

1. Opinions from the U.S. District Court for the District of Kansas awarding a defendant expenses it incurred from implementing expansive technology assisted review

In a handful of recent decisions in *Lawson v. Spirit AeroSystems, Inc.*, Case No. 18-1100-EFM-ADM (D. Kan.), Magistrate Judge Angel D. Mitchell, with affirmance from District Judge Eric F. Melgren, awarded a defendant approximately \$850,000 in expenses it incurred from expansive technology assisted review (TAR) the plaintiff had insisted on and briefing in connection with seeking such expenses.

In this breach of contract case, Plaintiff, the former CEO of Defendant, entered a noncompete agreement, which Defendant alleges he breached. *Lawson v. Spirit AeroSystems, Inc.*, 2020 WL 3288058, at *1 (D. Kan. June 18, 2020). Because of the alleged breach, Defendant stopped paying Plaintiff amounts Defendant owed under Plaintiff's retirement agreement. Plaintiff then filed suit and sought far-reaching discovery from Defendant. *Id.* at *3.

The parties engaged in a lengthy and protracted discovery process, during which Plaintiff identified nearly 70 custodians and about 90 search terms. Defendant ultimately selected a handful of custodians and ran Plaintiff's search terms over their documents, which returned over 320,000 documents. After reviewing a sample set, Defendant determined that 85% of the documents were irrelevant. Magistrate Judge Mitchell weighed in on the parties' discovery dispute and ordered the parties to, among other things, work together to formulate more effective search terms and to try to achieve a responsiveness hit rate of at least 85%.

After the parties' attempts to narrow in on a set of documents with a higher responsiveness rate were unsuccessful, the parties decided to transition to conducting a TAR of the 320,000 documents. *Id.* at *6. The parties agreed that the initial review would be conducted by Defendant's contract attorneys with a second-level review by attorneys at Defendant's retained firm. After initial disagreement regarding the appropriate recall rate, Defendant agreed to continue its review until it reached an 80% recall rate. *Id.* at *7. Once Defendant reached 80%, Plaintiff moved to compel Defendant to review and potentially produce from the residual TAR set, a process Defendant estimated would cost \$40,000. Magistrate Judge Mitchell denied the motion because Plaintiff refused to bear Defendant's costs to review and produce the residual TAR documents, no authority supported what Plaintiff sought, and the additional review was not proportional to the needs of the case. *Id.* at *8.

Thereafter, Defendant filed a motion requesting that Magistrate Judge Mitchell shift all costs and attorneys' fees associated with the TAR to Plaintiff. *Id.* at *1. Defendant argued that it "spent months collecting, processing, hosting and searching millions of documents from custodians selected by [Plaintiff] and using search terms selected by [Plaintiff]; that this process cost hundreds of thousands of dollars and yielded only a small percentage of responsive documents 'and far fewer *relevant* documents.'" *Id.* (emphasis in original). While Defendant was working to comply with Plaintiff's demands regarding the TAR protocol, Defendant also conducted custodian interviews and gathered targeted files, which resulted in far more significant and fruitful productions on the main issues in the case. Defendant therefore requested that Magistrate Judge Mitchell shift the TAR expenses to Plaintiff, citing the proportionality standards in the Federal Rules of Civil Procedure.

Plaintiff opposed the motion, arguing that cost-shifting was appropriate only for electronically stored information (ESI) that is not reasonably accessible, which was not the case here. Plaintiff also contended that Defendant had not cooperated, as Magistrate Judge Mitchell had ordered it to, in crafting search terms to reach an 85% responsiveness target, and that cost-shifting factors weighed in Plaintiff's favor.

As an initial matter, Magistrate Judge Mitchell disagreed with Plaintiff's argument that cost-shifting was appropriate only for ESI that is not reasonably accessible, stating it was "contrary to both the Federal Rules and the parties' own agreed ESI protocol." *Id.* at *10. While Magistrate Judge Mitchell acknowledged that "it is ordinarily presumed that the responding party bear the expense of complying with discovery requests," Defendant's motion was premised on Rule 26(c) of the Federal Rules of Civil Procedure, which is not limited to non-reasonably accessible discovery and was amended in 2015 "to make clear that the court may allocate discovery expenses for good cause in order to protect a party from undue burden or expense." *Id.* at *8.

After considering each of the relevant proportionality factors courts look to in connection with Rule 26(c), Magistrate Judge Mitchell concluded that good cause warranted allocating the TAR expenses to Plaintiff to protect Defendant from undue burden and expense. *Id.* at *10. Magistrate Judge Mitchell explained that Defendant needed protection and relief from Plaintiff's burdensome and costly discovery tactics and noted that she had repeatedly cautioned Plaintiff to better focus his requested electronic discovery or Magistrate Judge Mitchell would eventually shift costs. See *Id.* at *22. She also noted that Defendant had already shouldered its fair share of the expenses by cooperating with Plaintiff's burdensome requests and by running a separate discovery process using traditional discovery means, which ended up producing many more responsive documents than the TAR protocol Plaintiff demanded. As Magistrate Judge Mitchell put it, because Plaintiff was "the party that wanted to proceed with the TAR process at a point in time when it was disproportional to the needs of the case, the court will allocate the TAR expenses to [Plaintiff] to protect [Defendant] from undue burden and expense."

But Magistrate Judge Mitchell did not determine a specific dollar amount to allocate to Plaintiff and instead ordered Defendant to serve a notice by June 25, 2020, informing Plaintiff of the dollar amount Defendant was requesting. Magistrate Judge Mitchell also ordered the parties to confer in an attempt to reach agreement on the issue of expenses by July 2 and stated that if the parties could not reach an agreement, Defendant could file a motion seeking expenses by July 10.

Plaintiff appealed Magistrate Judge Mitchell's order to the district court judge, Judge Eric F. Melgren. *Lawson v. Spirit AeroSystems, Inc.*, 2020 WL 6939752, at *1 (D. Kan. Nov. 24, 2020). In his appeal, Plaintiff argued that "the Magistrate Judge's order should be overturned because it was clearly erroneous and contrary to law." *Id.* at *5. Specifically, Plaintiff contended that the TAR protocol was necessary in light of Defendant's defense strategy and that Magistrate Judge Mitchell's order was clearly erroneous because the TAR process "uncovered some useful evidence to support his theory of the case." *Id.* at *6. On the first point, Judge Melgren stated that both parties have "a significant interest in discovery" and that up until Magistrate Judge Mitchell's order, the main difference between the parties was that Defendant was shouldering the lion's share of the costs of that discovery. *Id.* at *5. On Plaintiff's second point, Judge Melgren stated that he was "not persuaded by [Plaintiff's] ends justify the means argument." *Id.* (internal quotation marks omitted). The mere fact that the TAR had led to production of *some* relevant documents did not,

by itself, establish that it was proportional to the needs of the case. In the end, Judge Melgren affirmed Magistrate Judge Mitchell's cost-shifting order, stating that "[t]he Magistrate Judge considered all the relevant facts and concluded that [Plaintiff's] persistence in pursuing the costly, ineffective TAR was disproportional to the needs of the case" and that Plaintiff "failed to carry his burden to prove that the Magistrate Judge's order was clearly erroneous or contrary to law."

After the parties were unable to reach an agreement on expenses, Defendant filed a motion requesting expenses related to the TAR. *Lawson v. Spirit AeroSystems, Inc.*, 2020 WL 6343292, at *1 (D. Kan. Oct. 29, 2020). Defendant sought \$791,700.21 in expenses in connection with the TAR and \$83,000 in costs and fees incurred conferring with Plaintiff and preparing the briefing associated with its motion for fees. Plaintiff objected to Defendant's requests, arguing that "many of the expenses included in [defendant's] calculation [were] unreasonable or outside the scope of the court's order." According to Plaintiff, Defendant's reasonable TAR expenses were "no more than \$330,000."

Magistrate Judge Mitchell granted in part and denied in part Defendant's application for expenses, ruling that in total, defendant "reasonably incurred \$449,999.21 in expenses paid to [its e-discovery vendor] and \$304,030.25 in attorney's fees[.]" *Id.* at *19. Magistrate Judge Mitchell also provisionally granted Defendant's request for expenses in connection with submitting its fee application but concluded that she could not "determine a specific dollar amount at this time." Accordingly, she ordered the parties to engage in a similar protocol as before, and if, as before, the parties could not reach an agreement on the amount of these expenses, Defendant was to prepare a renewed application.

After the parties again failed to reach an agreement, Defendant followed Magistrate Judge Mitchell's order and filed a renewed application. *Lawson v. Spirit AeroSystems, Inc.*, 2020 WL 7700228, at *1 (D. Kan. Dec. 28, 2020). In its renewed application, Defendant sought, in total, \$94,407.25 in expenses incurred in connection with its initial and renewed application. In response, Plaintiff argued that the expenses Defendant requested were "excessive, duplicative, and should be reduced by at least 50%." Plaintiff also argued that he should not be responsible for any expenses incurred after Defendant filed its initial application. Recognizing that she had already provisionally granted Defendant's request for expenses reasonably incurred in connection with preparing its original application, Magistrate Judge Mitchell granted Defendant's renewed application in full, ruling that Defendant had reasonably incurred \$94,407.25 in attorneys' fees. *Id.* at *6.