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United States Court of Appeals
Tenth Circuit

April 17, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

YOSEPH YADESSA KENNO,

Plaintiff - Appellant,

v.

COLORADO GOVERNOR'S OFFICE OF INFORMATION TECHNOLOGY,

Defendant – Appellee,

LYUBOV LOGACHEVA, in her individual capacity; BOB MCINTYRE, in his individual capacity; DON WISDOM in his individual and official capacity,

Defendants.

Nos. 21-1353 & 21-1434
(D.C. No. 1:19-CV-00165-MEH)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **PHILLIPS**, and **EID**, Circuit Judges.

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* After examining the briefs and appellate records, this panel has determined unanimously that oral argument would not materially assist in the determination of these appeals. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

In these consolidated appeals, Yoseph Yadessa Kenno appeals the district court's dismissal of his claims as a sanction for fabrication of evidence, the court's denial of his motion for reconsideration, and the court's award of fees and costs to the defendants. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm in each appeal.

BACKGROUND

The Colorado Governor's Office of Information Technology ("GOIT") employed Kenno as a database administrator from January 2017 to December 2018. GOIT terminated Kenno's employment after progressive discipline failed to correct what it viewed as serious performance problems. Kenno, who is black and Ethiopian, appealed his termination to the Colorado State Personnel Board ("Board"). He also filed charges of discrimination and retaliation with the Colorado Civil Rights Division ("CCRD"), which found no probable cause for discrimination or retaliation. In addition, Kenno filed the action underlying these appeals against GOIT and several GOIT employees, asserting multiple claims of discrimination, retaliation, wrongful discharge, and constitutional violations under various federal statutory schemes.

In proceedings before the Board, the CCRD, and the district court, Kenno produced evidence GOIT believed he fabricated or manipulated. GOIT moved for sanctions before the Board. The Board granted GOIT's motion, dismissed Kenno's case with prejudice, and awarded GOIT reasonable costs and attorney fees related to the fabrications.

In the district court, defendants filed a motion to dismiss Kenno's claims as a sanction for fabrication of evidence and also sought an award of costs and attorney fees. After a two-day evidentiary hearing, the district court granted defendants' motion. The court found by clear and convincing evidence that Kenno had fabricated or manipulated an audio file, emails, and a Google domain from which he sent fake recovery emails to his state email account. Accordingly, exercising its inherent powers, the district court granted defendants' motion, dismissed Kenno's claims with prejudice, awarded defendants their reasonable costs and attorney fees, and entered judgment. Kenno filed a motion for reconsideration, which the district court denied. Kenno then filed a notice of appeal, giving rise to No. 21-1353. After further post-judgment litigation, Kenno filed another notice of appeal, giving rise to No. 21-1434.

DISCUSSION

I. Dismissal as a Sanction

A. Standard of Review

"A district court has inherent equitable powers to impose the sanction of dismissal with prejudice because of abusive litigation practices during discovery." *Garcia v. Berkshire Life Ins. Co. of Am.*, 569 F.3d 1174, 1179 (10th Cir. 2009). [B]ecause dismissal is such a harsh sanction, it is appropriate only in cases of willfulness, bad faith, or some fault." *Xyngular v. Schenkel*, 890 F.3d 868, 873 (10th Cir. 2018) (internal quotation marks omitted). Dismissal is warranted where a

party has fabricated evidence, *Garcia*, 569 F.3d at 1181, but the evidence of fabrication must be clear and convincing, *Xyngular*, 890 F.3d at 873–74.

"We review a court's imposition of sanctions under its inherent power for abuse of discretion." *Id.* at 872 (internal quotation marks omitted). "An abuse of discretion occurs when the district court bases its ruling on an erroneous conclusion of law or relies on clearly erroneous fact findings." *Id.* (internal quotation marks omitted).[1]

Although Kenno had counsel for much of the district court proceedings, including the evidentiary hearing on defendants' sanctions motion, he appears pro se on appeal. We thus construe any of his pro se filings liberally, but we may not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

B. Audio Recording Manipulation

In late 2017 and early 2018, Kenno attempted to straighten out a problem with GOIT's deposits to his Health Savings Account ("HSA"). Kenno contacted GOIT's human resources department ("HR"), which directed him to the State Benefits department.[2] State Benefits resolved the problem by March 2, 2018. Kenno's supervisor, Lyubov Logacheva, received a request to speak with Kenno from her

[1] This circuit has suggested five factors a district court should consider before dismissing a case as a sanction. *See Garcia*, 569 F.3d at 1179. The district court here considered those factors, but Kenno has not taken issue with that part of the court's ruling.

[2] State Benefits is a department within the Department of Personnel and Administration and is separate from GOIT.

supervisor, who had told her Kenno had been rude to an HR employee. On March 13, 2018, Logacheva spoke with Kenno about his communications with HR.

On April 13, 2018, Logacheva released Kenno's performance evaluation, rating him successful overall but needing improvement in some areas, including communication and accountability for failure to meet deadlines. The need for improvement in accountability stemmed in part from his failure to meet a January 2018 deadline for an Oracle Cloud project. According to Logacheva, Kenno had primary responsibility for the project and a Caucasian co-worker had a secondary role. Kenno submitted a draft document to Logacheva on the due date, but she found it unsatisfactory. Also on the due date, Kenno and the co-worker had spoken by phone about the project. Kenno recorded that call on his personal cell phone. *See* Hr'g Ex. MMM.[3] Kenno produced the audio recording of the conversation in his initial discovery disclosures in this case.

In their motion for sanctions, defendants asserted Kenno had manipulated the recording by altering one seventeen-second section of his side of the conversation to make it appear that his co-worker had equal responsibility for the Oracle Cloud project and, on the due date, still needed to make changes to the draft document that was sent to Logacheva. Defendants presented an expert in the field of "audio and visual forensic analysis and enhancement," Angela Malley. R., Vol. 4 at 616:23–24.

[3] Unless otherwise indicated, our citations are to the record, supplemental record, and hearing exhibits filed in No. 21-1353. Hearing exhibits are located in Volume 2 of the Supplemental Appendix filed in No. 21-1353. For convenience we simply cite them as "Hr'g Ex."

Malley testified that her critical-listening analysis of the sound recording and her analysis of the digital audio file uncovered evidence of manipulation, including blips at the beginning and end of the altered section, the sudden lack of any background noise or comments from the co-worker, a sudden and significant increase in the decibel level of that section, and the presence of an encoder associated with a free audio editing tool but not associated with the recording software Kenno claimed he had used to record the conversation.

The district court found by clear and convincing evidence that Kenno manipulated the audio recording to strengthen the merits of his discrimination case by demonstrating pretext because the co-worker was not disciplined for presenting an unsatisfactory work product by the due date. The court also noted that Kenno had "previously edited other audio files sent to the CCRD, demonstrating his capability and propensity to manipulate files." R., Vol. 2 at 465.

Kenno's sole appellate argument regarding the audio file is an unsupported, conclusory statement that defendants presented no evidence he had manipulated "any audio file on [his] personal devices." Aplt. Opening Br. at 22. To the extent this statement is meant to suggest that the district court was required to find Kenno used his own personal devices to manipulate the audio, we reject it. To the extent Kenno means to challenge the fundamental proposition on appeal regarding the audio recording—whether clear and convincing evidence showed that he manipulated the audio recording at all, regardless of whether he used his own device—his one-sentence argument is inadequate to preserve appellate review. *See United States*

v. Barrett, 797 F.3d 1207, 1219 (10th Cir. 2015). But regardless, our review shows that clear and convincing evidence supports the district court's finding that Kenno manipulated the audio recording.

C. Fabrication of Emails Related to HSA Issue

1. Four Versions of the HSA Emails

In the district court, at least four different versions of a two-email exchange Kenno allegedly had with Logacheva in March 2018 came to light ("HSA Emails").

On June 28, 2019, Kenno emailed CCRD investigator Megan Bench and provided a link to a 432-page PDF document that contained a version of the HSA Emails ("CCRD Version," Hr'g Ex. C). In this version, Kenno stated in an email purportedly sent to Logacheva on Monday, March 19, 2018, that he had "just got off from a call with these benefits people" about his HSA contributions and they had made discriminatory comments to him: "During the call, they told me how their [department] doesn't doll [sic] out welfare checks. I wasn't asking for welfare. They were snickering too after telling me this. They wouldn't have mentioned welfare if I wasn't a black guy." Hr'g Ex. C at 1. Logacheva's purported reply indicated that she was "certain they were not discriminating against" Kenno, surmised that he perhaps misunderstood, and admonished him to follow GOIT "Values described in [his] performance plan when communicating with HR and refrain from making similar accusations going forward." *Id.* Importantly, Kenno's email to Logacheva showed it was not sent from his state email address but from the email address State Benefits had used to communicate with him about his HSA issue.

Although the CCRD Version was the first one Kenno created, GOIT did not obtain it from the CCRD until December 2020, after Kenno produced the other three versions, which we now describe.

In August 2019, Kenno produced in discovery a version of the HSA Emails in PDF format ("Discovery Version," Hr'g Ex. E). The body of the Discovery Version was the same as the CCRD Version, and the send date of Kenno's email to Logacheva was also the same as the CCRD Version (Monday, March 19, 2018). But Kenno's email to Logacheva now showed it was sent from Kenno's state email address, not from the State Benefits email address.

In February 2020, Kenno produced in discovery another version of the HSA Emails, this time in native .msg format[4] ("First MSG Version," Hr'g Ex. B). The First MSG Version had spacing, grammar, and spelling errors not present in the CCRD or Discovery Versions, and the send date of Kenno's email to Logacheva was "Mon, Mar 18, 2018," Hr'g Ex. B at 1, but in 2018, March 18 fell on a Sunday. Kenno admitted that a copy of the First MSG Version was found on his personal laptop.

Kenno produced the fourth version of the HSA Emails ("Second MSG Version," Hr'g Ex. U) on December 1, 2020, as part of his fourth supplemental disclosures. The Second MSG Version was attached to an email Kenno purportedly

[4] According to defendants' computer-forensics expert, "[a]n MSG is a native email format that's associated with Microsoft." R., Vol. 4 at 662:5–6. The district court explained that for purposes of the case, native format is the digital format a computer program uses when creating documents. *Id.* at 936:17–22.

sent on June 14, 2018 ("June 14 Email," Hr'g Ex. DDD) to another CCRD employee who was investigating his discrimination charges. In the Second MSG Version, the date of Kenno's email to Logacheva was corrected to Monday, March 19, 2018, but the body of the email had the same spacing, grammar, and spelling errors as the First MSG Version. Defendants' computer-forensics expert, Sarah McDermott, analyzed the header of the Second MSG Version and concluded that this version was addressed to Logacheva but delivered to Kenno's state email address, which was "inconsistent with an authentic email." R., Vol. 4 at 678:13–15. The June 14 Email was not located in CCRD's case files for Kenno's charges or on Kenno's personal laptop.

2. District Court's Ruling on HSA Emails

The district court found by clear and convincing evidence that Kenno fabricated all four versions of the HSA Emails and the June 14 Email. The court noted Kenno alone produced each different version, and the visual differences, which "could only be caused by user manipulation," combined with the timing of his disclosures showed "a clear progression of events consistent with [Kenno] creating the versions at different stages to respond to external developments of the moment." R., Vol. 2 at 465. The court elaborated: Kenno learned from CCRD in June 2019 about a temporal problem with his retaliation claim—Logacheva's adverse performance review occurred in April 2018, but Kenno had asserted in his state discrimination proceedings that his first protected conduct occurred after that, in May 2018. To remedy that causation problem, Kenno created the CCRD version in an attempt to show he engaged in protected activity in March 2018, but it had erroneous

sender information. Next, likely believing no one else would find the CCRD Version, Kenno created the Discovery Version to correct the wrong sender information in the CCRD Version, and when the Board ordered him to turn over native email files in February 2020, he created the First MSG Version with the date, spelling, spacing, and grammar errors not present in the CCRD Version or the Discovery Version. Then, when the Board administrative law judge informed Kenno in November 2020 that she had serious concerns about GOIT's allegations of fabricated evidence, Kenno created the Second MSG Version and attached it to the June 14th Email, which he also fabricated, in an attempt to legitimize the other versions of the HSA Emails.

The district court further observed that Kenno "had the motive, ability, and opportunity to fabricate the emails," taking advantage of an admitted "mistake in the charge of discrimination stating he was discriminated against on or around March 18, 2018, instead of May 18, 2018," and "play[ing] off" the problem with his HSA contributions that was "resolved on March 2, 2018. *Id.* at 466.[5] The court noted that in proceedings before the CCRD and an unemployment hearing officer, Kenno had never mentioned the HSA Emails or the acts described in them until June 28, 2019, which was when he sent the CCRD Version to Bench. Prior to that date, the evidence

[5] Kenno admitted in 2018 to Bench that the charge contained the wrong date. *See* Hr'g Ex. EE at 2, ¶ 5 (Bench's stipulated testimony); Hr'g Ex. TT (charge referring to March 18, 2018, as the date Logacheva revoked Kenno's telecommuting privilege after he complained of discriminatory treatment).

showed Kenno had consistently maintained his first protected activity occurred in May 2018, which was a complaint that a time-reporting requirement was discriminatory.

The court also pointed to testimony from multiple witnesses that the HSA Emails "do not exist in GOIT's system, despite a litigation hold that captured other emails from around the same time concerning [Kenno's] HSA contributions." *Id.* at 467. And the court relied on Logacheva's testimony that she did not send or receive the HSA Emails, access Kenno's email account, or delete the HSA Emails or any other emails relevant to Kenno's claims.

Finally, the district court explained that although Kenno's expert witness, Franklin Brackin, had concluded the First MSG Version was authentic because it had "passed through certain authentication paths," defendants' expert, McDermott, explained that those "paths pertain to spam and spoofing and do not determine whether an email was actually sent." *Id.* The court further relied on McDermott's demonstration how an email could be fabricated and how a fabricated email could pass through the authentication paths that Brackin had relied on.[6]

[6] The district court also found that Kenno manipulated versions of the June 28, 2019 email and the associated 432-page PDF document that he and his expert produced in December 2020. As noted, Kenno used the June 28 email and the PDF document to transmit the CCRD Version to Bench. We need not recite the details of the December 2020 fabrications because in his opening brief, Kenno fails to adequately raise any appellate challenge to the district court's finding that he had manipulated them for his benefit. *See Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)). Nor has Kenno adequately presented

3. Kenno's Arguments

Kenno contends that the forensic evidence does not support the district court's finding that he fabricated the MSG versions of the HSA Emails. We disagree. But we first note that the district court found the visual differences between the HSA Emails alone were strong evidence of user manipulation, and other circumstantial evidence showed that Kenno had the motive, ability, and opportunity to fabricate the HSA Emails. Kenno has not addressed these findings, in particular the findings concerning fabrication of the two PDF versions (CCRD and Discovery Versions).

Regarding the forensic evidence, Kenno points out that McDermott requested access to his personal electronic devices to look for previous versions of the MSG emails and for software programs that could have been used to create or modify the MSG emails, yet she never located any previous versions or modification software. However, these objects of McDermott's search were but part of a lengthy list of information she sought to analyze if given access to Kenno's devices and email accounts. We therefore reject Kenno's suggestion that McDermott's methodology was flawed. Furthermore, Kenno has not explained, nor do we see, how the failure to find previous versions of the MSG emails or any email-modification programs on Kenno's personal devices undermines either McDermott's analysis of the MSG emails or the other, non-forensic evidence showing Kenno fabricated the HSA

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any argument in his opening brief concerning the district court's finding that he fabricated the June 14 Email.

Emails. Nor does Kenno's argument account for the possibility that he could have created or modified the MSG emails on a device other than his own.

Kenno next faults McDermott for failing to identify by name a free conversion tool she claims was involved in the creation of the MSG emails. Kenno, however, has not contested that such tools exist.[7] Therefore, McDermott's failure to name one such tool does not undermine the district court's finding that Kenno fabricated or manipulated the MSG emails.

Kenno also argues that the metadata McDermott extracted from the MSG emails showed those emails were created and last modified in March 2018. But McDermott explained how dates in email metadata can be manipulated using a text editor. *See* R., Vol. 4 at 666:25 to 667:14. And she testified that it would have been possible to fabricate an email in 2019 or 2020 that appears it was sent in 2018, *see id.* at 728:19–23, provided it was not actually sent through an email system, *see id.* at 714:14–16, 715:8–12. We therefore reject Kenno's argument.

Kenno also questions the district court's treatment of testimony involving Google's email authentication tool. His expert, Brackin, testified that the First MSG Version was authentic because its headers passed Google's authentication tool. The district court rejected that opinion based on McDermott's testimony that the headers

[7] GOIT uses Gmail. R., Vol. 4 at 731:10–11. The HSA Emails were added to a chain of emails concerning the HSA contribution issue Kenno had with the State Benefits team using GOIT's email system. We therefore fail to see the relevance of Kenno's reply-brief argument concerning whether emails in MSG format can be fabricated through the use of a text editor.

of a fabricated email could pass through that tool. The court then accepted McDermott's testimony that the original June 28 email to Bench was authentic because its header passed the Google authentication tool. Kenno claims this differential treatment of opinions regarding the use of the authentication tool was unfair. We see no error because there was no question that Kenno actually sent the original June 28 email, but the authenticity of the First MSG Version was very much in question.

Finally, Kenno argues the district court erred by admitting a pre-recorded video demonstration, Hr'g Ex. III, McDermott used to illustrate her testimony that an email can easily be fabricated. He asserts that defendants did not disclose the video until the week before the hearing. GOIT argues the video was merely a demonstrative aid consistent with opinions McDermott expressed in her timely-disclosed expert reports. We see error, but it was harmless. Federal Rule of Civil Procedure 26(a)(2)(B)(iii) requires disclosure, in a timely expert report, of "any exhibits that will be used to summarize or support" an expert's opinion. This procedure was not followed here. But because the video merely illustrated McDermott's opinions that were timely disclosed in her reports, the procedural error was harmless; McDermott's testimony would have been the same without use of the video. *See* Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that

information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.").[8]

D. Fraudulent Google Domain and Email Address

On November 18, 2020, a Google domain and a related recovery email address were created. Soon thereafter, the domain and email address were used to send more than 1700 emails to Kenno's state email account, including a version of the HSA Emails, each purporting to be recovering a previously deleted email. Then, in December 2020, when Kenno and his attorney remotely observed GOIT employee Lilo Santos conduct a search of Kenno's email account for the period of Kenno's employment with GOIT (January 2017 through December 3, 2018), Kenno asked to extend the search through the date of the search. Defendants refused to deviate from the agreed search parameters, and the search ended. GOIT then searched Kenno's email account without the time limitation and discovered the 1700+ emails. Google verified that neither the domain nor the recovery email address were associated with any Google corporate accounts and that it does not have a process for recovering emails in this manner. Google also indicated that Santos was identified as the creator of the domain and it was registered using "lilosantaangelo@gmail.com." Santos

[8] Appended to Kenno's argument about McDermott's use of the video is a perfunctory argument that the district court erred in relying on the testimony of two other GOIT witnesses, Lilo Santos and James Karlin, because their testimony amounted to expert testimony that prejudiced Kenno. *See* Aplt. Opening Br. at 20. Kenno wholly fails to develop this argument, so it is waived. *See Barrett*, 797 F.3d at 1219.

testified that the email address was not his, his last name is not "Santaangelo," and he did not create the domain or the recovery email address.

The district court found by clear and convincing evidence that Kenno had created the Google domain and the recovery email address and sent the recovery emails to cover up his other fabrications. The court reasoned that Kenno's request for the searches to be run through the present showed he knew the fake recovery emails existed in his account, and only he had the motive and the relevant knowledge to plant the emails. Santos did not know what the search terms were going to be until several days after the fraudulent domain was created, the email address used to register the domain did not list Santos's real name or email address, and Santos had no reason to help Kenno.

Kenno argues that in finding he had created the fraudulent Google domain, the district court used a privileged attorney-client communication against him—his demand that the live search include emails through the date of the search. This argument is meritless. Although Kenno claims he directed the demand to his attorney, he waived any privilege by making the statement where others, including defendants' counsel, could hear it. *See In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) ("Because confidentiality is key to the privilege, the attorney-client privilege is lost if the client discloses the substance of an otherwise

privileged communication to a third party." (brackets and internal quotation marks omitted)).[9]

Kenno also contends the district court erred by accepting Google's affidavit that the domain was fraudulent but rejecting Google's certificate of authenticity listing Santos as the registrant. We disagree. The issue boiled down to whether Kenno created the domain but attempted to make it appear Santos had done so. The district court found that Kenno did just that, and we cannot say the court clearly erred in that finding.[10]

II. Pre-Judgment Discovery Rulings

Kenno raises several issues concerning discovery rulings entered prior to the district court's dismissal order and judgment. "[D]iscovery rulings are within the broad discretion of the trial court," and we will not disturb them absent "a definite and firm conviction that the lower court made a clear error of judgment or exceeded

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[9] The parties rely on Colorado privilege law, but because this case involves only federal-question jurisdiction, we apply federal common law to any privilege issues. *See* Fed. R. Evid. 501 (subject to exceptions inapplicable here, "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege"); *see also In re Qwest Commc'ns Int'l Inc.*, 450 F.3d at 1184 (explaining that Rule 501 applies to privilege issues in federal-question cases).

[10] Kenno asks us to draw an unspecified adverse inference based on defendants' alleged destruction of evidence. *See* Aplt. Opening Br. at 22–25. But Kenno did not present this issue to the district court and has made no attempt in his opening brief to show how the alleged destruction of evidence satisfies the standard for plain-error review. Although he asks for plain-error review in his reply brief, that request is not only belated, but also wholly conclusory. Kenno has therefore waived appellate review of this issue. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130–31 (10th Cir. 2011).

the bounds of permissible choice in the circumstances." *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1386 (10th Cir. 1994) (internal quotation marks omitted).

Kenno argues the district court erred when it allowed defendants' experts unfettered access to his personal laptop and cell phone despite that he had initially retained the company they worked for, Forensic Pursuit, and had shown Forensic Pursuit where privileged information was located on those devices. This argument overlooks the district court's order narrowly circumscribing the contours of Forensic Pursuit's search and establishing a mechanism for Kenno and his counsel to review and object to any information Forensic Pursuit found on grounds such as privilege before it was provided to defendants. *See* ECF No. 84 at 2–4. We see no abuse of discretion in the district court's handling of the search of Kenno's personal laptop and cell phone.

Kenno complains about the district court's treatment of his request that his expert have direct access to GOIT's Google Vault system, including related audit logs, concerning litigation holds GOIT created.[11] GOIT balked at the request, primarily due to security concerns. Kenno claims GOIT "refused any kind of forensic examination of [its] Google Vault system," Aplt. Opening Br. at 14, and that refusal left his expert unable to analyze any metadata associated with the HSA

[11] Google Vault is a system GOIT uses to preserve data for litigation purposes and to search through emails in Google Drive. *See* R., Vol. 4 at 732:3–9, 735:1–5 (Santos's testimony). Audit logs show who has had access to a Google Vault matter and their activities in the matter. *See id.* at 501:22–24 (Kenno's statement)).

emails, to examine Logacheva's email account, or to look for disclosures GOIT employee John Bartley had provided to Kenno in August 2018 that, Kenno claims, included the HSA Emails from Kenno's state email account and audio and video files.[12] He argues this resulted in unequal access to data because the court allowed defendants' expert direct access to Kenno's personal laptop and cell phone. He also asserts the district court "declined to order the forensic examination of Defendants' Google Vault." *Id.* at 16.

Ultimately, however, at a discovery conference on March 24, 2021, the parties agreed, and the district court ruled, that although Kenno's expert could not access the Google Vault system directly, he could observe and direct a GOIT employee's search of Kenno's email account in the Google Vault system and receive a copy of the results for forensic examination. *See* R., Vol. 4 at 98:18 to 100:2. Thus, Kenno appears simply mistaken that GOIT would not allow any forensic examination of its Google Vault system. *See also generally* Suppl. R., Vol. 1, ECF No. 149, Ex. 3 (video recording of agreed-to search of GOIT's Google Vault system performed on March 31, 2021); R., Vol. 4 at 389 to 443 (transcript of hearing before court on June 7, 2021, where additional searches of Google Vault and Kenno's Google Drive were performed). Furthermore, because his attorney acquiesced in the procedure, Kenno cannot now assert error in the district court's refusal to permit his expert to

[12] Bartley provided sworn written testimony that he had disclosed to Kenno only emails for the dates Kenno had requested—May 16, 2018 through July 11, 2018. Kenno stipulated to that testimony, and it was admitted at the evidentiary hearing.

have direct access to the Google Vault system. *See United States v. Zubia-Torres*, 550 F.3d 1202, 1205 (10th Cir. 2008) (explaining that appellate waiver applies "where a party attempts to reassert an argument that it previously raised and abandoned below").

III. Post-Judgment Rulings

A. Motion to Reconsider

1. Additional Procedural Background

To properly evaluate the district court's denial of Kenno's motion for reconsideration, it is helpful to first review some relevant dates. As mentioned, the parties agreed at the March 24, 2021 discovery conference on a method for searching for native versions of the HSA Emails in Kenno's state email account preserved in the Google Vault matter GOIT created. The court allowed Kenno "to reserve argument on any aspect of that" and to "come back and complain" about any resulting problems. R., Vol. 4 at 99:24–100:2. On March 31, the searches were performed; relevant to Kenno's motion for reconsideration, a blank Google Vault audit log file was produced. On May 5 and 6, the district court held the evidentiary hearing on the motion for sanctions. On June 3, the court held a discovery conference and ordered defendants to provide audit logs of Kenno's Google Vault. On June 4, defendants provided audit logs ("June 2021 Audit Logs"). At a June 7 hearing, the court and the parties searched and examined Kenno's Google Drive and litigation-hold emails directly, not through Google Vault, and GOIT agreed to

produce nine videos it had discovered on Kenno's Google Drive. On June 30, 2021, the district court issued its dismissal order and separate judgment.

Kenno then filed a pro se motion for reconsideration under Rule 59. He argued that four categories of newly discovered evidence required the court to reconsider its dismissal order and to hold a new evidentiary hearing: (1) the June 2021 Audit Logs, which allegedly showed that Santos had accessed Kenno's Google Drive around the time that the 1700+ emails were placed in Kenno's state email account; (2) defects in GOIT's litigation holds and allegedly false hearing testimony regarding them by Santos and Bartley; (3) three of the videos from Kenno's Google Drive that GOIT produced after the June 7 hearing; and (4) assertions that, contrary to evidence presented at the evidentiary hearing, GOIT had a policy to automatically delete emails.[13]

2. The District Court's Order

The district court construed Kenno's motion for reconsideration as seeking Rule 59(e) relief based on "'new evidence previously unavailable'" and denied it. R., Vol. 3 at 899 (quoting *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). The court first rejected Kenno's argument that the June 2021 Audit Logs were defective because they did not contain information from 2016, explaining that Kenno had not shown the relevance of audit logs predating his

[13] Kenno's theory, apparently, was that the HSA Emails did not exist in his state email account because they had been automatically deleted, if not intentionally deleted.

employment with GOIT. The court found Kenno knew of problems with audit logs in March 2021 when he received the blank log, but he never argued that the evidentiary hearing could not proceed without access to the logs, and it was improper to advance a previously available argument in a motion for reconsideration.[14] The court also observed that although production of the June 2021 Audit Logs post-dated the evidentiary hearing, it pre-dated the dismissal order, and Kenno had not sought to reopen the evidentiary hearing record to include information in those logs.

The court next determined that because Kenno had information about all litigation holds in January 2021, he could have raised concerns about the holds at the evidentiary hearing, so his post-judgment argument regarding the holds came too late. The court concluded that his argument that Santos and Bartley provided false testimony about the holds did not warrant Rule 59(e) relief because Santos testified for defendants and was cross-examined at the hearing, the court had considered that testimony, and Kenno had stipulated to Bartley's written testimony.

As to the later-discovered videos, Kenno had argued that Logacheva could have obtained a recording of his voice from them and used it to alter the audio recording of the conversation he and his co-worker had about the Oracle Cloud project. The court found no plausible connection between the videos and the audio

[14] In their response to the motion to reconsider, defendants explained that the March audit log was blank because Kenno requested a search in Google Vault by user yoseph.kenno@state.co.us, and because Kenno's state account was not an authorized Google Vault user, no activity by that user could have taken place, and therefore no activity appeared on the log.

recording because the videos did not contain the exact words Kenno spoke in the altered section of the audio recording.

Finally, the court determined that Kenno's argument that GOIT had an automatic email-deletion policy, which involved the June 2021 Audit Logs, did not warrant reconsideration because Kenno had ample time after those logs were produced to file a motion to reopen the evidentiary record and request additional discovery but failed to do so. The court also found there had been no showing that the single email-deletion policy Kenno identified would have affected any emails relevant to his case.

3. Kenno's Arguments

Kenno claims the district court should have construed his motion to reconsider as one for a new trial under Rule 59(a) rather than Rule 59(e) and applied the Rule 59(a) standard. We disagree. In substance, Kenno's motion asked the district court to reconsider its ruling on the merits of the sanctions motion, so the court properly characterized it as a Rule 59(e) motion. *See Phelps v. Hamilton*, 122 F.3d 1309, 1323–24 (10th Cir. 1997) ("[A] motion will be considered under Rule 59(e) . . . when it involves reconsideration of matters properly encompassed in a decision on the merits." (internal quotation marks omitted)).

We review the denial of a Rule 59(e) motion for an abuse of discretion, although in doing so we review for legal errors de novo. *Burke v. Regalado*, 935 F.3d 960, 1044 (10th Cir. 2019). Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to

the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (internal quotation marks omitted)).

Kenno argues his evidence was new because he obtained it after the evidentiary hearing. As the district court explained, however, Kenno knew about problems with audit logs and litigation holds before the evidentiary hearing but never informed the court that the hearing could not proceed without addressing those problems, and he stipulated to Bartley's testimony and had cross-examined Santos. We see no abuse of discretion in the district court's finding that Kenno could have raised these arguments previously. Such arguments are not a proper basis for reconsideration. *See id.* To the extent the videos and evidence of an automatic email-deletion policy were newly discovered, the court found them irrelevant to the fabrication issues, and we see no abuse of discretion in that finding.

Kenno contends he in fact voiced a concern at the evidentiary hearing about audit logs showing that Logacheva removed files, but the district court struck his testimony. *See* R., Vol. 4 at 943:5 to 945:25.[15] He also points out that the court granted a request his counsel made at the evidentiary hearing to obtain information from Google about the fraudulent Google domain and the 1700+ emails placed in his state email account. *See id.* at 966 (court stating it "would allow one post-discovery endeavor per side"). He then complains the court later reversed course when it stated

[15] The court struck Kenno's testimony because it concerned a matter his counsel had represented to defendants' counsel would not be an issue at the hearing.

it was not going to reopen the record, *see id.* at 535:8–12 (June 3 discovery conference); *id.* at 412:15–16 (June 7 hearing), and then used his failure to seek reopening of the record as to the 2021 Audit Logs as a reason to deny his motion for reconsideration. He adds that it was unfair for the court to ask for and receive copies of two of the videos identified at the June 7 hearing but not the 2021 Audit Logs.

Despite the district court's statements regarding closure of the record, we see no abuse of discretion in its refusal to reconsider its dismissal order based on the June 2021 Audit Logs. At the June 3 conference, when Kenno's counsel said he thought he had raised an issue about the audit logs at the evidentiary hearing, *see id.* at 535:8 to 536:5, the court gave counsel leave to inform the court about it "in an appropriate manner." *Id.* at 538:12–13. The court did not think it would have held the evidentiary hearing if Kenno had argued he lacked necessary evidence. *See id.* at 538:1–8. Despite the request for discovery the court granted at the evidentiary hearing and the June 3 invitation, Kenno never asked the court to consider any information he may have obtained from Google or from the June 2021 Audit Logs until his Rule 59(e) motion. Given Kenno's receipt of the blank audit log on March 31, 2021, the court was well within its discretion to deny reconsideration with respect to the June 2021 Audit Logs on the ground that Kenno had allowed the evidentiary hearing to proceed without any argument that he needed additional audit logs to defend himself.

Further, at the June 7 hearing, after the court stated it was "not going to open up the record," the court immediately added that "we also [are] going to . . have

Mr. Kenno satisfy himself that there's nothing strange . . . and people aren't conspiring behind his back." *Id.* at 412:15–17. That statement indicates the court was open to a good-faith motion to reopen the record based on the 2021 Audit Logs, but Kenno never filed one. The court's request for copies of the two videos that day further supports our view.[16]

B. Motions to Compel Release of Audit Logs

Kenno argues the district court abused its discretion in denying two post-judgment motions he filed pro se seeking production of defendants' entire Google Vault audit logs. *See* R., Vol. 3 at 653–83 ("First Audit Log Motion"); No. 21-1434, R. at 35–41 ("Second Audit Log Motion"). Kenno filed the First Audit Log Motion while his Rule 59 motion was still pending. He asserted defendants had used Google Vault to enforce email retention policies in state Google accounts since at least 2016, and contrary to the court's June 3, 2021 order, defendants had not disclosed all Google Vault audit logs. The district court denied that motion because it appeared GOIT had disclosed audit logs relevant to the time period at issue and Kenno had not adequately explained why audit logs from 2016—prior to his employment with GOIT—were relevant. *See* R., Vol. 3 at 696.

[16] Kenno represents that he contacted the district court by phone six times on June 24 and 25, 2021 "to schedule a hearing, to no avail." Aplt. Opening Br. at 6. His supporting evidence is a log of calls, presumably to the district court, of one or two minutes duration, at a time when he was still represented by counsel. This fails to call into question the district court's reliance on the lack of a proper motion to reopen the record as a ground for denying the Rule 59(e) motion.

Kenno filed the Second Audit Log Motion after the court's denial of his Rule 59 motion. He argued that audit logs from 2016 would show when an automatic email-deletion policy was implemented and that audit logs defendants had produced showed the existence of automatic email-deletion rules between 2017 and 2019. He also argued that audit logs for November 19, 2020 to December 8, 2020 were relevant because they showed defendants had conducted Google Vault searches during that period, indicating that defendants had lied in their sanctions motion when stating they only performed such a search after refusing Kenno's demand to run the December 9, 2020 search of his state email through the date of that search. The court denied the Second Audit Log Motion because Kenno was asking for reconsideration not only of the denial of his First Audit Log Motion but also of the court's order denying his Rule 59 motion. The court explained that Kenno's "third bite of the apple" was "improper" because he was advancing arguments he had or could have raised previously. No. 21-1434, R. at 391.

We see no abuse of discretion in the district court's denial of the First Audit Log Motion. In that motion, Kenno did not adequately explain the relevance of audit logs for 2016. But even if the court had granted that motion and compelled production of those audit logs, it would have made no difference, because, as we have explained, the court later—and properly—refused to consider audit logs as a basis for granting Kenno's motion for reconsideration. Thus, any error in denying the First Audit Log Motion was harmless because it did not affect Kenno's substantial rights. *See Eller v. Trans Union, LLC*, 739 F.3d 467, 474 (10th Cir. 2013)

("Even if the trial judge abused his or her discretion in making a decision to exclude evidence, we will overlook the error as harmless unless a party's substantial right was affected." (internal quotation marks omitted)).

We also see no abuse of discretion in the district court's denial of the Second Audit Log Motion on the grounds that Kenno sought reconsideration based on arguments he had or could have previously raised. *See Exxon Shipping Co.*, 554 U.S. at 485 n.5.

C. Motion to Consider CCRD Recording

Kenno filed a pro se post-judgment motion asking the court to consider an audio recording he made of a three-hour telephone conversation he had with CCRD investigator Bench in June 2019 ("CCRD Recording"). He alleged the recording showed he had told Bench the first discriminatory act occurred on March 18, 2018, and not, as Bench testified, on May 18, 2018. He also asserted that during the conversation, he had played his recording of the January 5, 2018 conversation with his co-worker regarding the Oracle Cloud project and his voice is not altered.

The district court denied Kenno's motion. The court identified a "fundamental issue" with Kenno's request—defendants had "requested a copy of the CCRD Recording during discovery, well before the evidentiary hearing," but Kenno "never produced the recording, arguing that it was [on a cell phone] in Ethiopia and that logistical challenges prevented him from obtaining it." No. 21-1434, R. at 392. The court then faulted Kenno for now seeking to use the recording in his defense because, even when represented by counsel, he "never requested an extension of time or a

postponement of the evidentiary hearing in order to obtain the recording." *Id.* at 393. The court observed that Kenno had "proceeded with his defense against the allegations of fabrication without the CCRD Recording, and Defendants had to present their arguments without it." *Id.* The court therefore concluded Kenno's belated disclosure was untimely and its use barred under Federal Rule of Civil Procedure 37(c)(1).

Kenno claims the district court's ruling was an abuse of discretion, but he provides no argument. Instead, he asks us to review the motion itself. We deem this argument waived because we do not allow incorporation by reference of district court filings. *See United States v. Gordon*, 710 F.3d 1124, 1137 n.15 (10th Cir. 2013); 10th Cir. R. 28.3(B). "Allowing litigants to adopt district court filings would provide an effective means of circumventing the page limitations on briefs set forth in the appellate rules and unnecessarily complicate the task of an appellate judge." *Fulghum v. Embarq Corp.*, 785 F.3d 395, 410 (10th Cir. 2015) (internal quotation marks omitted). Even more problematic for purposes of appellate review is that Kenno's motion does not explain why the district court's denial of the motion was an abuse of discretion. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong.").

IV. Award of Fees and Costs

Regarding the district court's award of attorney fees and costs to defendants, Kenno states that "[t]he sanctions applied by the court are punitive and

unconstitutional." Aplt. Opening Br. at 26. But instead of developing this argument, he asks us to review the arguments he presented in the district court in opposition to defendants' application for attorney and expert fees. We deem this argument waived because we do not allow incorporation by reference of district court filings. *See Gordon*, 710 F.3d at 1137 n.15; *Fulghum*, 785 F.3d at 410; 10th Cir. R. 28.3(B).[17]

CONCLUSION

The district court's judgments and post-judgment rulings in these consolidated appeals are affirmed. In No. 21-1454, Kenno has filed a Motion to Supplement the Record and for Judicial Notice. That motion has been docketed in each appeal. We grant the motions to supplement the record in part, limited to ECF Nos. 72, 84, 111, 138, and 201, and we direct the Clerk of this court to supplement the record in each appeal with those documents. We otherwise deny as moot the motions to supplement the record because the remaining docket entries listed in the motions are already part of the records on appeal. We deny the motions to the extent they ask for judicial notice of proceedings before the Colorado State Personnel Board. Although the

[17] GOIT argues that Kenno's notice of appeal in No. 21-1434, filed on December 16, 2021, is untimely as to the district court's October 12, 2021 order granting defendants' applications for attorney and expert fees and the court's October 14, 2021 judgment as to fees. However, on October 14, 2021, Kenno filed the notice of appeal giving rise to No. 21-1353, and in that notice, he named the October 12 order. That is sufficient to timely appeal the judgment as to fees. *See* Fed. R. App. P. 4(a)(1)(A) (notice of appeal in civil case not involving United States must be filed "within 30 days after entry of the judgment or order appealed from"); Fed. R. App. P. 4 (a)(2) ("A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.").

district court took judicial notice of those proceedings, it decided the case based on the evidence presented in this case, and our review is limited to the record that was before the district court, *see Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 648 (10th Cir. 2008) ("We generally limit our review on appeal to the record that was before the district court when it made its decision.").

Entered for the Court

Gregory A. Phillips
Circuit Judge