

The Honorable Judge Annette S. Plese

COPY

Original Filed

MAY 24 2021

TIMOTHY W. FITZGERALD
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

DEMARCO ADDERLEY,

Plaintiff,

vs.

SPOKANE COUNTY et. al.,

Defendants.

Case No. 17-2-00822-7

**MOTION AND MEMORANDUM RE
ADVERSE INSTRUCTION**

I. INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiff seeks an adverse inference jury instruction as to the missing Memorandum of Understanding (MOU) between Spokane County and Washington State Council of County and City Employees, AFSCME, AFL-CIO, Local 492 ("Local 492") relating to Travis Titchenal's seniority. The missing MOU goes to the key issue in this case: whether Defendants treated Mr. Titchenal more favorably than Mr. Adderley on account of race by preserving most of his (Titchenal's seniority) while denying Mr. Adderley all of his accumulated seniority he earned over several years as an employee of Spokane County assigned to Detention Services. In defending this case the Defendants

1 have advanced theories contending a County policy justified giving Mr. Titchenal his seniority
2 minus the time he was gone as a probationary road deputy with the Spokane County Sheriff's
3 Department "Sheriff's Office" based on the fact he never left employment with Spokane County.
4 While, at the same time, admitting a missing MOU (described in more detail below), and which
5 applied to Mr. Titchenal, violated policy. However, Spokane County has admitted the first MOU
6 existed, but the original and copies no longer exist. This is the only explanation given. Plaintiff's
7 motion for an adverse inference instruction should be granted for two reasons:

8 First, the missing MOU is material to this case; its existence would have enabled Mr.
9 Adderley to rebut Defendants' legitimate and non-discriminatory defenses in this case.

10 Second, Defendants acted with a culpable state of mind in intentionally destroying the
11 MOU. How do we know this? Because during McGrath's deposition he admitted the first MOU
12 existed. (McGrath Depo. 22:9-25; 23:1-15) Yet, as of the date of this motion, the first MOU has
13 not been produced with the only explanation from counsel for Spokane County being "we do not
14 have a signed copy anywhere." (McGrath Depo. 27:19-22) Recognizing no sane party will
15 outwardly admit to spoliation of evidence some common sense inferences should be drawn.
16 Defendants have been represented by competent, ethical and experienced counsel throughout this
17 litigation matter. Unquestionably Defendants' counsel told their respective clients to secure
18 discoverable documents after its existence was confirmed. Unquestionably this did not happen
19 because the signed document which admittedly existed during the discovery phase of these
20 proceedings is now "missing" or "lost."
21
22
23
24
25

1
2 **II. FACTS**

3 1. Plaintiff served discovery on Defendants seeking, *inter alia*, “all... documents ...
4 which relate to Travis Titchenal’s return to his employment with the Spokane County Detention
5 Services.” (Love Decl. A *citing* Plaintiff RFP 4)

6 2. Defendants responded to the discovery; however, Defendants’ production did not
7 contain the MOU which is the subject of this motion. (Love Decl. ¶4) Defendants’ document
8 production/discovery responses did not indicate the MOU existed even though Plaintiff’s
9 discovery requests asked Defendant to identify any “missing”, “destroyed”, or “lost” documents
10 and, if “disposed of”, to “explain the circumstances surrounding such disposition.” (Love Decl. at
11 Ex. A *citing* Plaintiff’s First Discovery to Defendants, pg. 5, ¶10)

12 3. On December 17, 2019, Plaintiff deposed John McGrath, the former Spokane
13 County Detention Services Director and one of the key decision makers in this case who also
14 admitted to signing the missing MOU. (Love Decl. at Ex. B *citing* McGrath Dep.)

15 4. At deposition Mr. McGrath testified in preparation for his deposition he “reviewed
16 *a couple MOUs and I think that’s the extent of it.*” (McGrath Dep. 6:7-10) Later in the deposition
17 Mr. McGrath revealed there was a different MOU signed between Spokane County and Local 492
18 relating to Mr. Titchenal than the one pertaining to Mr. Adderley that was marked as an exhibit at
19 Mr. McGrath’s deposition. (Love Decl. at Ex. C Exhibit 1 McGrath Dep.)

20
21
22 Q. (BY MR. LOVE) Okay. So the fact that Titchenal came back seven days prior
23 to this Memorandum of Understanding being signed, that’s why he didn’t have to
24 go through the competitive testing process?

25 A. No. Titchenal came under a different MOU than – this one supersedes the MOU
that Titchenal came under.

1 Q. So there was a Memorandum of Understanding that related to Titchenal?

2 A. It's the original MOU of this.

3 Q. I'm not following you. I've only seen one signed Memorandum of
4 Understanding in this litigation. So are you saying that there's another
5 Memorandum of Understanding that was signed that applied to Titchenal?

6 A. Yes.

7 (McGrath Dep. 22:9-23)

8 5. Defendant Spokane County's attorney confirmed she saw the MOU.

9 MR. LOVE: Have you seen that, Counsel?

10 MS. YAKELY: We did just see it last week, yes.

11

12 MR. LOVE: But, I mean, I don't understand why that wouldn't have been produced
13 in discovery. You said you saw it last week for the first time?

14 MS. YAKELY: Uh-huh. Remember, I didn't have this case initially; so I can't tell
15 you why it wasn't produced.

16 (McGrath Dep. 22:24-25; 23:1-15)

17 6. Plaintiff's counsel asked to see a copy of the MOU. (McGrath Dep. 23:15) The
18 deposition continued with Mr. McGrath testifying the "missing" or "lost" MOU related to Mr.
19 Titchenal and was signed on August 6, 2014, by Christopher Bowles (at the time Vice President
20 of Local 492 on behalf of Pete Mason at the time President of Local 492), Mr. McGrath (at the
21 time Director of Detention Services on behalf of Spokane County), and Timothy O'Brien (an
22 attorney employed by Spokane County). The now "missing" or "lost" MOU was forwarded by
23 Mr. McGrath to Gordon Smith of Local 492 for the last signature, but was never returned.

24 (McGrath Depo. 27:2-25; 28:15-19)
25

1 7. Plaintiff's counsel inquired of Defendant Spokane County's counsel as to the
2 existence of a copy of the document that admittedly existed and was seen the week prior to Mr.
3 McGrath's deposition and received the following response.

4 Q. So that's the document I have not seen. Do you have a copy of that?

5 MS. YAKELY: No, we do not have a signed copy anywhere.

6

7 (McGrath Dep. 27:19-22)

8 8. To this day the first MOU relating to Mr. Titchenal has not been produced in
9 discovery. (Love Decl. ¶6)

10 9. Although not produced, Mr. McGrath concedes the MOU did not comply with
11 Spokane County policy even though the purported policy does not address seniority. (McGrath
12 Dep. 10:8-13; 31:6-11)

13 III. ARGUMENT

14
15 "Spoliation is defined simply as '[t]he intentional destruction of evidence.' BLACK'S
16 LAW DICTIONARY 1401 (6th ed. 1990)." *Henderson v. Tyrrell*, 80 Wash. App. 592, 605 (1996).
17 When spoliation is found to have happened "the common remedy is an inference 'that the
18 adversary's conduct may be considered generally as tending to corroborate the proponent's case
19 and to discredit that of the adversary.'" *Henderson*, 80 Wash. App. at 605. Determining whether
20 to issue an adverse inference spoliation instruction requires examination of two factors: "(1) the
21 potential importance or relevance of the missing evidence; and (2) the culpability or fault of the
22 adverse party." *Henderson*, 80 Win. App. at 607.

23
24 ***Potential importance/relevance of missing evidence.*** The missing MOU is significant
25 because one of the key issues in this case for the jury to decide is why Mr. Titchenal did not

1 have to undergo competitive testing and kept his seniority minus the time he was gone from
2 Detention Services as a probationary road deputy with the Sheriff's Department. Conversely, Mr.
3 Adderley had to undergo competitive testing and retained none of his seniority with Detention
4 Services after he returned from being a corrections officer with Benton County, even though the
5 pertinent provision in the collective bargaining agreement in force at the time between Spokane
6 County and Local 492 defined seniority as:

7 10.1.1 Total length of unbroken service within the job classification. See Plaintiff's
8 Exhibit 20

9 The missing MOU is the source document under which Mr. Titchenal retained his seniority.
10 Spokane County and Local 492 will undoubtedly argue at trial they did not discriminate and all of
11 its actions were legitimate and non-discriminatory. The missing MOU, however, which Mr.
12 McGrath admits did not comply with Spokane County policy, is wholly relevant and necessary to
13 rebut the Defendants' defenses to this case and establish pretext. Since the document no longer
14 exists one is left wondering whether it would have contradicted Spokane County and Local 492's
15 policy-related defense in this case.
16

17 **Culpability.** Mr. McGrath under oath admits to having seen the MOU. These admissions
18 came during Mr. McGrath's deposition in this case. Yet the original signed document, *as well as*
19 *any electronic signed copies of it*, have been lost. From this fact pattern intentional spoliation is
20 the only reasonable inference: Plaintiff requested documents in discovery, Spokane County did
21 not produce the document and did not identify it even existed at any point, until the deposition
22 testimony of John McGrath uncovered it. Plaintiff's counsel requested to see a copy of the
23 document, but was advised by counsel for Spokane County and Mr. McGrath during Mr.
24
25

1 McGrath's deposition that "[w]e did just see it last week" but now "we do not have a signed copy
2 anywhere." (McGrath Depo. 22:24-25; 23:1; 27:21-22.)

3 **IV. CONCLUSION**

4 Plaintiff's motion should be granted.

5 DATED this 24th Day of May, 2021.

6 MICHAEL LOVE LAW, PLLC

7 

8 Michael B. Love, WSBA No. 20529
9 905 West Riverside Ave. Ste. 404
10 Spokane, Washington 99201
11 Telephone No. 509.212.1668

12 CROTTY & SON LAW FIRM, PLLC

13 

14 Matthew Z. Crotty, WSBA No. 39284
15 905 West Riverside Ave. Ste. 404
16 Spokane, Washington 99201
17 Telephone No. 509.850-7011

18
19
20
21
22
23
24 **CERTIFICATE OF SERVICE**
25

1 The undersigned hereby certifies on the date below written, I caused a true and correct copy
2 of the foregoing document to be served on the following attorney, via the method indicated:

3 Heather Yakely
4 Sarah Harmon

Via Email (per agreement)

5 Dated this 24th Day of May, 2021.

6
7 
8 Michael B. Love

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25