

1 Plaintiff alleges he complained and, as a result, was compelled to take a leave of absence for
2 approximately one month.

3 Given these allegations, Plaintiff's complaint asserts claims for (1) Title VII sex
4 discrimination, (2) Title VII retaliation, (3) Intentional Infliction of Emotional Distress, and (4)
5 Negligent Hiring, Supervision, Retention and/or Training.

6 **II. Arguments by the parties**

7 **A. Plaintiff's argument**

8 Plaintiff argues the store in question had surveillance cameras that captured at least
9 portions of the events on February 21, 2021. He argues that Lorena Casson, AutoZone Regional
10 Human Resources Manager, found the video relevant to the issue of sexual harassment. As a
11 result, she viewed it and took screenshots of it. But the video was never downloaded. It was
12 "overwritten or recorded over" and no longer exists. This is so even though Plaintiff sent a
13 preservation letter on March 23, 2021.

14 Plaintiff explains the video is crucial to his case, as it would have shown a panoramic
15 view of the store which would have substantiated Plaintiff's version of the events on the day in
16 question. For example, Plaintiff argues the surveillance would have captured the allegation that
17 Mr. James was following Plaintiff around the store and that Mr. James did not allow Plaintiff to
18 leave the store. Lastly, Plaintiff explains that the screenshots Ms. Casson took of the video are not
19 probative of Mr. James' behavior.

20 Plaintiff argues that both under Fed. R. Civ. P 37 and the court's inherent authority,
21 sanctions are warranted in this case. He argues he will suffer prejudice as he will not be able to
22 corroborate portions of his allegations. As a result, he requests that (1) Defendant be prohibited
23 from arguing the incident did not occur, and (2) the jury be instructed to draw an adverse
24 inference that the evidence in the video was not favorable to Defendant. Plaintiff argues the
25 failure to preserve was willful, allowing for these specific sanctions. And in any event, Plaintiff
26 argues there is also evidence of bad faith.

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1 **B. Defendant’s argument**

2 Defendant starts out by arguing that Plaintiff is—at best—speculating about what the
3 video may have shown. In this vein, it argues that a threshold inquiry is whether the video
4 contained any relevant evidence before determining the issue of spoliation. Given the speculative
5 aspect of the video, Defendant argues there could not have been any spoliation.

6 In addition, Defendant relies on Ms. Casson’s review of the video in question, and her
7 findings that the video did not reveal any sexual harassment, to show that the video is not
8 relevant. Moreover, Defendant relies on Plaintiff’s statements during the investigation by Ms.
9 Casson that (1) the video did not provide corroboration for the events in question, (2) Mr. Jones’
10 masturbation took place outside the view of the surveillance cameras, and (3) Ms. Casson did not
11 hide anything from him, for its arguments that the video did not contain any relevant evidence.

12 Despite the lack of relevance, Defendant explains that Ms. Casson still asked loss
13 prevention to range lock the video, but that a system upgrade inadvertently deleted the video. In
14 turn, Defendant argues this shows no culpable state of mind accompanying the destruction of this
15 video.

16 Lastly, Defendant argues there is no prejudice to Plaintiff given Ms. Casson’s testimony
17 as to what the video showed and the screenshots that exist of the video. Nevertheless, Defendant
18 contends that, in the event this Court finds sanctions to be appropriate, those requested by
19 Plaintiff are too harsh and contradict known facts.

20 **Plaintiffs’ reply**

21 Plaintiff starts out by arguing the Ninth Circuit’s decision in *Leon* does not condone a
22 party’ assertion of irrelevance when the party asserting spoliation is unable to view the video to
23 rebut the proposition. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006).

24 Moreover, Plaintiff explains he never saw the video in question. Instead, he only saw the
25 screenshots Ms. Casson showed him. As a result, he contends it is misleading for Defendant to
26 argue that Plaintiff *agreed* that the video in question could not have corroborated the events in
27 question. And while Plaintiff admits that Mr. James was trying to avoid the cameras, he argues he
28 is entitled to see whether Mr. James was successful in that endeavor.

1 In addition, he argues that the importance of the video goes beyond whether it captured
2 Mr. Jones masturbating, as his claim comprises the totality of the acts that took place during his
3 shift—not just that one act. To that end, he argues the video would have recorded certain events
4 that corroborate his allegations. Specifically, Plaintiff contends that (1) the harassing comments
5 started when another employee, Esteban Nevarez, was outside with another customer, (2) Mr.
6 James sent Mr. Nevarez home, (3) that Mr. James locked the front door after Mr. Nevarez left, (4)
7 Mr. James made several improper comments once he was alone in the store with Plaintiff, (5) Mr.
8 James followed Plaintiff around the store as Plaintiff was trying to get away from him, (6)
9 Plaintiff tried to take out the trash to avoid Mr. James, (7) Plaintiff tried to remain within camera
10 view while Mr. James started to masturbate in one of the store aisles and texted his parents to
11 come get him, and that (8) when his parents arrived, he yelled that he was leaving but Mr. James
12 came running and interfered with his ability to unlock the door. Plaintiff argues that, at the very
13 least, the cameras would have recorded: (1) Mr. Navarez exiting the store to help a customer and
14 when he went home, (2) Mr. James locking the front doors after Mr. Navarez left, (3) the
15 interactions between Mr. James and Plaintiff, (4) Plaintiff texting (his parents for a ride), and (5)
16 Mr. James running from the aisle where he was masturbating to prevent Plaintiff from leaving the
17 store when his parents arrived.

18 While Plaintiff asserts that Mr. James went to one of the aisles to masturbate, such that the
19 camera may not have recorded the incident, he points out that even Ms. Casson admitted she may
20 have seen Mr. James' head on video in one of the store's aisles. Plaintiff contends this may be the
21 aisle where the masturbation took place.

22 Plaintiff maintains he is prejudiced as the video would have corroborated at least
23 portions of his allegations, to include his body language and whether it showed discomfort, fear,
24 etc.

25 Plaintiff also argues that however “inadvertent” the deletion of the video may have been,
26 Defendant made no efforts to preserve it. Although Ms. Casson “range locked” the video to
27 prevent it from being overwritten, it did not download it or otherwise save it. Plaintiff contends
28 this may not even comply with Autozone's own policies.

1 Plaintiff continues to argue the requested sanctions are proper and that it need not
2 establish Defendant acted in bad faith. Instead, he argues negligence is enough. He argues
3 Defendant is currently relying on Ms. Casson’s review of the video to argue that it did not contain
4 any evidence of sexual harassment. The requested sanction would preclude Ms. Casson from
5 doing this.

6 **III. Analysis**¹

7 Spoliation is the destruction or significant alteration of evidence, or the failure to preserve
8 property for another's use as evidence in pending, or reasonably foreseeable litigation. *United*
9 *States v. Kitsap Physicians Sys.*, 314 F.3d 995, 1001 (9th Cir. 2002) (citing *Akiona v. United*
10 *States*, 938 F.2d 158, 161 (9th Cir. 1991) (a party engages in spoliation “as a matter of law only if
11 they had ‘some notice that the evidence was potentially relevant’ to the litigation before they were
12 destroyed,” altered, or lost); 7 Moore's Federal Practice - Civil § 37.120 (2023).

13 At the outset, the Court points out that Fed. R. Civ. P. 37(e) exclusively governs the remedies
14 available for the spoliation of electronically stored information (“ESI”). Fed. R. Civ. P. 37(e); see
15 also Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment (stating that the new
16 Rule 37(e) “forecloses reliance on inherent authority or state law”).

17 Before determining whether the Court should impose sanctions, Fed. R. Civ. P. 37(e) requires
18 the Court to assess the following four criteria: (1) whether the information qualifies as
19 electronically stored information (“ESI”); (2) whether there was a duty to preserve the ESI in the
20 anticipation or conduct of litigation; (3) whether the ESI was lost because a party failed to take
21 reasonable steps to preserve it; and (4) whether the ESI can be restored or replaced through
22 additional discovery. *Lopez v. Cardenas Markets, LLC*, No. 2:21-CV-01915-JCM-BNW, 2023
23 WL 3182658 * 2 (D. Nev. May 1, 2023). A party must preserve evidence it knows or should
24 know is relevant to a claim or defense of any party, or that may lead to the discovery of relevant
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27 ¹ Instead of summarizing the testimony of each witness, the Court incorporates the relevant
28 testimony in this section of the order.

1 evidence. *Brown v. Reinke*, No. 1:12-cv-262-BLW, 2016 WL 107926, at *5 (D. Idaho Jan. 8,
2 2016).

3 If these requirements are satisfied, the rule authorizes two levels of sanctions. Section (e)(1)
4 permits a court, upon finding prejudice to another party from the loss of ESI, to order measures
5 no greater than necessary to cure the prejudice. Section (e)(2) permits a court to impose more
6 severe sanctions such as adverse inference jury instructions or dismissal, but only if it finds that
7 the spoliating party “acted with the intent to deprive another party of the information's use in the
8 litigation.”³ Fed. R. Civ. P. 37(e)(2). Unlike Rule 37(e)(1), Rule 37(e)(2) “does not include a
9 requirement that the court find prejudice to the party deprived of the information.” Fed. R. Civ. P.
10 37(e) advisory committee's note to 2015 amendment. “This is because the finding of intent
11 required by the subdivision can support not only an inference that the lost information was
12 unfavorable to the party that intentionally destroyed it, but also an inference that the opposing
13 party was prejudiced by the loss of information that would have favored its position.” *Id.*
14 “Negligence—even gross negligence—in failing to retain relevant evidence is not sufficient to
15 support an adverse inference under Rule 37(e)(2).” *Meta Platforms, Inc. v. BrandTotal Ltd.*, 605
16 F.Supp.3d 1218, 1238, No. 20-CV-07182-JCS (N.D. Cal. June 6, 2022).

17 Finally, the relevant standard of proof for spoliation sanctions is a preponderance of the
18 evidence. *See Burris v. JPMorgan Chase & Co.*, No. CV-18-03012-PHX-DWL, 2021 WL
19 4627312, at *11 (D. Ariz. Oct. 7, 2021); *Compass Bank v. Morris Cerullo World Evangelism*, 104
20 F. Supp. 3d 1040, 1052-53 (S.D. Cal. 2015).

21 **A. The surveillance video is relevant**

22 The Court starts out by disposing of Defendant’s argument that the video in question did not
23 contain relevant evidence.

24 First, the video need not have captured *all* of the alleged conduct in order to be relevant. Nor
25 does it need to capture the worst conduct (Mr. James masturbating) to be relevant. Instead, the
26 video is relevant if it could have corroborated (or disproven) at least some aspects of Plaintiff’s
27 narrative. Given Ms. Casson’s testimony regarding the number and position of the surveillance
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1 cameras, the video would have captured several events on the day in question which in turn,
2 would have corroborated (or not) aspects of Plaintiff's narrative. ECF No. 76-2 p. 52.

3 Indeed, Ms. Casson's testimony is consistent with this finding as she explained that the video
4 showed several events that are consistent with Plaintiff's narrative (i.e. Plaintiff grabbing the
5 trash, Mr. Navarez leaving the store, Mr. James putting the sign on the door and closing the store,
6 and Plaintiff by the front of the store (ostensibly waiting to be picked up by his parents). ECF No.
7 76-1 pp. 50, 52; ECF No. 76-2 p. 202. In turn, the video may have also shown whether the video
8 captured anything resembling Mr. James following Plaintiff around the store and whether Mr.
9 James ran to the front door to preclude Plaintiff from leaving. Even if the video did not show Mr.
10 James masturbating, or the sex toy Plaintiff alleges Mr. James pulled out, the video would have at
11 least corroborated (or disproven) certain parts of Plaintiff's allegations.²

12 Second, Ms. Casson's determination that the video did not capture any sexual harassment
13 does not make the video irrelevant. To be sure, Plaintiff need not rely on an opposing party's
14 determination of (1) what the video captured or (2) the subjective interpretation of the events
15 captured. In addition, Ms. Casson's viewing of the video consisted of viewing several screens
16 simultaneously (presumably one for each camera) and reviewed it only once. Evidentiary hearing
17 audio at 33:58-34:44 min; 37:30 min. Thus, it is very likely that she missed other events that
18 could have corroborated (or disproven) Plaintiff's narrative.³

19 Third, Ms. Casson's actions speak to its relevance: after Plaintiff complained regarding the
20 allegations in question, she viewed the video and believed it was important to preserve it. ECF
21 No. 76-2 p. 59.

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24 ² Given the totality of evidence before the Court, it is unlikely that the video would have shown
25 Mr. James masturbating. ECF No. 50-1 pp. 16, 18; ECF No. 53-3 pp. 18-19; ECF No. 76-2 pp. 175-176,
26 192, 195; ECF No. 76-3 pp. 4-5. At best, the video would have shown Mr. James' head in the aisle where
27 Plaintiff alleges Mr. James masturbated. ECF No. 76-2 p. 192. Nevertheless, as stated above, the relevance
28 of the video is not contingent on it showing this specific event.

³ The Court disagrees with Defendant's arguments during the evidentiary hearing that Ms. Casson
likely did not miss anything when reviewing the video because she knew what to look for given she (1)
had previously read Plaintiff's written narrative of the events and (2) talked to Plaintiff. The fact remains
that Ms. Casson was viewing five screens at once and only reviewed the video once.

1 Lastly, the notion that the video is not relevant given Plaintiff “admitted” to Ms. Casson (and
2 in Court) that the video did not corroborate his allegations and that Ms. Casson did not hide
3 anything from him is far from convincing. First, Plaintiff never saw the video to be able to make
4 any statements as to what the video corroborated. Second, while Ms. Casson may not have hidden
5 anything from him, the point here is that Ms. Casson likely missed certain things that were in the
6 video.

7 **B. The surveillance video is ESI**

8 Next, the surveillance video in question constitutes ESI for purposes of a Rule 37 analysis.

9 **C. AutoZone had a duty to preserve the surveillance video**

10 Defendant had a duty to preserve the ESI in anticipation of litigation, as it knew or should
11 have known that a surveillance tape that may have corroborated Plaintiff’s account of the events
12 taking place on February 21, 2021. *Perkins v. City of Modesto*, No. 1:19-CV-00126L-JOE-PG,
13 2020 WL 1333109, at *16 (E.D. Cal. Mar. 23, 2020). In addition, Plaintiff sent a preservation
14 letter on March 23, 2021. ECF No. 50-1 p. 37-38.

15 **D. AutoZone did not take reasonable steps to preserve the video**

16 Having found that Defendant had a duty to preserve the surveillance tape, the Court must next
17 determine whether the ESI is “lost” because Defendant failed to take reasonable steps to preserve
18 it and whether it can be restored or replaced through additional discovery. Fed. R. Civ. P. 37(e);
19 *see also Colonies Partners, L.P. v. Cnty. of San Bernardino*, No. 5:18-CV-00420-JGB-SHK,
20 2020 WL 1496444, at *5 (C.D. Cal. Feb. 27, 2020).

21 The 2015 Advisory Committee Notes highlight some factors a court should consider when
22 deciding if a party took reasonable steps to preserve lost ESI: (1) a party’s “good-faith operation
23 of an electronic information system”; (2) a “party’s sophistication with regard to litigation”; (3)
24 “the extent to which a party knew of and protected against such risks”; and (4) whether the
25 information is “destroyed by events outside the party’s control,” such as party’s computer room
26 flooding or a malign software attack. *See* 2015 Advisory Note.

27 There is no doubt that Ms. Casson “range locked” the video in an attempt to preserve it. Ev.
28 hrg. at 1:13 min. The question is whether this constituted “reasonable steps to preserve it.” The

1 evidence before the Court is that despite Ms. Casson’s efforts, the contents were overwritten
2 when AutoZone changed its surveillance system. Ev. hrg at 31:38 min. While there is no
3 evidence that Ms. Casson was aware the video would be overwritten, AutoZone—and by
4 extension Ms. Casson—should always protect against such risk by downloading or otherwise
5 saving the video in question. AutoZone is a national entity who ought to be sophisticated with
6 litigation matters and the duty to preserve evidence. Defendant had a duty to make copies of the
7 surveillance in question and not rely on the system alone to preserve it. At the very least,
8 AutoZone should have a policy in place for situations in which software and hardware (that
9 contain videos such as this one) is replaced. There was no testimony regarding such policy. To
10 the contrary, Ms. Casson did not even know what AutoZone did with the hardware and software
11 or what steps are usually taken when such a switch occurs. Ev. hrg 1:37-1:39. Here, the video was
12 not destroyed by events outside of Defendant’s control. In short, AutoZone did not take
13 reasonable steps to preserve the video.

14 **E. The surveillance video cannot be replaced**

15 Lastly, while Ms. Casson has a few screenshots of the video in question, the video itself
16 cannot be restored or replaced. According to Ms. Casson, the video has been “lost.” Ev. hrg at
17 46:36. The device that stored the video was removed from the store and nobody knows what
18 happened to it. Ev. hrg at 48:17. In turn, the Court finds the video cannot be replaced.

19 **F. Sanctions**

20 The court finds by a preponderance of the evidence that the video in question has been
21 spoliated. Next, the Court turns to the issue of sanctions.

22 The Court does not find that AutoZone acted “with the intent to deprive another party of the
23 information's use in the litigation.” Ms. Casson range-locked the video in question in order to
24 preserve it. Ev. hrg at 40:25 min. She also testified that once a video is range-locked it cannot be
25 overwritten or recorded over. Ev. hrg at 31:38 min. In the past, range-locking video has prevented
26 deletion. Ev. Hrg at 1:31:18. In addition, she took screenshots of the video. Ev. Hrg 1:21:15-1:30
27 min. A party who intends to deprive the opposing party of information would not have taken
28 screenshots of the surveillance video. Especially when some of the screenshots can be used very

1 effectively against AutoZone at trial.⁴ While the Court finds it was grossly negligent for
2 AutoZone not to have downloaded a copy of the surveillance video, that is not enough for
3 sanctions under Rule 37(e)(2). *Meta Platforms, Inc.*, 605 F.Supp.3d at 1238.

4 But the Court finds that sanctions are appropriate under Rule 37(e)(1), as Plaintiff has been
5 prejudiced by the destruction of this video. “Prejudice exists when spoliation prohibits a party
6 from presenting evidence that is relevant to its underlying case.” *Fast*, 340 F.R.D. at 339 (internal
7 quotation marks and citation omitted). Courts have the discretion to determine if the spoliation of
8 evidence is prejudicial, and neither party has the burden of establishing or disproving prejudice.
9 *Hernandez v. Tulare Cty. Corr. Ctr.*, 2018 WL 784287, at *10 (E.D. Cal. Feb. 7, 2018) (citing
10 Fed. R. Civ. P. 37(e), Committee Notes on Rules – 2015 Amendment)).

11 In selecting an appropriate remedy, courts are to choose “the least onerous sanction
12 corresponding to the willfulness of the destructive act and the prejudice suffered by the victim.”
13 *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 992 (N.D. Cal. 2012). Under Rule
14 37(e)(1), the Court has broad discretion to employ measures “no greater than necessary to cure
15 the prejudice” suffered by the non-spoliating party. Such measures may include “forbidding the
16 party that failed to preserve information from putting on certain evidence” or “permitting the
17 parties to present evidence and argument to the jury regarding the loss of the information.” Fed.
18 R. Civ. P. 37(e), Advisory Committee Notes to 2015 Amendment. “[I]t may be appropriate to
19 exclude a specific item of evidence to offset prejudice caused by failure to preserve other
20 evidence that might contradict the excluded item of evidence.” *Id.* “The only express limitation to
21 curative measures under Rule 37(e)(1) is that they ‘do not have the effect of measures that are
22 permitted under subdivision (e)(2).’” *Spencer v. Lunada Bay Boys*, No. 16-cv-02129-SJO-RAOx,
23 2018 WL 839862 at *1, 2018 U.S. Dist. LEXIS 22779 (C.D. Cal. Feb. 12, 2018).

24 First, the Court agrees with Defendant’s argument that the overwhelming portion of the
25 complaint deals with verbal harassment and that the surveillance video would not have captured
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28 ⁴ The screenshots show: (1) Mr. James closing the store before closing hours and (2) Mr. James in close proximity to Plaintiff as he is trying to leave the store.

1 what was said (as the video did not record sounds). The court also agrees it is more likely than not
2 that the video would not have shown Mr. James masturbating.

3 But, as explained above, the video could have at the very least corroborated several pieces of
4 Plaintiff's narrative. In addition, Plaintiff's credibility increases based on the amount of
5 corroboration. The destruction of the video potentially precluded Plaintiff from showing the jury
6 the number of ways in which his narrative is corroborated by the video. Given this, the prejudice
7 is not removed by Ms. Casson's own testimony that the video did corroborate *some* aspects of
8 Plaintiff's narrative.

9 The Court asked Plaintiff what, in his view, would be an appropriate sanction if the Court
10 were to find the destruction of the video was prejudicial but that there was no intent to deprive on
11 the part of AutoZone. Plaintiff argued the proper sanction would be to preclude either party from
12 testifying as to the contents of the video, given that only one party had had the opportunity to
13 view it. Defendant argues it is important to have testimony that the video did not corroborate
14 Plaintiff's allegations as it is part and parcel of a "prompt remedial measures" affirmative defense
15 it will assert at trial. It wants to be able to argue that it took the allegations seriously, that Ms.
16 Casson reviewed screenshots of the video with Plaintiff, and that ultimately Ms. Casson fired Mr.
17 James, such that Plaintiff could have returned to the workplace.

18 As explained by the Advisory Committee Notes:

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20 Care must be taken, however, to ensure that curative measures under subdivision
21 (e)(1) do not have the effect of measures that are permitted under subdivision
(e)(2) only on a finding of intent to deprive another party of the lost information's
use in the litigation.

22 *See* Fed. R. Civ. P. 37(e), Advisory Committee Note to 2015 Amendment. Precluding Defendant
23 from testifying regarding the contents of the video would impact its ability to present an
24 affirmative defense and would be more onerous than what is needed to cure the prejudice at hand.

25 Instead, the Court will preclude AutoZone from arguing at trial that (1) the video did not
26 corroborate Plaintiff's allegations but will allow AutoZone to argue that a review of the video did
27 not show Mr. James masturbating. In addition, the jury will be instructed to weigh Ms. Casson's
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1 testimony regarding what the video showed by also considering (1) that she only viewed it once
2 and (2) that the review of the video included watching several camera views simultaneously. The
3 Court finds this sanction strikes a proper balance given (1) the degree of negligence on
4 Defendant's part in failing to preserve the video, (2) the Court's findings as to what the video
5 likely would have (and would not have) showed, and (3) the considerations outlined in the
6 Advisory Committee Notes, including the need to impose measures that are no greater than
7 necessary to cure the prejudice. This sanction allows AutoZone to advance its affirmative
8 defense, as it will be able to show that the video was reviewed. At the same time, these sanctions
9 will prevent AutoZone from gaining an advantageous position by asserting that the video fails to
10 support the Plaintiff's narrative. Furthermore, it cautions the jury that Ms. Casson's testimony
11 regarding the video must be evaluated in conjunction with other pertinent factors.

12 **IV. Conclusion**

13 **IT IS THEREFORE ORDERED** that Plaintiff's Motion for Sanctions due to Spoliation
14 of Evidence (ECF No. 50) is **DENIED in part and GRANTED in part.**

15 DATED: March 11, 2024.

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19 BRENDA WEKSLER
20 UNITED STATES MAGISTRATE JUDGE
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