

In *King v. Catholic Health Initiatives*, 2019 WL 6699705 (D. Neb. Dec. 9, 2019), Magistrate Judge Michael D. Nelson of the District of Nebraska held that the defendants had to review backup media for deleted emails but rejected the claim that defendants had to supplement their productions with instant messages, voicemails and texts that had not been saved automatically.

In this employment litigation, plaintiff stated that her former employer “failed to take proper remedial action to protect her from sexual harassment from another employee.” *Id.* at *1. Plaintiff claimed that over the course of her employment she had made repeated requests that this employee be disciplined or told to stay away from her but that those requests were ignored. Plaintiff alleged that she eventually resigned due to the harassment by this employee, and the alleged harasser was dismissed shortly thereafter.

In discovery, plaintiff requested the emails as well as the instant messages, voicemails and text messages of herself and the alleged harasser. *Id.* at *2. Defendants claimed that they had already produced all available documents while acknowledging that they might have backup media with the requested emails. Defendants opposed discovery of those backup media because even the process of finding out whether these media contained responsive material would be expensive and burdensome. *Id.* at *3. Defendants also argued they had no duty to preserve any documents because any preservation obligation arose after the defendants’ disposal of the plaintiff’s and alleged harasser’s emails in accordance with its normal retention practices. In defendants’ view, the lack of a preservation obligation weighed against forcing them to incur the expense of exploring whether the backups contained responsive material. *Id.* at *2.

Recognizing that the issue was a “close call,” the magistrate judge concluded that the circumstances surrounding plaintiff’s departure triggered defendant’s duty to preserve. *Id.* at *4. Plaintiff’s supervisor had engaged in email exchanges with the senior human resources directors in which directors noted that the situation with the harassing employee was “high risk” and that there was legal risk involved in deciding to fire the alleged harassing employee. This exchange was sufficient, Magistrate Judge Nelson found, to indicate that defendants should have reasonably anticipated litigation triggering the duty to preserve.

Magistrate Judge Nelson denied plaintiff’s request for severe sanctions, stating that additional discovery could replace the deleted documents. Defendants had sought to escape the retrieval effort, explaining that it cost approximately \$18,000 to recover a year’s worth of data and that the success rate of retrieval was only 70 to 80 percent. *Id.* at *3. The magistrate judge, however, did order defendants to begin the retrieval process from the alleged harasser’s backup files but did not order the process for plaintiff’s backup documents pending review of the availability of the missing emails from plaintiff’s or the alleged harasser’s files or other sources. *Id.* at *4. Judge Nelson noted that if the alleged harasser’s files could not be restored or replaced, he would then consider an additional remedy “no greater than necessary to cure the prejudice.” *Id.* (quoting Fed. R. Civ. P. 37(e)(1)). The additional remedy, however, would likely not be severe, as Magistrate Judge Nelson explained that defendants “did not act in bad faith and [had] attempted to comply with [plaintiff’s] discovery requests to the extent it was able.”

Magistrate Judge Nelson also held that defendants had no duty to provide instant messages, voicemails and text messages requested by plaintiff. *Id.* at *5. He noted that defendant’s instant

messaging system — Microsoft Lync — saved messages only “if the save feature was enabled on a user-by-user basis.” Similarly, defendants did not have in place any mechanism to save voicemails or forward voicemail to email. As such, the magistrate judge found that the defendants had no duty to supplement their production with voicemails. In response to plaintiff’s request for text messages, Magistrate Judge Nelson noted that the custodians from which the text messages were sought did not have company-issued phones and found, therefore, that text messages sent by nonparty custodians “using their personal devices [were] not reasonably available in the possession, custody or control of Defendants.”