-5 (D. Colo. July 9, 2013)(citations omitted). After the duty to preserve attaches, the failure to preserve information or records from a key player is grossly negligent or willful behavior. *Id.* "Bad faith culpability, 'may not mean evil intent, but simply signify responsibility and control'." *Id. citing Phillip M. Adams & Associates, L. L. C. v. Dell, Inc*., 621 F. Supp. 2d 1173, 1193 (D. Utah 2009).

should also be considered by this Court in determining those motions. In ruling on the summary judgment motion, all factual inferences must be construed in a nonmoving party's favor, *see Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998), including those associated with the alleged destruction of evidence.

Likewise, in *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), the Second Circuit specifically approved the district court's "sound approach" in presuming an obligation to preserve files and intentional destruction even when, at the time of destruction, no litigation, administrative proceedings or even investigations had commenced and the government claimed that the destruction had nothing to do with a fear of future litigation. The Second Circuit agreed that because the district court could not rule out the possibility that a reasonable jury might find that the prospect of litigation played a role in the destruction of the evidence, it properly considered the government's obligation to preserve the files and intentional destruction of them when ruling on summary judgment. *Id.; see also EEOC v. Denver Newspaper Agency, LLP*, 2007 U.S. Dist. LEXIS 9837 (D. Colo. Feb. 12, 2007) (finding that because missing notes may have contained relevant evidence of the falsity of the "legitimate non-discriminatory reasons" an adverse inference could impact the jury, summary judgment motion would be denied on issue). The same holds true for evidence regarding defendants' affirmative defenses at trial. *Byrnie*, 243 F.3d at 110 (noting that potential spoliation of evidence "becomes a matter for the jury to decide" and denying summary judgment).

Here, given that the Defendants' destruction of the entirety of Saunier's computer records cannot be credibly explained (or is the result of gross negligence) Mr. Richter is entitled to an adverse inference against Defendants on all claims at summary judgment and for the jury consideration at trial.

G. Richter Is Entitled to Other Sanction Remedies for Loss and Destruction of Material Evidence.

Other sanctions as described in Rule 37 may be imposed, including evidence preclusion, to mitigate the resulting prejudice to Plaintiff. *See, e.g., 103 Investors I, L.P. v. Square D Company*, 470 F.3d 985, 988-89 (10th Cir. 2006) (striking testimony of irretrievably destroyed evidence when extreme prejudice resulted from the destruction); *Montoya v. Newman*, 2015 U.S. Dist. LEXIS 87836 (D. Colo. July 7, 2015) (allowing party to argue any inferences they hope the jury will draw); *Workman v. AB Electrolux Corp.*, 2005 U.S. Dist. LEXIS 16306 (D. Kan. Aug. 8, 2005)(*listing* "(1) outright dismissal of claims; (2) exclusion of countervailing evidence; or (3) a jury instruction on the spoliation inference, which permits the jury to assume that destroyed evidence would have been unfavorable to the position of the offending party.")(expert precluded from testifying regarding cause when evidence regarding other potential causes was destroyed and expert had not considered other causes). This court should preclude Defendants from countering any evidence offered by Mr. Richter that, if not denied the opportunity to compete for Commander during Saunier's tenure, he would have been promoted.

H. Fees and Costs for the Present Motion

Finally, Mr. Richter is entitled to reasonable costs and attorney fees he incurred in connection with this motion. *See Asher Assocs., LLC v. Baker Hughes Oilfield Operations, Inc.*, 2009 U.S. Dist. LEXIS 40136 (D. Colo. May 12, 2009). Monetary sanctions are awarded in spoliation in cases like this where:

> [A]n award of costs serves both punitive and remedial purposes: it deters spoliation and compensates the opposing party for the additional costs incurred. Such compensable costs may arise either from the discovery necessary to identify alternative sources of information or from the investigation and litigation of the document destruction itself. *Id.*

In this case Mr. Richter's attorneys were required to subpoena Mr. Saunier, travel from Washington to Colorado to conduct his deposition (and other discovery, including the 30(b)(6) deposition of the City) without the benefit of the records written by a key participant in the case, and that should have been in the possession of Defendants. Plaintiff's counsel then had to conduct another *expedition* to attempt to discovery or reconstruct what was lost due to Defendants' spoliation. Now we know that any record the Police Chief kept on his computers is forever lost and that alternative sources are a dry well. The destroyed evidence was material to Mr. Richter's denial of promotion and discrimination claims in this case. *Supra.* As such he is entitled to "finest water" presumption that evidence would have won those claims.[13] Further, Mr. Richter may never use those records at summary judgment or trial, which will cause more effort and time than otherwise necessary to litigate his claims; had the records not been destroyed.

IV. CONCLUSION

Mr. Richter requests that this Court sanction Defendants for the spoliation of material evidence and award him all fees and costs incurred in connection with the filing of this Motion and to deter Defendants from further acts spoliation.

Respectfully submitted May 6, 2016.

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[13] "The hostile inferences created by destroying evidence do not seem to offset the strategic gains achieved by the document destroyer of preventing [Richter's] use of a particularly damaging document or of adding excessive litigation costs to [Richter's] case…the inferences may not be strong enough to counter [Defendants'] *remaining* documents, which are carefully retained because of their support of [their own] case." Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents,* 61 TEx. L. REV. 1185.

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2016, I have caused to be electronically filed the foregoing with the Clerk of Court using CM/ECF system which will send notification of such filing to the following e-mail addresses:

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