tion. According to Pendergrass, Rite Aid was liable for each "republication" of its initial report, including the July 2007 viewing by Target, and any other republications occurring within the statutory limitations period.

The court presumed that the discovery rule delayed the beginning of the limitations period to November 30, 2006, when the plaintiff alleged he first learned of the defamatory report. Second, it declined to apply the "single publication" rule (that any one edition, broadcast, or similar aggregate communication was a single publication) in this case, "given the vast differences between traditional 'mass publication' for a general audience and confidential publication to a consumer reporting agency." Rite Aid did not circulate the report to a wide audience; instead, it transmitted it to ChoicePoint with the knowledge that it would be made available to subscribing customers upon request, and viewed on separate, distinct occasions. Therefore, there was no "aggregate publication." Accordingly, the motion was dismissed in respect of any republication of the report that occurred on or after January 2007, but granted for any republication occurring prior to that date, being time-barred. *Pendergrass v. ChoicePoint, Inc.*, No. 08-188, 2008 WL 5188782 (E.D. Pa. Dec. 10, 2008).

Employment Discrimination—Evidence

Stover, an African-American woman, was employed by the defendant school district as a secretary and administrative assistant. A few years prior to Stover's resignation in 2006, the District created and filled an unadvertised position for a "Central Office Administrative Coordinator." This position was filled by a O., a white man. His starting salary was significantly higher than what Stover was being paid, and he had a master's degree, while Stover had a bachelor's degree. When Stover learned of the new hire's salary, she argued that like O., she was an administrative assistant and performed substantially equal work, and, therefore, should be paid the same. She filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that the District had discriminated against her on the basis of race, and violated the Equal Pay Act (EPA). A year later, Stover filed a complaint in federal court, alleging race discrimination and a violation of the EPA, and adding claims for gender discrimination and retaliation. At trial, the district court precluded certain evidence, including evidence of the District's practice of not advertising employment openings. The district court ultimately permitted the case to go to a jury, and the jury returned a special verdict in favor of the District on all claims. The District also moved for, and was granted, an award of attorney's fees and costs. Stover appealed, claiming that the district court made several errors, including: not permitting alleged admissions of discrimination and discriminatory intent to be considered as direct evidence; permitting evidence of the new hire's qualifications; allowing evidence that attacked Stover's character; excluding evidence of the District's hiring practices; and dismissing the constructive discharge claim.

The U.S. Court of Appeals for the Fifth Circuit affirmed in part, reversed and vacated in part, and remanded. Dealing first with the district court's grant of summary judgment in favor of the District on the constructive discharge claim, the court applied the requirement that the employee must "offer evidence that the employer made the employee's working conditions so intolerable that a reasonable employee would be compelled to resign." Stover presented no evidence of a demotion, a reduction in salary or job responsibilities, reassignment to menial work, badgering or harassment, or offers of early retirement. "[A]t best, the evidence shows that Stover was disgruntled ... [but] none of the evidence increases the severity of pervasiveness of any harassment to the level required to support a constructive discharge claim." On Stover's challenges to various evidentiary rulings in the court below, the appellate court held that the district court properly admitted evidence comparing the skill, effort, and responsibilities required of the jobs performed by Stover and O. There was sufficient evidence presented at trial for the jury to conclude that the District did not discriminate against Stover on the basis of race or sex, so that her claim (that evidence that the District admitted discriminatory conduct and violations of the EPA should have been considered as direct evidence of discrimination) was not justified. Stover also claimed that the court below had erroneously permitted evidence that Stover had destroyed or deleted computer information. The appellate court found that this was not an abuse of discretion, as "the district court stated that Stover had portrayed herself to be a victim and work attitude was at issue. The court permitted the evidence for purposes of impeachment." Likewise, on the remaining argument—that the district court improperly precluded evidence of discriminatory hiring practices by the District—the Fifth Circuit found no error had occurred. The "lack of a policy requiring advertisement under these circumstances is not evidence of discrimination." *Stover v. Hattiesburg Pub. Sch. Dist.*, 549 F. 3d 985 (5th Cir. 2008).

Public Records

Production of Deleted E-mails

In the course of a public debate on whether to renovate a government building (a courthouse) or to demolish it, the Seneca County Board of Commissioners approved an architectural study of the County government's future space requirements. The resulting report identified five options. The report was circulated by e-mail to the Board members by Commissioner Nutter prior to August 2006, when the Board approved a variation of one of the options that included demolition. Nutter had received no e-mail responses from the other commissioners, and no one had raised the issue during any meeting prior to a Board resolution in an open meeting. Claiming there had been no public deliberations on the approved option, the applicant company sought to review all outgoing and incoming e-mails, including "all sent messages, received messages, deleted messages, and drafts of messages" of specified County Commissioners, including Nutter, up to August 2007. The records produced contain-

continued on page 36

ed no e-mails from Nutter's inbox between January 1 and July 19, 2007, and none from Commissioner Bridinger's inbox or sent-messages folder. The applicant claimed that Nutter admitted to deleting e-mails he received between January 1 and July 19, 2007, and that Bridinger admitted he deleted all e-mails until recently. There were also substantial gaps between the dates of e-mails provided by another commissioner. Under the County schedule for records retention and disposition, e-mail that had significant administrative, fiscal, legal, or historic value had to be retained; others could be deleted. According to the Board's clerk, the individual computer user was responsible for making the determination of when an e-mail could be deleted. The Board advised that it and its IT contractor had searched every computer hard drive of every person from whom e-mails were requested, and it provided every available document responsive to the request. Deleted e-mails could be possibly be retrieved from a hard drive with "very expensive forensic tools," but "that information would be considered deleted by the user and would not be available to the user." The company nonetheless applied to compel the Board to, among other things, recover the content of requested e-mails that had been deleted by the commissioners, and to make the recovered e-mails promptly available for inspection and copying. It argued that when a public officer "unlawfully" destroyed public records but the contents of the records could be recovered or restored, the public office's obligation to maintain the records included an obligation to take the necessary steps to restore the records and to make them available under the State's Public Records Act.

The court started with the proposition that deleted computer files, whether they were e-mails or otherwise, were retrievable or discoverable, as "the mere deletion of some of the e-mails by the commissioners did not necessarily destroy them." The applicant's computer expert indicated that at least some of the deleted messages could be retrieved through forensic recovery techniques. Second, the court found that it was a reasonable inference that the e-mails had been deleted in violation of County policy. There were substantial gaps in the responsive e-mails provided, and no incoming or outgoing e-mails were provided from Commissioner Bridinger's public account. "These facts raise the reasonable inference that the e-mails were deleted in violation of the county's records retention and disposition schedule; it defies logic that all public-office e-mail during these lengthy periods lacked significant administrative, fiscal, legal, or historic value." As these were public records, the "mere fact" that the cost of the recovery services could be expensive did not bar the court from ordering that recovery be attempted.

Several factors supported having the Board bear the expense of the forensic recovery of the deleted e-mails, including the fact that the Board failed to maintain the requested e-mails in accordance with the applicable schedule for records retention and disposition. Accordingly, the court granted the application to compel the Board to make reasonable efforts to recover, at its expense, the requested deleted e-mails and to make them promptly available for inspection. The court added, however, "that in cases in which public records, including e-mails, are properly disposed of in accordance with a duly adopted records-retention policy, there is no entitlement to these records under the Public Records Act." *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, No. 2007-1694, 2008 WL 5157733 (Ohio Dec. 09, 2008).

Search and Seizure

Traffic Stops—Tandem Drivers

The issue in this case was whether there was sufficient evidence of tandem driving such that probable cause to arrest the driver of one vehicle established probable cause to arrest the driver of a second vehicle. A police officer in New Mexico, Officer Marquez, saw Rodriguez-Rodriguez ("Rodriguez") driving a red Nissan just ahead of a brown pickup truck. Both vehicles had California plates and both were traveling at a speed below the speed limit. The driver of the brown pickup was stopped for a traffic violation, refused to answer questions, and tried to run away. The officer smelled marijuana and a large bundle of it was visible in the cab of the truck. Marquez contacted deputies to intercept the Rodriguez vehicle, and it was stopped some six miles away. Rodriguez consented to a search of his vehicle, where evidence was discovered linking him to the driver of the brown truck. Rodriguez was taken into custody, admitted to working in conjunction with the driver of the brown truck in the transport of marijuana, and was charged with various drug offenses. He sought to suppress the evidence, arguing that his traffic stop violated the Fourth Amendment because it was not supported by reasonable suspicion, and that his investigative detention amounted to an illegal arrest because it exceeded the scope of any arguably permissible stop and because the officers lacked probable cause to believe that he had violated the law.

The U.S. Court of Appeals for the Tenth Circuit affirmed the denial of his motion to suppress evidence. The critical question was whether Officer Marquez had probable cause to believe that Rodriguez was committing a crime. "Sufficient evidence that two vehicles are driving in tandem plus evidence that one vehicle contains contraband can provide probable cause sufficient to support arresting the driver of the other vehicle." Here, there was "considerable objective evidence that the brown pickup and red Nissan were driving in tandem," as the two vehicles traveled a mere two car lengths apart on a highway in very light traffic; Rodriguez abruptly sped off when Marquez stopped the pickup; and the driver of the pickup seemingly waited for Rodriguez's vehicle to elude Marquez's range of vision before he pulled over. When Officer Marquez discovered that the pickup truck was carrying marijuana, the evidence of tandem driving created probable cause that Rodriguez was committing a crime as well. This