

3. In *Rheem v. UPMC Pinnacle Hospitals*, No. 23-cv-75, 2024 WL 4494695 (M.D. Pa. Oct. 15, 2024), U.S. Magistrate Judge Martin C. Carlson addressed the standards for forensic evaluation of a nonparty's mobile device and for the imposition of additional ESI searches.

In this workplace disability discrimination case, Plaintiff alleged that he began using CBD oils and gummies to treat pain after undergoing multiple medical procedures to alleviate a chronic spine condition. *Id.* at *1. Plaintiff further alleged that UPMC Pinnacle Hospitals (UPMC) knew about Plaintiff's use of CBD products, which were legal and could occasionally yield positive drug test results, but nonetheless accused Plaintiff of being impaired and suspended his employment. Plaintiff claimed that UPMC also denied him the opportunity to participate in its Last Chance Agreement program, which was "routinely" offered to first-time minor drug and/or alcohol offenders, and then terminated Plaintiff's employment.

Plaintiff alleged that the work-related justification for his termination was pretextual and that UPMC's decision to terminate him was based on his medical condition in violation of the interference and retaliation provisions of the Americans with Disabilities Act and other workplace disability discrimination statutes.

During discovery, several disputes arose including with respect to a forensic examination of a cell phone and the scope of UPMC's ESI searches.

With respect to the first issue, Plaintiff sought an order compelling a nonparty coworker, Robin Wible, to turn her personal cell phone over to UPMC so that UPMC could conduct a forensic examination of the phone for derogatory information relating to Plaintiff. *Id.* at *2. Plaintiff claimed that Wible initiated the report of his alleged drug use and that she "occasionally used her personal cell phone for business purposes."

Magistrate Judge Carlson concluded that "considerations of privacy and practicality, along with relevance and proportionality, all caution against ordering a forensic review of this non-party's personal cell phone." *Id.* at *6. He recognized that "there is a uniquely intrusive aspect" to a "forensic review of the electronic media of a non-party," which could include "the most intimate of personal details on a host of matters, many of which may be entirely unrelated to issues in specific litigation." Based on these concerns, Magistrate Judge Carlson explained that courts have recognized a need to "guard against undue intrusiveness" and to be "cautious in requiring" the forensic inspection of electronic devices in order to protect privacy interests, and "[m]ere suspicion" or speculation that a party may be withholding discoverable information is insufficient to support an "intrusive examination" of the party's electronic devices or information systems. *Id.* (quoting *Hespe v. City of Chicago*, No. 13 C 7998, 2016 WL 7240754, at *4 (N.D. Ill. Dec. 15, 2016)).

Magistrate Judge Carlson concluded that caution was particularly important in this case because Wible's phone was not backed up and relevant information was unlikely to exist on the phone, because there was no indication that Wible played any policy-making or decision-making role in Plaintiff's termination, and because a forensic review of Wible's personal cell phone would be both disproportionate and particularly invasive of her personal privacy. *Id.* at *7.

Magistrate Judge Carlson next turned to Plaintiff's complaint that UPMC's search terms for its ESI were too narrow, in particular because UPMC failed to include relevant terms such as "CBD," "THC," and "marijuana." In response, UPMC argued that these terms were, in fact, used in the ESI search it conducted, and that search yielded more than 2,000 potentially relevant documents containing some 368,000 pages of material.

Magistrate Judge Carlson explained that "ESI searches are best performed in a collaborative fashion," invoking *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 *Sedona Conf. J.1* (2018). In particular, he explained that the Sedona Principles identify "two specific, collaborative strategies" designed to "enhance the fairness and transparency of voluminous ESI discovery review," which include the use of relevant search terms and ongoing sampling of data to assess the accuracy of search terms.

Magistrate Judge Carlson noted that the "collaborative efforts between the parties may have fallen short of the ideals expressed in the Sedona Principles" but concluded that UPMC's search was adequate. *Id.* at *8. He explained that the lawsuit involved a "fairly straightforward and discrete series of allegations," and that UPMC insisted it searched its ESI using the terms Plaintiff complained about. He found that absent a showing of deficiency in UPMC's ESI search protocol, UPMC had "adequately captured potentially relevant electronically stored data."

Accordingly, Magistrate Judge Carlson also denied Plaintiff's request to expand UPMC's ESI searches.