

## Semsroth v. City of Wichita

United States District Court for the District of Kansas  
October 14, 2004, Decided; October 14, 2004, Filed  
Case No. 04-1245-MLB

**Reporter:** 2004 U.S. Dist. LEXIS 30726

GRETA SEMSROTH, on behalf of herself and all others similarly situated, et al., Plaintiffs, -vs- CITY OF WICHITA, et al., Defendants.

**Subsequent History:** Claim dismissed by Semsroth v. City of Wichita, 2004 U.S. Dist. LEXIS 30727 (D. Kan., Oct. 25, 2004)

**Counsel:** [\*1] For Greta Semsroth, On behalf of herself and all others similarly situated, Kim Warehime, On behalf of herself and all others similarly situated, Sara Voyles, On behalf of herself and all others similarly situated, Heather Plush, On behalf of herself and all others similarly situated, Plaintiffs: Lawrence W. Williamson, Jr., LEAD ATTORNEY, Williamson Law Firm, LLC, Kansas City, KS.

For Wichita City of, District of Kansas, Wichita Police Department, Chief Norman Williams, Individually and in his official capacity, Defendants: Kelly J. Rundell, LEAD ATTORNEY, City of Wichita, Kansas - Law Department, Wichita, KS.

**Judges:** Donald W. Bostwick, U.S. MAGISTRATE JUDGE.

**Opinion by:** Donald W. Bostwick

### Opinion

### MEMORANDUM AND ORDER

On October 8, 2004, Defendants filed a Motion for Protective Order and Order in Limine (Doc. 24) accompanied by the affidavits (with attachments) of Kevin Norman and Kelly Rundell. Plaintiffs filed a Memorandum in Opposition on October 11, 2004 accompanied by the affidavit of Lawrence Williamson and correspondence between counsel. (Doc. 25.) Due to the nature of the motion, the court held oral argument on October 12, 2004.

Defendants' motion seeks an order "which permits the City of Wichita to re-enable [\*2] the expiration process on the TSM system and resume normal operations, prohibits plaintiffs from making motions, arguments or claims of spoliation of computerized evidence, and protects defendants from awards of fees, expenses, sanction or

penalties for alleged spoliation of computerized evidence." (Doc. 24, at 3.) Plaintiffs' opposition asks the court "to deny defendants motions, to issue an Order to Preserve Evidence, and to Order sanctions against defendants for bringing such an unfounded motion." (Doc. 25, at 8.) After hearing arguments of counsel and reviewing the filings and all attachments, the court orally **GRANTED** Defendants' motion insofar as it permits the City of Wichita to re-enable the expiration process on the TSM system and resume normal operations, and **DENIED** the remainder of Defendants' motion. As to Plaintiffs' requests, the court declined to enter a preservation order at this time and denied, without prejudice to renewal at a future time, the request for sanctions.

The present motions involve Defendants' obligation to preserve material in electronic format, particularly materials located on back-up tapes used by the City of Wichita for disaster protection purposes. [\*3] This action was filed on July 28, 2004. (Doc. 1.) On July 26, 2004, counsel for Plaintiffs wrote to the City advising them of their obligation to preserve evidence that is relevant to the lawsuit. (Doc. 24, Rundell Aff., Attach. A.) Counsel advised that the scope of this duty encompassed e-mails, databases, activity logs, and all electronic data files, and included both on-line data storage on computers and mainframes as well as off-line data storage, such as backups and archives. The letter specifically referred to all information sent or received by all members of the Wichita Police Department, all current and past managers of the City, including any interim managers, all City Council members, both past and present, the current Mayor (sic) of the Wichita Police Department, and members of the EEO office of the City of Wichita. *Id.* at 3-4. Finally, the letter referenced all information regarding discipline of Wichita Police Department Personnel, all information regarding female officers, all information regarding promotions and awards of officers, and all information regarding the unequal treatment of female officers in the Wichita Police Department. *Id.*

On August 11, 2004, counsel [\*4] for the City responded to this letter raising several issues about the City's computer and e-mail systems and suggested that a meeting be held with computer experts from both sides to better define the issues. (Doc. 24, Rundell Aff., Attach. B.) Plaintiffs' counsel responded by letter of August 26, 2004, (a copy of which was provided at the hearing) and the

City's counsel replied by letter of September 3, 2004. (Doc. 24, Rundell Aff., Attach. C.) Subsequently, the parties exchanged e-mails on September 30, 2004 and October 5, 2004. No meeting was held between counsel and their computer experts prior to the filing of the motion and the hearing. Likewise, the City took no affirmative action to alleviate the problem which they clearly knew would result from disabling the expiration process on the TSM system.

The City submitted the affidavit of Kevin Norman who is the Senior System Analyst in the IT/IS Department of the City (Doc. 24, Norman Aff., at 2), and Mr. Norman attended the October 12, 2004 hearing. His affidavit explains the back-up system used for disaster data storage by the City -- the Tivoli Storage Manager (TSM). TSM backs up the City's computer network system, but does not [\*5] back-up data stored on the hard drives of the City's 1361 computer terminals that are connected to the network. TSM does not, however, provide the back-up for the City's e-mail system, which has its own separate back-up system. <sup>1</sup> TSM uses a progressive backup methodology, which means that TSM performs a full back-up only one time, and from that point on only backs up changed data. That data is spread across numerous tapes, and data related to a specific person could be (and more likely is) spread across a number of back-up tapes within the tape library. Currently there are 122 back-up tapes in use in the TSM system. The recovery log on the server has a maximum allowed storage capacity of 13 gigabytes and if the recovery log reaches that amount, the TSM server will crash. At the hearing, Norman advised that the server capacity had been reached that day and, as a result, the back-up server was disabled. As a result, no additional back-up can be accomplished and, in the event of a disaster, the City would be unable to recover any data entered after October 12, 2004. Therefore, the City has requested permission of the court to re-enable its expiration process <sup>2</sup> so that it can restart the [\*6] TSM back-up system.

Both parties refer the court to Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) (Zubulake IV), concerning a party's obligation to preserve electronic data. In

that case, the court discussed the scope of the duty to preserve:

Must a corporation, upon recognizing the threat of litigation, [\*7] preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, "no". Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.

At the same time, anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary. 220 F.R.D. at 217 (footnotes omitted).

The court then summarized the scope of a party's preservation obligation:

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes *would* likely be subject [\*8] to the litigation hold. 220 F.R.D. at 218.

Norman's affidavit states that the TSM tapes are not searchable by content and thus cannot be searched using a word search format. The only method of ascertaining what is on the tapes is by guessing based on the names of the files and then restoring the tapes onto disks before they can be searched. (Doc. 24, Norman Aff., at 6). It thus appears to the court that in computer parlance, the TSM back-up tapes are inaccessible. See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318-20 (S.D.N.Y. 2003)

<sup>1</sup> Norman stated at the hearing that the City had created a duplicate of the back-up tapes for the City's e-mail system shortly after receiving the letter of July 26, 2004. Thus, the problems discussed concerning the TSM system are not applicable to e-mail back-ups. Likewise, the City has apparently advised all appropriate employees not to destroy information or data relevant to this lawsuit and has assured that any hard drives from the computers of "key players" identified by Plaintiffs will not be destroyed. Thus the focus of the present opinion is only on the TSM back-up system.

<sup>2</sup> The expiration process is the process that cleans up, i.e., deletes, inactive or deleted files that no longer need to be maintained on the back-up server or back-up tapes. The expiration process is set for fixed time parameters and allows the TSM system to function automatically within those parameters.

(*Zubulake I*) (describing five categories of data and classifying back-up tapes--Category 4--as inaccessible<sup>3</sup>).

Here, the City placed a "litigation hold" on the TSM back-up process after receipt of the July 26, 2004 letter, but the continuation of that hold has made the system inoperable due to capacity restraints. Litigation holds, like preservation orders, are subject to modification depending on the circumstances. For example, the form initial preservation order set out in the *Manual for Complex Litigation*, [\*9] *Fourth*, § 40.25, contains a paragraph stating that a party may apply to the court for further instructions regarding the duty to preserve specific categories of documents, and

A party may seek permission to resume routine business processes relating to the storage or destruction of specific categories of documents, data, or tangible things, upon a showing of undue cost, burden or overbreadth. That is precisely what the City has done in this case. Under the circumstances presented, the court finds that the City should be allowed to immediately re-enable the expiration process on the TSM system and resume normal back-up operations. While this will result in deletion of data from the back-up TSM system, no party has been able to identify specifically what data will be erased or whether any such data even relates to the Wichita Police Department as opposed to the various other city agencies who maintain files and data on the City's system.

By allowing the City to re-enable the expiration process on the TSM system, however, the court is in no way relieving the City from its obligation to preserve evidence which is unique to this case and which it knows is relevant to the subject matter of [\*10] the present action. Likewise, the court is not granting the City's request to protect it from any future motions or requests for sanctions should it be determined that the City destroyed relevant documents.

As to Plaintiffs' request for a preservation order, the court will not enter a preservation order at this time. Defendants have advised their employees of the obligation to preserve relevant documents and there is no evidence that the City has lost or destroyed evidence that is relevant to the present case. Under those circumstances, the court will not grant a blanket preservation order. *See, e.g., Madden v. Wyeth*, No. 3-03-CV-0167-R, 2003 U.S. Dist. LEXIS 6427, 2003 WL 21443404, at \*1 (N.D.Tex. Apr. 16, 2003).

While the court's ruling will allow the City to re-enable their TSM back-up system, there will obviously be many questions that still need to be answered concerning preservation and production of electronic data in this case. From a review of the prior communications between counsel in this case, it appears to the court that both sides have been more involved with posturing than with the genuine resolution of issues concerning the management of electronic data. It further appears that counsel are not [\*11] fully and adequately communicating with each other in an attempt to resolve those issues. This failure to communicate led to the last minute "crisis" motion concerning the TSM system which could have been avoided had this issue been fully discussed and addressed by counsel earlier. Both sides bear some responsibility for this delay and confusion.

A scheduling conference has been set previously in this case for October 19, 2004 at 9:00 a.m. Under paragraph 4 of the court's Electronic Discovery Guidelines, the parties have the obligation to meet and confer in good faith concerning procedures for handling electronic information prior to the scheduling conference. Because of the lack of meaningful communication to date, the court hereby directs the parties to meet and confer in person, accompanied by their respective in-house or retained computer expert, prior to the scheduling conference to specifically address the items set out in the court's Electronic Discovery Guidelines. In order to allow counsel time to meet and confer, the court hereby continues the scheduling conference for one week to **October 26, 2004 at 9:30 a.m.** If the parties are unable to reach agreement on the issues concerning [\*12] electronic discovery set out in paragraph 4 of the court's Electronic Discovery Guidelines, they should bring their respective in-house or retained computer experts to the scheduling conference so those issues can be taken up with the court.

**IT IS THEREFORE ORDERED** that Defendants' Motion for a Protective Order and Order in Limine (Doc. 24) is **GRANTED IN PART AND DENIED IN PART** as set forth above. Plaintiffs' requests for a preservation order and for sanctions are **DENIED** as set forth above.

Dated in Wichita, Kansas, on this 14th day of October, 2004.

s/ Donald W. Bostwick

U.S. MAGISTRATE JUDGE

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<sup>3</sup> Inaccessible data is not readily usable. Backup tapes must be restored before the data is usable. That makes such data inaccessible. 217 F.R.D. at 320.