

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

DARRIN SCOTT WALKER

Plaintiff,

vs.

MICHAEL BOWERSOX, et al.,

Defendants.

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Case No. 05-3001-CV-S-RED

ORDER

Pending before the Court is Plaintiff's Motion for Sanctions (Doc. 192). After careful consideration, this Court **GRANTS** the Motion to the extent discussed herein.

BACKGROUND

Walker is a prisoner incarcerated at the South Central Correctional Center. On December 16, 2003, Walker was chained to a restraint bench because he would not accept a cell assignment with another inmate. Walker was videotaped pursuant to a department of corrections policy.¹ The policy provided that when a prisoner refused to accept a cell assignment, the prisoner would be placed on a restraint bench and "checked every two hours by medical, he will be taken to the medical cell, allowed to use restroom (sic) and afforded a drink of water. He will be asked if he will take a cellmate at this time. This will be video taped. If he refuses he will be placed back on restraint bench (sic) and the process repeated every two hours." Walker claims to have requested water and restroom breaks, but received no relief. It is undisputed that a videotape was made in accordance with the policy. While restrained Walker argued that his constitutional rights were being

¹The policy had been verbally adopted at the time of the Walker incident and was formally adopted on December 22, 2003.

violated. Those holding Walker agreed the videotape was important and should be kept in case of litigation. Accordingly, one of those persons took the videotape to a major within the prison system. The videotape now cannot be located and Defendants speculate that it may have been taped over. Walker filed a motion for sanctions on September 23, 2009, alleging the prison intentionally destroyed the videotape.

DISCUSSION

For this Court to impose sanctions, Walker must prove 1) the Defendants intentionally destroyed evidence in a manner that indicates a desire to suppress the truth, and 2) Walker was prejudiced by the destruction. *See Morris v. Union Pac. R.R.*, 373 F.3d 896, 902 (8th Cir. 2004).

1. THE DEFENDANTS INTENTIONALLY DESTROYED THE VIDEOTAPE

Intentional destruction “is rarely proved by direct evidence, and a district court has substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witnesses in a particular case, and other facts.” *Morris*, 373 F.3d at 902. Some factors courts consider are the likelihood of litigation and “whether lawsuits or complaints have been filed frequently concerning the type of records at issue.” *See Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 746, 748 (8th Cir. 2004).

Defendants argue there is no evidence the videotape was intentionally or even inadvertently destroyed. Walker relies on *Stevenson* for his assertion the videotape was intentionally destroyed. In that case, the Eighth Circuit stated that although the facts tested the limits of bad faith destruction, the district court did not abuse its discretion in finding bad faith based on several facts: the defendant knew the destroyed voice tape would be relevant in future litigation; a claims representative for the

defendant immediately began his investigation into the accident, and although he collected train orders and warrants, the record of the train's movement, and the train consist, he did not collect the voice tape; and the defendant had kept similar tapes in the past when they had been exculpatory. *Stevenson*, 354 F.3d at 747-48. In part, the facts provided a close call because the tape's destruction was done pursuant to a company retention policy that provided for the recording over of voice tapes 90 days after they were made. *See Id.* at 747.

For all of the following reasons, this Court agrees with Walker that the videotape was intentionally destroyed in a manner indicating a desire to suppress the truth. The prison had adopted a policy that required episodes on the restraint bench be videotaped. The Defendants offered no explanation of what happened to the tape, other than the fact the tape could have been taped over, which indicates intentional destruction. The videotape was delivered to a responsible person for safekeeping by people who believed the videotape should have been kept in case of litigation. The Defendants were on notice to keep the videotape because prison officials knew Walker was considering a lawsuit the night of the incident. Lastly, the loss or taping over of the videotape was not a first time incident. In *Lawrence v. Bowersox*, the Eighth Circuit stated:

We pause here to note a disturbing tendency by units within the Missouri Department of Corrections to "misplace" videotapes of prison incidents. In addition to the missing original videotape in this case, in *Estate of Davis*, 115 F.3d at 1392, the court noted that a videotape from the Potosi Correctional Center was "lost after it was forwarded to the Missouri Department of Corrections." Furthermore, in *Foulk*, 262 F.3d at 702, an official from the Moberly Correctional Center admitted that a videotape had been "destroyed or taped over." We are aware that large bureaucracies cannot have a foolproof system for preserving records. However, three missing videotapes in approximately five years of incidents giving rise to litigation within one prison system strikes us as more than mere coincidence. Perhaps it is time to remind the Missouri Department of Corrections that Rule 37 of the Federal Rules of Civil Procedure allows a court to strike pleadings and enter a default judgment against parties that fail to comply with discovery orders, fail to disclose information required by Rule 26(e)(2), or provide false or misleading disclosures.

Lawrence v. Bowersox, 297 F.3d 727, 732 n. 2 (8th Cir. 2002).

Here there is a continuation of the pattern the Eighth Circuit discussed in *Lawrence*. The Walker incident occurred a mere seventeen months after the Eighth Circuit issued its warning. The Missouri Department of Corrections' history is a strong indication the Walker videotape was deliberately destroyed with an intention to suppress the truth. Accordingly, there is sufficient evidence showing the videotape was intentionally destroyed in a manner indicating a desire to suppress the truth.

2. WALKER IS PREJUDICED BY THE VIDEOTAPE'S DESTRUCTION

Walker argues he is prejudiced by the non-production of the videotape because it would show who was telling the truth. Walker alleges he repeatedly asked for water and restroom breaks to no avail. Defendants allege Walker was offered water and restroom breaks, but refused them. Defendants argue the loss of video footage is not prejudicial because 1) the tape would only show non-compliance with the policy, which is not co-extensive with a violation of the Eighth Amendment's prohibition against cruel and unusual punishment, and 2) Walker's testimony at trial is sufficient to show he was not provided with water or restroom breaks during the seventeen hour period he was chained to the restraint bench. This Court finds neither argument persuasive. The first argument is unpersuasive because not complying with the policy is some evidence of an Eighth Amendment violation and the videotape is highly probative of whether the Defendants complied with the policy. The second argument is also not meritorious because the jury is bound to question the testimony of a convicted felon as against the testimony of prison officials, and the tape would add credibility to Walker's statements. This Court agrees with Walker that the videotape's spoliation is prejudicial to him because the videotape would dispel the inconsistency in testimony.

3. REMEDY

Walker requests one of two remedies: 1) strike Defendants' answers and limit their trial presentation to damages, or 2) give a jury instruction that the videotape's contents would have been unfavorable to the Defendants. This Court finds the adverse inference instruction appropriate.

CONCLUSION

This Court **GRANTS** Walker's Motion for Sanctions. The Defendants' intentional destruction of the videotape is evidenced by 1) the policy requiring videotaping of such incidents, 2) the lack of explanation for why the tape cannot be produced, 3) the videotape was delivered to a responsible person who knew it may be needed in litigation, 4) prison officials knew Walker was considering a lawsuit the night of the incident, and 5) past incidents involving the Missouri Department of Corrections. The spoliation of the videotape prejudiced Walker in that there is inconsistency in testimony the videotape could easily dispel, and the inconsistency affects Walker's ability to prove an Eighth Amendment violation. The appropriate remedy is a negative inference instruction.

IT IS SO ORDERED.

DATED: October 26, 2009

/s/ Richard E. Dorr
RICHARD E. DORR, JUDGE
UNITED STATES DISTRICT COURT