1. A decision from the U.S. District Court for the District of Columbia rejecting a plaintiff's argument in connection with a motion to compel that the clawback procedures of Federal Rule of Evidence 502(d) reduced the burden and expense for the defendant to respond to discovery requests because the defendant could forego a document-by-document review to find and withhold privileged material.

In *United States Equal Employment Opportunity Comm'n v. The George Washington Univ.*, 2020 WL 3489478 (D.D.C. Jun. 26, 2020), Magistrate Judge G. Michael Harvey concluded that the Plaintiff could not rely on the clawback procedures of Federal Rule of Evidence 502(d) to argue that the Defendant's burden to respond to discovery requests would be reduced if it replaced a document-by-document review with a less-reliable keyword search review to determine which of thousands of emails in the review set were privileged.

In this case, Plaintiff the U.S. Equal Employment Opportunity Commission alleged that George Washington University violated the Equal Pay Act and Title VII of the Civil Rights Act when it subjected the athletic director's female executive assistant to less favorable treatment and to lower pay than her male counterpart. *Id.* at *1. During document discovery, Plaintiff requested, among other things, all emails, both sent and received, from the school email accounts of the athletic director, the female assistant, and the male assistant during each person's tenure in the athletic department. *Id.* at *2. These requests were intended to allow Plaintiff to compare the female and male assistants' job duties and assist it in uncovering evidence of the athletic director's bias in favor of male employees. Plaintiff also requested production of all documents containing complaints against the athletic director for discriminatory behavior.

In the resulting discovery dispute over these requests, the primary controversy between the parties was whether Plaintiff's requests were proportional to the needs of the case. *Id.* at *5. Defendant objected to each request for production, arguing that the breadth of the information requested was disproportionate to the needs of the case and that the cost of production would be too burdensome. *Id.* at *3. In this context, Defendant supported its argument regarding the burden and expense of the requested discovery by submitting estimates regarding the costs to review the number of emails at issue, including by contract attorneys and outside counsel, to establish how much Defendant would actually pay to respond. *Id.* at 7. Plaintiff disputed Defendant's estimated costs to review the documents requested, contending that a cheaper procedure than a full document-by-document review was available. *Id.* at *8. Under Plaintiff's proposed procedure, Defendant's contract attorneys or outside counsel "would use filtering and targeted searches" to identify privileged emails. Only the targeted emails would go to Defendant's attorneys for a document-by-document review. All other emails not identified by the keyword searches would be produced to Plaintiff without review.

Defendant rejected Plaintiff's proposal to use Rule 502(d) as a means to reduce the burden of reviewing the requested discovery, arguing that it "would likely result both in privileged material being produced ... and in non-privileged material being withheld." *Id.* at *8. In response, Plaintiff argued that Rule 502(d) mitigated any concerns regarding disclosure of confidential information. Specifically, Rule 502(d) allows courts to enter an order stating that "privilege or protection is not waived by disclosure connected with litigation pending before the court." *Id.* (quoting Rule 502(d)). Plaintiff argued that Rule "502(d) was drafted for cases like this one" and that Rule 502(d)

made it "so document-by-document pre-production privilege review does not have to be performed ... in large e-discovery situations." *Id.* at *9.

Magistrate Judge Harvey viewed Plaintiff's proposal as raising two related possibilities, "each based on the notion that entry of a Rule 502(d) order would allow [Defendant] to lower its costs by permitting it to produce documents without robust privilege review." *Id.* at *9. One possibility was that the court "could enter an order under Rule 502(d) and then require [Defendant] to utilize the cheaper review protocol [Plaintiff] prefers, which would substantially lower the cost of complying with the [requests for production] at issue and therefore affect the proportionality analysis such that [Defendant] should be required to respond to them as written." Alternatively, the court "could enter an order under Rule 502(d) and then allow [Defendant] to utilize whatever review protocol it prefers, but the [court] should consider only the lower cost of the review protocol [Plaintiff] prefers in its proportionality review, again affecting the proportionality analysis in [Plaintiff]'s favor." Magistrate Judge Harvey noted Plaintiff's view that either scenario would result in an order for Defendant "to produce the entirety of the email accounts of [the relevant individuals] for the identified time periods and to bear the cost of such production itself."

Near the outset of his analysis, Magistrate Judge Harvey explained that Rule 502(d)'s enactment "was apparently motivated by the 'increased prominence of electronic discovery that may involve the production of thousands of pieces of electronically stored information.' " *Id.* (quoting *Amobi v. D.C. Dep't of Corr.*, 262 F.R.D. 45, 52 n.1 (D.D.C. 2009)). But Magistrate Judge Harvey rejected Plaintiff's proposal for several reasons.

First, Rule 502(d) "merely allows a court to enter an order that attorney-client privilege or work product protection will not be waived by disclosure of protected information during discovery." The Rule "says nothing about the necessity or reasonableness of any particular privilege-review procedure." And although the Advisory Committee Note states that one of Rule 502(d)'s goals is to "reduce the costs of pre-production review for privilege and work product," "[t]he Advisory Committee Note is not the law, the rule is." *Id.* (quoting *Bear Rep. Brewing Co. v. Cent. City Brewing Co.*, 275 F.R.D. 43, 48 (D. Mass. 2011)). As Magistrate Judge Harvey put it, "[i]f the drafters had wanted to encourage courts to prohibit a party from engaging in document-by-document privilege review without that party's consent, they would have said so more clearly."

Second, Magistrate Judge Harvey recognized that compelling Defendant to adopt Plaintiff's proposed procedure "would likely have the effect of requiring production of privileged material." *Id.* at *11. For example, relying on search terms such as "attorney-client privilege" or "work product" or "confidential" would be ineffective at picking up documents like "communications among non-attorneys[, which] can be entitled to protection if they concern matters in which the parties intend to seek legal advice ...." Magistrate Judge Harvey explained that courts and commentators generally disapprove of actions that have the effect of compelling disclosure of confidential information, and he emphasized that the federal rules "do[] not supersede controlling case law forbidding a court from compelling disclosure of protected information ...." *Id.* at *10. Magistrate Judge Harvey advanced several points to support this conclusion. For one, discovery orders must comply with the Federal Rules of Civil Procedure, including Rule 26(b)(1), which "limits the scope of discover[y] ... to *nonprivileged* information." *Id.* (quoting *Winfield v. City of New York*, 2018 WL 2148435, at *5 (S.D.N.Y. May 10, 2018)). Additionally, Rule 502(d) was designed to protect privilege, not undermine it by compelling the disclosure of

confidential documents. Further, the Rules Enabling Act precludes courts from interpreting federal rules in any way that substantively affects private rights. Magistrate Judge Harvey also noted that "a responding party, not the court or requesting party, is generally best suited to determine and implement appropriate procedures, methodologies, and technologies to identify, preserve, collect, process, analyze, review, and produce relevant and discoverable ESI [electronically stored information], and no Federal Rule has given judges the authority ... to dictate to parties how to search their documents." *Id.* at *11 (internal quotation marks and brackets omitted).

Third, Magistrate Judge Harvey identified practical reasons not to compel Defendant to adopt Plaintiff's proposed review procedure. In particular, he recognized that Rule 502(d)'s clawback provision is an imperfect tool: "[I]t is ... 'common sense observation' that '[i]f an adverse party is provide[d] access to privileged material, a pertinent aspect of confidentiality will be lost.' " Id. at *11 (quoting *In re Dow Corning Corp.*, 261 F.3d 280, 284 (2d Cir. 2001)).

Ultimately, Magistrate Judge Harvey determined it would be inappropriate to compel Defendant to adopt Plaintiff's proposed review procedure. Accordingly, Magistrate Judge Harvey determined that Defendant's higher estimated cost of production was the proper cost to use "in balancing the burden against the likely benefit" in determining whether to compel Defendant to respond to Plaintiff's discovery requests. *Id.* at *12.