3. A decision from the Northern District of New York granting in part the plaintiff's motion to compel the defendants to use certain expanded search terms in identifying potentially relevant ESI but permitting the defendants to use predictive coding to review the resulting documents rather than a full linear review.

In *Maurer v. Sysco Albany, LLC*, 2021 WL 2154144 (N.D.N.Y. May 27, 2021), Magistrate Judge Christian F. Hummel of the Northern District of New York granted in part the Plaintiff's motion to compel the Defendants to use certain expanded search terms in identifying potentially relevant ESI but permitted Defendants to use predictive coding to review the resulting documents.

Plaintiff in this employment discrimination litigation alleged that his former employer and certain of its employees violated the Americans with Disabilities Act, among other claims, by terminating his employment after he requested disability leave. In connection with his discovery requests, Plaintiff provided a proposed list of custodians and search terms for Defendants to use to search for documents and sought to have Defendants search for documents for the period of January 1, 2013, through the present. The parties thereafter engaged in meet-and-confer discussions regarding Plaintiff's requests but ultimately disagreed regarding both the scope of Defendants' collection of documents and whether Defendants would apply predictive coding to the complete email boxes of key custodians back to January 1, 2013, or a more limited timeframe of documents collected from the email boxes.

Plaintiff moved to compel Defendants to use one of two methods to find and produce additional responsive documents: either search terms including Plaintiff's name, the names of Defendants' employee decisionmakers, and a number of other general terms to identify documents for linear review, or, alternatively, predictive coding across the full custodial collections of documents for the period starting January 1, 2013. *Id*. at *5.

Defendants countered, arguing that only a narrow set of search terms was needed and that loading the full custodial set for review starting from January 1, 2013 (as Plaintiff requested), would be disproportionately burdensome. Among other arguments, Defendants claimed that the cost to host this full custodial set would be $23,755 per month and the cost of using predictive coding would exceed $200,000. *Id*. at *6. Defendants also argued that using individual names — including the names of the employees involved in the decision making — would return large numbers of false positives. *Id*. at *7. Instead, Defendants proposed collecting documents for only a two-year period, 2016 to 2018, and then applying a narrower set of search terms. Defendants stated that this approach yielded approximately 27,000 "hits," and Defendants could then use predictive coding over this set of documents. *Id*. at *8. In response, Plaintiff stated that using predictive coding over the documents resulting from this narrower set of terms and time period was insufficient since "in order for predictive coding to be accurate it must be applied to a larger set of documents." *Id*. at *4.

Magistrate Judge Hummel began his analysis by setting forth the relevant standards under Federal Rule of Civil Procedure 26, which provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." *Id*. at *8 (quoting Fed. R. Civ. P. 26(b)(1)). Rule 26 tasks the court to consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving

the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

As an initial matter, Magistrate Judge Hummel held that the "use of a general search-term-based search of the custodian accounts" followed by a second-level review using predictive coding was reasonable, especially in light of the fact that "the ESI relevant to the claims and defenses in this case is likely not voluminous." *Id*. at *8–9. And while he noted that Defendants had not provided enough "clarity as to the time period used for their purported decision to terminate" Plaintiff, he found that Plaintiff had not established that events over seven years before his termination could possibly be relevant. *Id*. at *8. Therefore, Magistrate Judge Hummel found that the appropriate timeframe was the two-year time period proposed by Defendants.

Magistrate Judge Hummel next observed that "the review procedures proposed by plaintiff would result in storage and review costs that would be disproportionate to the likely limited amount of relevant ESI that will be discovered." *Id*. at *9. Therefore, "conducting a linear review of every hit resulting from a search term-based search that includes all custodians' names and name derivatives or reviewing the full custodian accounts using predictive coding dating back to 2013 is not proportional to the benefit and importance of ESI in resolving the issues presented in this case."

Still, Magistrate Judge Hummel agreed that excluding Plaintiff's name in Defendants' search terms would potentially "omit relevant documents." *Id*. "[A] name-only search ... for this short period of time will not result in an unduly burdensome number of emails for defendants to review, especially since defendants will be able to further filter out irrelevant hits through the use of predictive coding." Magistrate Judge Hummel thus granted Plaintiff's motion in this regard. But he also found that using the employee decision makers' names as standalone search terms would result in a disproportionate volume of documents. Therefore, Magistrate Judge Hummel permitted Defendants to couple the decision makers' names with other terms, thereby reducing the volume of returned results.

In closing, Magistrate Judge Hummel noted that "the best solution in the entire area of electronic discovery is cooperation among counsel," and "[i]deally, the parties should agree on the search methods, including search terms or concepts." *Id*. at *10 (internal quotations omitted). He therefore directed the parties to confer and submit a final ESI protocol consistent with the conclusions set forth in his decision within 30 days.