

3. A ruling from the U.S. District Court for the Northern District of Illinois declining to order a forensic examination of Plaintiff's electronic devices after she produced previously undisclosed but highly relevant audio recordings near the end of discovery but requiring Plaintiff to produce metadata for the recordings and permitting Defendant to take additional discovery.

In *Alipourian-Frascogna v. Etihad Airways*, SPJC, 2023 WL 5934897 (N.D. Ill. Sept. 12, 2023), U.S. Magistrate Judge Sheila Finnegan addressed the standards for imposing the "extraordinary remedy" of a forensic examination of Plaintiff's electronic devices.

Plaintiff filed this litigation against her former employee, Defendant Etihad Airways, bringing claims under Title VII of the Civil Rights Act of 1964 related to employment decisions allegedly based on race and national origin. *Id.* at \*1. Near the close of discovery, Plaintiff produced four audio recordings of conversations between Plaintiff and other employees of Defendant. Defendant was unaware of these recordings, which had been made without consent of the other parties to them, and the recordings were produced without any metadata relating to their creation.

After learning of the audio recordings, Defendant sought discovery regarding when Plaintiff's counsel learned of the recordings and why they were not produced earlier, the identity of the devices and software on which the recordings were made, and whether any other recordings were deleted. *Id.* at \*2. Defendant also sought to compel Plaintiff to submit any personal devices on which she recorded and/or stored the audio recordings for a forensic examination and to produce the audio recordings in their native format. Defendant further requested information about the identity of the person making each recording, where the recording was made, and the date of the recording.

Magistrate Judge Finnegan began her analysis by noting that the relevance of the audio recordings was not in dispute. Among other reasons for this, the parties raised contentions that the audio recordings demonstrated that a witness had committed perjury or justified the taking of additional depositions. Magistrate Judge Finnegan stated that the audio recordings could also be evidence that Plaintiff destroyed or failed to preserve relevant ESI, and Defendant was entitled to explore how the Plaintiff plausibly could have obtained, and then forgotten about, the recordings, producing them only after most of the discovery in the case was done and when the disclosure appeared to benefit her. For these reasons, Magistrate Judge Finnegan determined that discovery into the evidentiary foundation and the making of the recordings was necessary to allow the court to determine their admissibility.

Magistrate Judge Finnegan next addressed whether Plaintiff could be compelled to re-produce the audio recordings in a native format with all associated metadata. She found that the metadata for the audio recordings was relevant to the evidentiary foundation for the recordings and therefore granted Defendant's motion in this regard.

Magistrate Judge Finnegan then turned to the question of whether to compel a forensic examination of the devices on which the audio recordings were made. *Id.* at \*5. She explained that a forensic ESI examination is "an extraordinary remedy that is required only if the moving party can actually prove that the responding party has concealed information or lacks the expertise necessary to search and retrieve all relevant data." She noted the importance of

protecting the nonmoving party's privacy interests, stating that "[m]ere suspicion or speculation that an opposing party may be withholding discoverable information is insufficient to support an intrusive examination of the opposing party's electronic devices or information system."

Defendant argued that a forensic examination was necessary to investigate the "creation, storage, transfer, and/or deletion of any of the Audio Files and/or other, yet-unproduced recordings of telephone conversation with Etihad employees." In particular, Defendant argued that a forensic exam was appropriate because Plaintiff either intentionally concealed the audio recordings or lacked the competence to locate and identify additional recordings. In response, Plaintiff contended that "her memory was sparked and she went looking for the material that she thought might be there. Finding it, she provided it."

Magistrate Judge Finnegan found that several factors weighed in favor of ordering the requested forensic examination, including (i) Plaintiff's late production of key evidence, (ii) unanswered questions about the creation of the audio recordings, and (iii) Plaintiff's counsel's statement that he "ha[d] no knowledge as to the device" on which the recordings were made. But she found that she was not prepared to order an examination to proceed based on the record before her. Instead, she concluded that it was sufficient to grant the additional discovery into the audio recordings, after which Defendant could renew its request for a forensic examination.

In addition to the discovery already ordered and the production of the audio recordings in their native format with accompanying metadata, Magistrate Judge Finnegan ordered that Plaintiff's counsel provide Defendant's counsel with an affidavit that — after consultation with Plaintiff and a reasonable and good faith search — all responsive audio recordings and transcripts in Plaintiff's possession, custody, and control have been produced and none have been withheld.