

## Order's Up: No Spoliation Sanctions for Cook's Failure to Back-up Stolen iPhone [eDiscovery Alert]



Nicole Marie Gill

**Chair and  
Managing  
Member,  
CODISCOVER**

ngill@cozen.com  
Phone: (215) 665-4677  
Fax: (215) 665-2013

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A recent decision declined to find the requisite “intent to deprive” that would merit sanctions under Rule 37(e) when a plaintiff was unable to produce text messages because his phone had been stolen and he had not taken measures to back up its contents, despite initiating litigation almost a year prior to the theft.

We work closely with clients to identify sources of potentially relevant information early on to ensure such a discovery dispute never wastes your time and resources.

*Fowler v. Tenth Planet, Inc., et al.*, 1:21-cv-02430-JRR (D. Md. Mar. 29, 2023) is a wage and hours case in which the parties dispute the time period when the plaintiff was employed as a line cook and thus entitled to overtime pay, and the time period when he was employed as a kitchen manager, and not entitled to overtime pay. The plaintiff filed the complaint in September 2021 and served the defendants in November 2021. In September 2022, a year after the plaintiff filed the case, he was served with discovery requests for his text messages with one of the defendants. The plaintiff said he no longer had the text messages at issue because his phone was stolen from his car in July or August 2022, and he did not back up his phone prior to the theft. The defendants moved for dismissal or sanctions on the basis of the failure to produce the text messages.

Magistrate Judge J. Mark Coulson recommended the denial of the defendants’ motion for spoliation sanctions, rejecting the defendants’ arguments that (1) the plaintiff’s failure to preserve the text messages constituted bad faith and (2) the inability to use the text messages greatly prejudiced the defendants’ case.

First, the Court concluded that the defendants did not carry their burden of showing prejudice because:

- the evidence on the record as to which position the plaintiff was initially hired for was mixed;
- the evidence as to whether the missing text messages would have supported the defendants or the plaintiff was mixed; and
- the missing text messages were not the only potential evidence on the issue.

Next, the Court found that the defendants did not carry their burden of showing an “intent to deprive” by clear and convincing evidence because:

- although the plaintiff should have taken additional steps to preserve the missing text messages considering the circumstances and timeline of the case, failure to do so only constituted negligence, not an intent to deprive; and
- the plaintiff did not engage in any affirmative conduct other than being a victim of theft.

The magistrate judge declined to recommend sanctions and instead recommended that the judge decide the extent to which the parties could introduce evidence and other testimony regarding the missing text messages and the circumstances of their availability.

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