

## eData lawflash

July 25, 2012

## Failure to Issue Written Legal Hold Is Not Gross Negligence Per Se

*Rejecting Judge Scheindlin's Pension Committee standard, the Second Circuit adopts a case-by-case approach to determining the degree of negligence and sanctions.*

In a recent decision, the U.S. Court of Appeals for the Second Circuit rejected the strict liability standard set out by Southern District of New York Judge Shira A. Scheindlin in her key *Pension Committee*<sup>1</sup> opinion. The Second Circuit held that the failure to issue a legal hold once the duty to preserve is triggered does *not* in itself automatically constitute gross negligence.

In *Chin v. Port Authority of New York & New Jersey*,<sup>2</sup> the Second Circuit stated that, contrary to the holding in *Pension Committee*, "failure to institute a 'litigation hold'" does not constitute gross negligence per se. Rather, the court adopted language from Magistrate Judge James C. Francis's *Orbit One* opinion, finding that "'the better approach is to consider [the failure to adopt good preservation practices] as one factor' in the determination of whether discovery sanctions should issue."<sup>3</sup>

### Background

In 2001, after being passed over for promotion, 11 Asian-Americans, all current or former police officers employed by the Port Authority of New York and New Jersey, filed a charge with the Equal Employment Opportunity Commission (EEOC). In 2003, the plaintiffs sued the Port Authority in the Southern District of New York under Title VII for employment discrimination based on race. During discovery, the plaintiffs learned that the Port Authority had failed to issue a legal hold and had destroyed at least 32 "promotions folders" assembled for employees recommended for promotion. Finding that there was ample other evidence available to the plaintiffs regarding their relative qualifications, the district court denied the plaintiffs' sanctions motion seeking an adverse inference for the spoliation and ruled that the Port Authority's actions were "negligent, but not grossly so." After a nine-day trial, the jury unanimously found in favor of seven of the plaintiffs in the discrimination case. The Port Authority appealed, and the nonprevailing plaintiffs cross-appealed; one of them, Howard Chin, also argued that he was entitled to a new trial due to the district court's improper denial of an adverse inference against the Port Authority for failing to issue a legal hold. Citing *Pension Committee*, Chin argued that, by its failure to issue a legal hold over the promotion folders, the Port Authority was grossly negligent. The Port Authority did not dispute that it

1. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. L.L.C.*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010). For a discussion of *Pension Committee*, see our LawFlash, "Zubulake Judge Defines Discovery Duties and Spoliation Negligence Standards" (Jan. 29, 2010), available at [http://www.morganlewis.com/pubs/eData\\_ZubulakeDiscoveryDuties\\_LF\\_29jan10.pdf](http://www.morganlewis.com/pubs/eData_ZubulakeDiscoveryDuties_LF_29jan10.pdf). (Please note, this LawFlash refers to the Amended Order and Opinion dated Jan. 15, 2010; subsequently, this was amended by a further Order dated May 28, 2010 that revised p. 10 at lines 7–10 to read as follows: "By contrast, the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to just key players, could constitute negligence.")

2. *Chin v. Port Auth. of N.Y. & N.J.*, Nos. 10-1904-cv(L), 10-2031-cv(XAP), 2012 WL 2760776 (2d Cir. July 10, 2012), available at [http://www.ca2.uscourts.gov/decisions/isysquery/09ab2524-a7c4-4394-af0e-344d5064e295/1/doc/10-1904\\_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/09ab2524-a7c4-4394-af0e-344d5064e295/1/hilite/](http://www.ca2.uscourts.gov/decisions/isysquery/09ab2524-a7c4-4394-af0e-344d5064e295/1/doc/10-1904_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/09ab2524-a7c4-4394-af0e-344d5064e295/1/hilite/).

3. *Chin*, slip op. at 53–54 (quoting *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010) (alteration in original). For analysis of *Orbit One*, see our LawFlash, "Disagreeing with *Pension Committee*, Court Holds That Showing Loss or Destruction of 'Discovery Relevant' Evidence Is a Prerequisite to Sanctions" (Dec. 20, 2010), available at [http://www.morganlewis.com/pubs/eData\\_LF\\_CourtHoldsEvidencePrerequisitetoSanctions\\_20dec10.pdf](http://www.morganlewis.com/pubs/eData_LF_CourtHoldsEvidencePrerequisitetoSanctions_20dec10.pdf).

had a duty to preserve upon notice of the EEOC charge, but it argued that the district court properly used its discretion to deny an adverse inference instruction.

## The Second Circuit Decision

Reviewing for abuse of discretion, on appeal the Second Circuit upheld the district court's denial of an adverse inference instruction as a sanction for spoliation.

As explained above, the Second Circuit rejected *Pension Committee's* per se standard, where failure to issue a written legal hold would constitute gross negligence, in favor of *Orbit One's* broader approach to assessing the circumstances, where this failure is only one factor in determining negligence. Further, the Second Circuit noted that, even if the Port Authority had been grossly negligent, this would only have permitted, but not required, the district court to issue an adverse inference instruction.

The Second Circuit looked to *Residential Funding's* three-part test for an adverse inference instruction, which requires a party to establish “(1) [T]hat 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 party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.”<sup>4</sup> Once these three elements are established, the court has discretion to issue an adverse inference jury instruction “insofar as such a sanction would ‘serve [the] threefold purpose of (1) deterring parties from destroying evidence; (2) placing the risk of an erroneous evaluation of the content of the destroyed evidence on the party responsible for its destruction; and (3) restoring the party harmed by the loss of evidence helpful to its case to where the party would have been in the absence of spoliation.’”<sup>5</sup>

The Second Circuit noted that it had consistently endorsed a case-by-case approach to analyzing the failure to produce relevant evidence and the exercise of discretion in ordering an adverse inference instruction. Here, because Chin was able to establish his record at trial, the Second Circuit held that the district court did not abuse its discretion.

## Implications

Although *Chin* removes *Pension Committee's* harsh bright-line rule and offers some relief to parties with matters where a written legal hold was not immediately issued, it does not affect the obligation to preserve data upon reasonable anticipation of legal proceedings. As a best practice, parties should continue to issue a written legal hold promptly upon notice of legal proceedings as part of their preservation and discovery management plan. A written legal hold helps to ensure that potentially relevant evidence is preserved as part of a comprehensive preservation plan and enables a party and its counsel to demonstrate their commitment to meeting discovery obligations.

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4. *Chin*, slip op. at 52–53 (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) (internal quotations omitted)).

5. *Chin*, slip op. at 53 (quoting *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107 (2d Cir. 2001) (alteration in original)).

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