

Selected eDiscovery Court Decisions October 2019-October 2020

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I. Preservation

Williams v. UnitedHealth Group, No. 2:18-cv-2096, 2020 WL 528604 (D. Kan. Feb. 3, 2020). The pro se plaintiff in this employment action and moved to compel the defendant employer to supplement its responses to her requests for production and interrogatories. In particular, the plaintiff sought “all conversations conveyed between Maxwell Thompson and Katrina Williams via Cisco Jabber/Instant Messenger from September 2016 through July 2017” and “all conversations conveyed between Stephanie Mochamer and Katrina Williams via Cisco Jabber/Instant Messenger from September 2016 through July 2017.” The defendant previously produced nine responsive screenshots in response to these requests and represented by affidavit that the only way such messages would have been preserved is if the sender or recipient manually captured them by screenshot. The court denied the plaintiff’s motion, concluding that all existing responsive documents had been produced and there was no evidence that any additional responsive messages had been withheld.

II. Proportionality

Hawkins v. AT&T, 812 Fed. Appx. 215 (5th Cir. May 12, 2020). In a rare instance of a federal appellate court reversing a trial judge’s ruling limiting discovery, the Fifth Circuit held that a district court abused its discretion by denying the plaintiff discovery in this employment action, leading to summary judgment being granted for the defendant employer. The plaintiff was a customer service representative who had injured her shoulder and took a medical leave of absence under the Family Medical

Leave Act (FMLA). Upon returning to the workplace, she claimed that she was harassed and ultimately fired in because of her age and disability. The employer asserted that it had received negative customer reviews of her performance and that she had falsified records. The trial court denied her request for copies of any grievances filed against her, denied her request to depose a witness on the records falsification issue, prevented her from receiving full employment records of comparators necessary to support her claims, and denied her last request – on the same day that the defendant moved for summary judgment – for records of performance evaluations and disciplinary actions taken against other employees for similar alleged workplace rule infractions. The appellate court stated that a trial court’s discovery ruling “should be reversed only in an ‘unusual and exceptional case,’” but held that this was such a case, as the plaintiff was prejudiced by the trial court’s repeated denial of requests for discovery on disputed relevant facts. Summary judgment on the retaliation and discrimination claims was reversed and the case remanded to the district court.

III. eDiscovery Process

Equal Employment Opportunity Commission v. M1 5100 Corp., No. 19-cv-81320, 2020 WL 3581372 (S.D. Fla. July 2, 2020). In an age discrimination action, the EEOC moved to compel “a Privilege Log, Better Discovery Responses, and Fees” from the defendant. More specifically, the EEOC sought “the opportunity to inspect Defendant’s ESI because, by Defendant’s counsel’s own admission, Defendant ‘self-collected’ responsive documents and information to the discovery requests without the oversight of its counsel.” The defendant was represented by counsel who signed the discovery responses but stated in a court hearing that he did not supervise his client’s ESI collection efforts, which were conducted by “self-interested” employees of the defendant. The court found that “counsel left it to the client and the client’s employees to determine the appropriate custodians, the necessary search terms, the relevant ESI sources, and what documents should be collected and produced,” resulting in the production of a mere 22 documents after several delays in what the court characterized as a complicated age discrimination action. Citing Fed. R. Civ. P. 26(g) and *The Sedona Principles*, the court observed that “an attorney cannot abandon his professional and ethical duties imposed by the applicable rules and case law and permit an interested party or person to ‘self-collect’ discovery without any attorney advice, supervision, or knowledge of the process utilized.” The court acknowledged that allowing an opposing party to inspect of ESI is an exceptional remedy, permitted only “when all other reasonable solutions have been exhausted or when the Court suspects bad faith or other discovery misconduct,” and gave the defendant “one last chance” to conduct an appropriate search with counsel’s

involvement and produce the responsive ESI. The court declined to find the defendant or its counsel acted in bad faith and stated that “the Court will give Defendant’s counsel the benefit of the doubt and suspects that, during these difficult times of the COVID-19 pandemic, counsel’s involvement in the discovery process with his client has been unusually difficult.”

Gross v. Chapman, No. 19-cv-2743, 2020 WL 4336062 (N.D. Ill. July 28, 2020). In a truly modern romance story, two families disputed over their children’s wedding reception plans, resulting in a federal lawsuit. It appears that Bride insisted on an “adults only” reception, and Groom’s family objected. Bride called her parents – from Groom’s house – to complain, and the conversation was recorded by Groom’s family’s Google Nest surveillance system. Groom texted Bride to insist that the two families meet, Bride insisted that Groom uninstall the surveillance system, Groom called off the wedding, and Bride’s family was stuck with approximately \$100,000 in expenses. In the resulting legal action, there were several rounds of text message and email productions, covering the time from when Bride and Groom became engaged through the break-up, resulting in 4,862 texts, 132 emails, 3 photos and 36 Instagram and Facebook posts, under an agreed-upon search protocol. However, the plaintiffs alleged that the final tranche of 28 text messages, covering the period after the breakup, was too low, and filed a motion to compel additional discovery of the defendants’ discovery process. Citing Sedona Principle 6, the court held that the plaintiffs failed to provide sufficient evidence to overcome a presumption against “discovery about discovery,” and relied on “mere speculation” that there must be more texts, without citing facts or case law to support their motion. The court concluded that “discovery on discovery with no basis other than plaintiffs’ hopeful guess that there must be more texts about an engagement breakup is substantially out of proportion to the needs of the case.”

IV. TAR

Livingston v. City of Chicago, No. 16 CV 10156, 2020 WL 5253848 (N.D. Ill. Sept. 3, 2020). In an employment discrimination action, the plaintiffs sought to compel the defendant City of Chicago to either manually review 1.3 million pages of email or to adopt the plaintiffs’ TAR protocol to review the entire ESI collection. The City disclosed its intention to use a different TAR protocol that would not require manual review of a large segment of the collection. Citing Sedona Principle 6, the court held that the City’s proposal was sufficiently transparent, would satisfy the “reasonable inquiry” standard of Fed. R. Civ. P. 26(g), and would be proportional to the needs of the case, noting that the plaintiff failed to cite any legal authority to support its request that the court require the City to adopt the plaintiff’s preferred methodology.

V. Form of Production

Corker v. Costco Wholesale, No. C19-0290, 2020 WL 1987060 (W.D. Wash. Apr. 27, 2020). In a commercial lawsuit involving the Kona coffee trade, the plaintiffs moved to compel one of the defendants to produce price and volume data “in the Form Kept in the Ordinary Course of Business and Without Redactions” after the defendant had produced a 2,269-page PDF that appeared to be a static version of a spreadsheet, with significant redactions obscuring sales information regarding non-Kona brands. The court held that the static PDF images of the spreadsheet were not “reasonably useable” as required by Fed. R. Civ. P. 34(b)(2)(E), as the data cannot be sorted or filtered as it would in an active spreadsheet. The defendant then offered to generate “a report in Excel format that contains all of the relevant information responsive to plaintiffs’ discovery request while filtering/hiding irrelevant and commercially sensitive information regarding non-Kona brands and sales.” The court rejected that proposal as well, stating that parties a producing party “may not redact otherwise responsive documents because those documents contain irrelevant material.” However, the court recognized that the defendant had shown good cause for entry of a protective order to prevent disclosure of sensitive commercial information to competitors, and pointed to the existing protective order in this action, which would allow production of such sensitive information for “Plaintiff’s Outside Counsel Only.”

VI. Spoliation

Kologik Capital v. In Force Technology, No. 18-11168, 2020 WL 1169403 (D. Mass. March 11, 2020). In an action alleging breach of a professional services agreement under which the defendant was obligated to remit payments from customers who used the plaintiff’s software, the court held that the plaintiff’s “notice of default” put the defendant on notice of reasonably anticipated litigation, triggering a duty to preserve relevant evidence. Shortly thereafter, the defendant went into bankruptcy. The plaintiff was able to purchase the defendant’s assets in a transaction approved by the bankruptcy court, but by that time, relevant ESI had been lost. The plaintiff was able to establish, through non-party subpoenas of the defendant’s customers, that the defendant continued in business after declaring bankruptcy, but the defendant claimed that it had no ESI beyond what had already been produced and had no ability to restore the lost ESI. The plaintiff moved for sanctions under Fed. R. Civ. P. 37(e), but the defendant countered that sanctions were inappropriate, as there was no evidence of “intent to deprive.” The court held that intent was not necessary to support sanctions under Rule 37(e)(1). The court ordered the defendant to recover

the ESI from non-party customers and to waive objections as to authenticity and business record status of the ESI recovered from non-party sources.

WeRide Corp. v. Kun Huang, No. 5:18-cv-07233, 2020 WL 1967209 (N.D. Cal. Apr. 24, 2020). In a trade secrets action involving autonomous vehicle technology, the plaintiff brought suit against its former CEO and former Head of Hardware Technology, alleging that the pair appropriated proprietary source code and engaged in trade disparagement in violation of separation agreements after joining a new competing company. The plaintiffs obtained a preliminary injunction that included ESI preservation provisions and required the defendants to make devices available for inspection. However, the defendants failed to disable an email auto-delete function, resulting in the loss of all emails more than 90 days old, and deleted a number of specific email accounts. The defendants were also found to have deleted significant amounts of sources code and to have sold or traded several relevant devices. Finally, before the former CEO officially left his position to join his new company, he advised the new company to use an ephemeral messaging application, DingTalk, for internal correspondence, since it was “more secure” than other messaging platforms. The plaintiff moved for spoliation sanctions under both Fed. R. Civ. P. 37(b) and 37(e), plus the court’s inherent authority. The court rejected the use of inherent authority, finding that rule-based authority was sufficient, and that the “preponderance of evidence” standard should apply, as it does in almost all aspects of civil litigation. Finding that the amount of spoliation was “staggering,” the court issued terminating sanctions under both Rules 37(b) and Rule 37(e)(2) against both individual defendants and the defendants’ new company.