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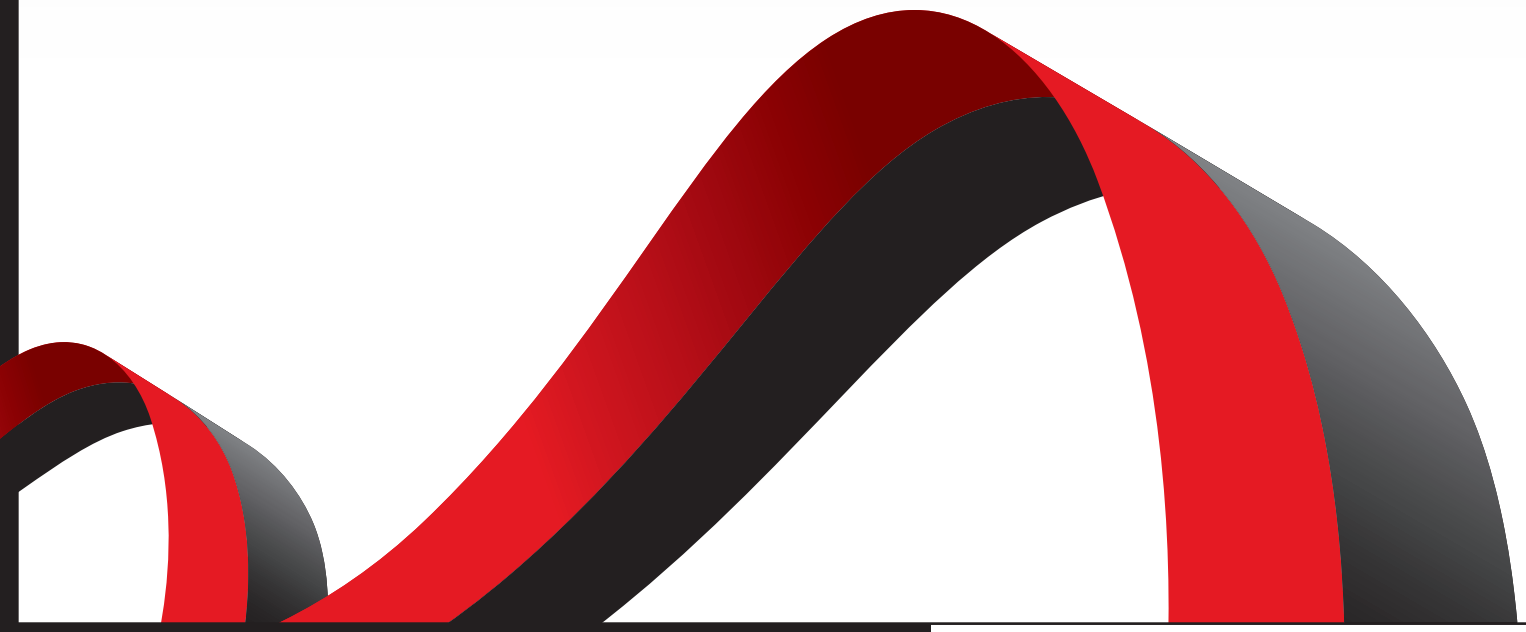

A relationship of a different stripe.

porterwright

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One Facebook Firing Case. Two Terminations. NLRB Finds Only One Unlawful and Notes How It Treats Malicious and Untrue Posts

September 9, 2013 | Sara Hutchins Jodka | Employer Law Report

In another Facebook firing case, involving two separate terminations, a National Labor Relations Board (NLRB) Administrative Law Judge (ALJ) ruled that a company violated *and* did not violate the National Labor Relations Act (the Act) after terminating employees for posting comments on Facebook. In *Butler Medical Transport LLC and Michael Rice and William Lewis Norvell*, Case Nos. 5-CA-97810, 5-CA-94981 and 5-CA-97854 (Sept. 4, 2013), two employees were terminated for posting comments on Facebook. One suggested to a former employee that she contact an attorney or the Labor Board. The other, well he just made up some stupid post about breaking down in a company vehicle.

The Termination of William Lewis Norvell

The facts of the first case are relatively simple. William Norvell worked as an emergency medical technician for Butler Medical Transport, LLC ("Butler"). He went on workers' compensation leave on July 21, 2012. On October 10, 2012, Norvell accessed the Facebook page of Chelsea Zalewski, a former Butler employee, through his personal, home computer. Zalewski who had been Norvell's partner at Butler posted a note on her page indicating that Butler has terminated her as follows:

> Well no longer a butler employee....Gotta love the fact a "professional" company is going to go off what a dementia pt says and hangs up on your when you are in the middle of asking a question.

Following her post, several people posted comments in response. Zalewski responded to some inquiries about what the patient actually reported, which included the following:

> Yeah ur telling me! The pt said I told her that they never fix anything on the units...Yeah i no that pt I'm not dumb enough to tell her let alone any pt how shitty those units are they see it all on their own.

Norvell decided to respond and he posted the following comment:

> Sorry to hear that but if you want you may think about getting a lawyer and taking them to court.

Another employee then suggested that Zalewski seek employment with another ambulance company to which Norvell posted another follow-up comment, "You could contact the labor board too."

A copy of the posts were delivered to Butler's human resources director. During the termination discussion, Norvell confirmed to the HR director that he had indeed authored the Facebook posts. The HR director informed Norvell that his Facebook posts violated the company's bullet point list of rules, which included a promise by employees that they would refrain from using social networking sites that could discredit Butler or damage its image. The HR director then informed Norvell his employment was being terminated. No reason other than the October 10th Facebook posts were discussed with Norvell as the reason for his termination.

Norvell filed a charge with the NLRB. after concluding that there was no question that Norvell would not have been terminated but for his Facebook post, the ALJ's only issue with respect to Norvell's termination was whether the post constituted protected concerted activity within the meaning of the Act. In analyzing the post, the ALJ indicated that the Facebook post must be considered in the

context in which it was made. Here, Norvell was advising Zalewski a fellow, yet former employee, to obtain an attorney and to contact the labor board. What the ALJ found particularly interesting was the fact that Norvell was responding to a post in which Zalewski herself stated that she had been terminated for commenting to a patient about the condition of Butler's vehicles, which is a matter of mutual concern to Butler's employees. By advising Zalewski to obtain legal counsel or contact the Board, the ALJ found that Norvell was making a common cause with Zalewski regarding a matter of concern to more than one employee and thus found that the post was protected regardless of whether Norvell's post may have an adverse effect on Butler's business.

The Termination of Michael Rice

Mr. Norvell wasn't the only employee terminated by Butler for making Facebook posts. On January 14, 2013 Michael Rice was terminated by Butler for posting the following on Facebook:

> Hey everybody!!!!! Im fuckin broke down in the same shit I was broke in last week because they don't wantna by new shit!!!! Cha-Chinnnggggggg chinnng-at Sheetz Convenience Store.

Butler's Chief Operating Officer testified without contradiction that he had reviewed Butler's maintenance records and determined the Rice's ambulance had not broken down when he made the post. He also testified that the assertion made in Rice's Facebook post was absolutely false. At an unemployment insurance hearing, Rice contended that his post referred to a private vehicle, not one of Butler's ambulances. As a result of the evidence provided at the unemployment hearing and at the NLRB's hearing, the ALJ concluded that Rice's allegations made in his Facebook post were "maliciously untrue and made with the knowledge that they were false." As the ALJ noted, an employee's public criticism of an employer is unprotected if they it is maliciously untrue, *i.e.*, if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. As a result, the ALJ concluded that Rice's statement lost any protection that it might otherwise have had under the Act and dismissed the complaint regarding Rice's termination.

The ALJ's Take on Butler's Bullet Point Lists

Lastly, the ALJ took on Butler's sheet of bullet points, which Butler had been distributing to all newly hired employees since November 2011. Among the items on the bulleted list was a promise whereby employees promised they "will refrain from using social networking sights which could discredit Butler Medical Transport or damages its image."

Though Butler argued that the bullet point list was *not* a policy, the ALJ found that this was a "distinction without a difference" and that the bullet point restricting social networking was relied upon by Butler in terminating employees, including Mr. Norvell. In addition, because new employees were required to acknowledge receipt of the bullet points, they would reasonably understand they would be subject to discipline up to and including termination if their conduct did not conform to them. As such, the ALJ found that the bullet point restricting social networking was unlawful because employees would reasonably construe it prohibit Section 7 activity. In addition, the ALJ found the bullet point list regarding social networking sites unlawful specifically because it had been applied to restrict the Section 7 rights of both Norvell and Zalewski.

Conclusion

After all was said and done, the ALJ held that Butler violated Section 8(a)(1) of the Act by discharging Norvell but it did not violate the Act by discharging Rice. It did find that Butler violated Section 8(a)(1) in maintaining a provision in its policy prohibiting the use of social networking sites which could discredit it or damage its reputation.

Take Aways

This case serves as yet another example of what types of comments on social media sites constitute protected conduct and which ones do not. This case is particularly important because it discusses comments made on

social media that while discussing the terms and conditions of employment, are "maliciously untrue and made with the knowledge that they were false," and therefore lose protection under the Act.

In addition, employers should be advised that no matter how creative they try to be when they name their policies, *i.e.*, whether they are bullet points, guidelines, code of conduct, acknowledgments, etc., if something comes down from the company that directs employees how to act, it is a policy and the NLRB can and will review it as such. Hey, it might even find it unlawful. Basically, it's the duck premise. No matter what you call it, if something looks like a policy, works like a policy, and employees treat it like a policy, it's a policy, and an employer's attempt to call it something else is a distinction without a difference.

Employers should review all of their "policies" and any other similar internal memoranda, codes of conduct, bullet point lists, etc., that relate to social media to be sure they conform to the NLRB's recent rulings on social media policies.

On another point, this case underscores the point that we have written about on this Blog numerous times. Employers need to review their employees' social media posts in the context in which they are written to determine whether they potentially could be protected conduct, as Employers are prohibited from taking adverse actions against employees for those protected posts. However, posts that are not related to terms and conditions of work and of which are not protected or that are malicious and blatantly false are not protected by the Act and employers can terminate employees for same.

So, the golden rule here, employers review social media postings in their full context before making any disciplinary decisions based on those postings.

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Facebook eases requirements for sweeps and contest promotions

September 3, 2013 | Robert Morgan | Technology Law Source

For many years, we have been advising our clients that, in addition to the laws addressing sweepstakes and contest promotions, they must also be aware of the Facebook's promotion guidelines if they wished to link their sweepstakes promotion to the company Facebook presence. While that remains true, Facebook has now made it much easier for companies to run promotions through Facebook. Prior to Facebook changing the terms of their guidelines on Aug. 27, promotions were not allowed to be run directly through Facebook or Facebook's functionality. Instead, running a contest or sweepstakes promotion required companies to use a third-party (or in-house created) application run on Facebook's platform. Facebook posted an announcement of the changes which also explained some of the remaining limitations (such as prohibitions in the new guidelines against encouraging inaccurate tagging for purposes of a promotion). The amended guidelines also include certain other requirements with respect to clarifications that Facebook is not a sponsor of and does not endorse the promotion and a release of Facebook from all liability.

Whether a company would be wise to take advantage of this new freedom depends in part on a number of factors — including the nature and complexity of the promotion, the notoriety of the particular company and anticipated participation. It may prove extremely difficult to reasonably and fairly sort through thousands of entries without running them through some kind of application in order to verify, count, review or otherwise manage the entries. Further, running the promotion directly through Facebook might be more likely than usual to result in a flood of negative comments should the promotion encounter an administrative difficulty or even just from sore losers.

It will be interesting to see how companies take advantage of this change in Facebook's guidelines, how Facebook uses this change to its own advantage, and what new perils companies might face in administering contest and promotions through Facebook.

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Court Finds Non-Public Facebook Posts Are Covered By The Stored Communications Act--But Not Posts Produced By A User's Frenemy

August 23, 2013 | Sara Hutchins Jodka | Employer Law Report

As long as there has been Facebook, attorneys have been scratching their heads asking whether Facebook posts fall under the purview of the Federal Stored Communications Act ("SCA"). In *Ehling v. Monmouth-Ocean Hospital Service Corp.*, No. 2:11-cv-03305 (WJM) (D.N.J. Aug 20, 2013) the District Court for the State of New Jersey gave us its opinion by holding that non-public Facebook posts, which are configured to be private are indeed covered under the SCA because they are:

- electronic communications;
- transmitted via an electronic communication service;
- in electronic storage; and
- not accessible to the general public.

Even though the posts were covered under the SCA, the court went on to find that the "authorized user" exception — one of two exceptions to the SCA — applied and held there was no violation of the SCA, or of Facebook user's privacy, when the Facebook posts were accessed. Here's how the case played out in more detail.

The Factual Background

Plaintiff Deborah Ehling is a registered nurse and paramedic who was hired as registered nurse and paramedic by the defendant MONOC, a non-profit hospital service corporation that provides emergency medical services to citizens in New Jersey. Ehling was heavily involved in taking actions intended to protect MONOC employees.

From 2008 through 2009 Ehling maintained a Facebook account and amassed approximately 300 Facebook "friends." Ehling selected privacy settings for her account and limited access to her Facebook wall so that only her Facebook "friends" could see her posts and they were not posted publicly. Ehling did not add any MONOC managers as her Facebook friends, but she did add some of her MONOC coworkers, including a paramedic named Tim Ronco. Ehling posted on Ronco's wall and Ronco had access to Ehling's Facebook wall. Unbeknownst to Ehling, and for whatever reason, Ronco began taking screenshots of Ehling's Facebook wall, printing them out, and emailing them to one of MONOC's managers.

In its decision, the court emphasized that there was no evidence that anyone at MONOC asked Ronco for any information about Ehling and never requested that Ronco keep MONOC apprised of Ehling's Facebook activity, which will come into play later.

On June 8, 2009, Ehling posted the following statement on her Facebook wall:

> An 88 yr old sociopath white supremacist opened fire in the Wash D.C. Holocaust Museum this morning and killed an innocent guard (leaving children). Other guards opened fire. The 88 yr old was shot. He survived. I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? and 2. This was your opportunity to really make a difference! WTF!!!! And to the other guards....go to target practice.

After learning of the post, MONOC management temporarily suspended Ehling with pay and sent her a memo noting its concern that her comment reflected "deliberate disregard for patient safety." Ehling eventually was fired. She responded by filing a complaint with the National Labor Relations Board ("NLRB"), but the NLRB found that MONOC did not violate the National Labor

Relations Act for taking action against Ehling in response to the post that was sent unsolicited to MONOC management.

In the lawsuit filed in New Jersey federal court, Ehling raised numerous claims against MONOC and the individual defendants, including claims that MONOC's accessing of her Facebook posts violated the SCA and invaded her privacy. The court, however, granted MONOC's summary judgment on all counts.

Ehling's Stored Communication Act Claim

Ehling alleged that MONOC violated the SCA by improperly accessing her Facebook wall post about the museum shooting. She argued that her Facebook posts were covered by the SCA because she had selected privacy settings limiting access to her Facebook "friends." MONOC countered that even if the SCA applied, it was authorized to access her post regarding the museum shooting under the "authorized user" exception. The court agreed with MONOC.

In analyzing Ehling's SCA claim, the court discussed the statute's history, which was first passed in 1986 long before social media websites like Facebook existed. As a result, the court noted that courts have had very few opportunities to address whether the SCA applied to Facebook wall posts.

With respect to its application, the SCA provides that whoever "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters or prevents the authorized access to a wire or electronic communication while in electronic storage in such a system" shall be liable for damages. 18 U.S.C. §2701(a); 18 U.S.C. §2707. The statute further provides that "[i]t shall not be unlawful ... [to] access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public." 18 U.S.C. §2511(2)(g)(i). In other words, the SCA covers: (1) electronic communications, (2) that were transmitted via an electronic communication service, (3) that are in electronic storage, and (4) that are not public. The court found the Facebook posts that are configured to be private meet all four criteria and therefore fall within the purview of the SCA.

Check 1: Facebook Posts Are Electronic Communications. As to the first element, the court found that Facebook posts are electronic communications under the definition of "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system." 18 U.S.C. §2510(12). Since users create Facebook posts through electronic transmissions of writing, images or other data via the internet from their computers or mobile devices to the Facebook servers, these are indeed electronic communications.

Check 2: Facebook Posts are Transmitting Via Electronic Communication Service. The court then held that Facebook posts are transmitted via an electronic communication service, which is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. §2510(15). Since Facebook provides its users with the ability to send and receive electronic communications including private messages and Facebook wall posts, Facebook is, in turn, an electronic communications service provider under the second element of the SCA.

Check 3: Facebook Wall Posts are in Electronic Storage. As to the third element, the court found that Facebook wall posts are also in electronic storage. The court noted the two types of electronic storage that the SCA distinguishes: (1) "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof;" and (2) "any storage of any such communication by an electronic communication service for purposes of backup protection of such communication" 18 U.S.C. §2510(17)(A)-(B). Because Facebook wall posts, unlike e-mail, are not held somewhere else temporarily before they are delivered, and

the Facebook website itself is the final destination, the court found that Facebook wall posts are not held in temporary intermediate storage. However, Facebook does store electronic communications for back-up purposes. When Facebook users post information the information is immediately saved to the Facebook server. When new posts are added, older posts are archived on separate pages and though not displayed, are still accessible. Because Facebook saves and archives wall posts indefinitely, the court found that Facebook posts are stored for back-up purposes and that wall posts are indeed electronic storage within the third element of the SCA.

Check 4: Facebook Posts Configured to be Private are not Available to the Public. As to the last element, the court found that Facebook posts configured to be private are, by definition, not accessible to the general public. The touchstone of the SCA is that it protects private information, making it clear that the statute's purpose is to protect information that the user took steps to keep private. Cases on this subject confirm this reasoning, *i.e.*, information is protectable so long as the user actively restricts the public from accessing it. *See e.g. Viacom Int'l Inc. v. Youtube Inc.*, 253 F.R.D. 256, 265 (S.D.N.Y. 2008); *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d at 965, 911 (C.D. Cal. 2010).

Because Facebook allows users to select their privacy settings, users can limit their posts to Facebook friends, particular groups, individuals, or to the user solely. The court found that when a user makes a Facebook wall post inaccessible to the general public, the wall posts are "configured to be private" for purposes of the SCA. The critical inquiry is whether the Facebook user took steps to limit access to the information on his or her Facebook wall. Not wanting to draw what it felt was an arbitrary line, the *Ehling* court held that privacy protection afforded by the SCA is not limited to or dependent on the number of Facebook "friends" that the user has.

Choose Your "Friends," or Rather Your Frenemies Carefully - Application of the Authorized User Exception to Facebook Posts:

While the court found that non-public Facebook wall posts are covered by the SCA, it held that the SCA's "authorized user" exception applied to the case to find against any liability. See, the SCA "does not apply with respect to conduct authorized (1) by the person or entity providing a wire or electronic communications service; [or] (2) by a user of that service with respect to a communication of or intended for that user." 18 U.S.C. §2701 (c).

The authorized user exception applies where (1) access to the communication was "authorized," (2) "by a user of that service," (3) "with respect to a communication ... intended for that user." 18 U.S.C. §2701(c)(2). The court found that all three of these elements of the "authorized user" exception were met in the case.

First, access to Ehling's Facebook wall post was indeed "authorized." The evidence established that Ronco voluntarily provided Ehling's Facebook post to MONOC management without any coercion or pressure. Ehling provided no evidence to support her theory that access to her Facebook was unauthorized.

As to the second element, Ehling's Facebook wall post was authorized "by a user of that service" which is "any person or entity who (A) uses an electronic communications service; and (B) is duly authorized by the provider of such service to engage in such use." Because Ronco was a Facebook user and Ehling acknowledged that she added Ronco as a Facebook friend and posted on Ronco's wall, the court found that access to the wall was authorized by a user of the service.

Lastly, the court found that Ehling's Facebook wall post was "intended for that user." Based on the privacy settings that Ehling selected for her page, Ehling's wall posts were visible to and intended to be viewed by any of Ehling's Facebook friends "including Ronco." As such, when Ehling posted the June 8, 2009 comment about the museum shooting and Ronco viewed it, as one of plaintiff's Facebook friends, the post was indeed intended for Ronco within the definition of the exception. With that the court found the authorized user

exception to the SCA applied in the case and there was no violation of the SCA for MONOC reviewing and using Ehling's Facebook wall post to suspend her employment.

Ehling's Invasion of Privacy Claim

Ehling's invasion of privacy claim was also based on her theory that the defendants invaded her privacy by accessing her private Facebook postings regarding the museum shooting. The defendants argued they were entitled to summary judgment on the privacy claim because Ehling's friend "freely chose to share the information" with them, and the court agreed. For an invasion of privacy claim to exist under New Jersey state law, Ehling had to show (1) there was an intentional intrusion of her solitude or seclusion or private affairs; and (2) the intrusion would highly offend a reasonable person.

Here the court found there was no intrusive act because Ehling had no evidence that the defendants obtained access to Ehling's Facebook page by logging into her account, by logging into another employee's account or by asking another employee to log-in to Facebook. Rather, the defendants were the passive recipients of information they did not seek or request. Since Ehling voluntarily gave information to her Facebook "friend" and the "friend" voluntarily gave that information to another party, the only possibility violation of that of trust, not privacy.

Takeaways. This case underscores our experience that the vast majority of employers learn about problematic Facebook posts from co-worker "friends" of the employee poster. As a result, employers need not, and should not, make demands for their employees' social media passwords or log-in information and should not take underhanded steps, i.e., logging into someone else's account to back in to someone else's account or setting up a false account. Not only is it illegal in 11 states for an employer to demand social media passwords from employees (and it looks like New Jersey will be added to the list relatively soon), but Ehling demonstrates that non-public posts will likely be deemed to fall under the protection of the SCA. Therefore, coerced or underhanded access to an employee's Facebook posts will be deemed "unauthorized" and employers will lose the protection of the SCA's "authorized user" exception. Employers could also be deemed liable for invasion of privacy under state law. Given the NLRB's decision in this matter, the NLRB is likely to take the same approach.

So, employers beware and think twice before you start snooping around an employee's social media account. The public stuff is fine, but the private stuff that would require more work to dig into, you should back off. As we noted in another blog on gathering social media evidence, available here, your employees are your top social media evidence gathers. Owners and managers of a company should not be Facebook "friends," or Twitter "followers" of employees, but to the extent co-workers are "friends" and/or "followers" and bring information regarding fellow co-worker's social media activity to the employer's attention, which is unsolicited and not encouraged by the employer, the employer should be able to avoid a SCA or invasion of privacy lawsuit.

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When Managers and Social Media Collide: Court Finds That Blog and Drunken Facebook Posts By Coyote Ugly's Managers Do Not Amount to Adverse Actions or are Enough for Constructive Discharge Claim

August 9, 2013 | Sara Hutchins Jodka | Employer Law Report

Stewart v. CUS Nashville, LLC, No. 3:11-cv-0342, 2013 U.S. Dist. LEXIS 16035 (M.D. Tenn. Aug. 8, 2013) serves as a cautionary tale to employers about the disastrous impact that can happen when managers and social media collide. And while this case turned out well for the employer in the end, that end was after a long and expensive two-day bench trial that I am sure the employer would have much rather avoided.

If you are not familiar with the *Stewart* case, here is the background you need to know. CUS Nashville, LLC owns Coyote Ugly franchises. (Yes, the one from the movie.) The case was brought as a collective action by two Coyote Ugly bartenders under the Fair Labor Standards Act ("FLSA") alleging an unlawful tip-pooling policy. Where it gets interesting though is when some of the higher-ups within Coyote Ugly took to social media to complain about the lawsuit and to go after some of the class plaintiffs.

First, Liliana Lovell ("Lil" from the movie…you remember) wrote a post on her blog "Lil Spill," which is hosted on Coyote Ugly's website, and made some comments about the case, including:

> "This particular case will end up pissing me off[,] cause it is coming from someone we terminated for theft."

Well that "someone we terminated for theft" just happened to be Misty Blu Stewart, the class representative plaintiff. Even though Ms. Stewart had indeed been fired for stealing and had already found a new job and had no economic damages, she claimed she was damaged because she was "humiliated and embarrassed" by the blog post. So what did Ms. Stewart do? She amended her FLSA complaint to add an individual claim for retaliation under the FLSA.

Next, in another Coyote Ugly franchise not so far way, another social media incident was brewing. The Oklahoma City Coyote Ugly was celebrating its anniversary. Mr. Huckaby, the Director of Operations, visited the bar to attend the celebration. While there, he got wasted (or at least that was his excuse), and while wasted he started to engage in Drunken Facebooking. (It is a real thing. It even has its own Facebook page – "Drunken Facebooking".) During his Drunken Facebooking session, he posted on his Facebook page:

> "Dear God, please don't let me kill the girl that is suing me . . . that is all. . ."

That "girl that is suing me" that Mr. Huckaby was trying his hardest not to "kill" was Sarah Stone, a Coyote Ugly employee, class member and girl he just happened to be a few feet away from when he likely made the post (judging by the time of the posting). Well, Ms. Stone just happened to be Facebook friends with Mr. Huckaby (this is why we tell supervisors not to be "Friends" with subordinates) and she saw the post and assumed Mr. Huckaby was talking about her. He removed the post later that night (again while drunk), but the damage was done, and after Mr. Huckaby made some other outburst about people suing the company, Ms. Stone quit her job. Ms. Stone amended her suit to also include an individual claim of constructive discharge.

Coyote Ugly moved to dismiss the claims, but the court held that there was a genuine issue of material fact and refused to throw them out. The case proceeded to trial and the court found for the plaintiffs in regards to their FLSA

claims, but held that neither the blog post nor the Facebook post constituted "adverse actions" or were sufficient to amount to constructive discharge and dismissed Ms. Stewart's and Ms. Stone's retaliation claims.

The Court's Ruling on Ms. Stewart's Retaliation Claim

Before I go into the individual review of Ms. Stewart's individual claim, it is important to keep in mind that there is a difference between an "adverse employment action" in the discrimination context and an "adverse action" in retaliation context. An "adverse employment action" in discrimination cases must be tied to employment, like a transfer, a demotion, a bad review, a termination, something like that. An "adverse action" for retaliation purposes, however, only has to be something that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." This means, the action can occur while on the job, off the job, or even on social media. So, you can see where the posts were at least arguably sufficient to bypass summary judgment given the low threshold. Here is what the court found in finding the claims had no merit.

At the trial stage, the court reviewed Ms. Stewart's retaliation claim and her evidence and concluded Ms. Stewart's retaliation claim failed because she could not prove Lil's blog was a materially adverse action and noted, "[t]o be materially adverse, an adverse action 'must be more disruptive than a mere inconvenience or an alteration of job responsibilities.'" Citing *Kocsis v. Multi-Care Mgmt*., 97 F.3d 876, 886 (6th Cir. 1996)). Here, the evidence failed to show that the blog post, which did not identify Ms. Stewart, caused any significant disruption to her current employment, which Ms. Stewart actually conceded at trial. In addition, while Ms. Stewart's boyfriend, counsel, and a former customer saw the blog post, Ms. Stewart had no evidence that demonstrated that this caused her any tangible detriment and, therefore, that she had suffered any economic damages. She had also not sought any treatment for the "embarrassment" she allegedly suffered. With that, the court threw out her retaliation case.

The Court's Ruling on Ms. Stone's Retaliation Claim

In reviewing Ms. Stone's constructive discharge claim, the court noted the standard for a viable claim. For Ms. Stone to prevail, she had to prove: (1) Coyote Ugly deliberately created intolerable working conditions, as perceived by a reasonable person; (2) it did so with the intention of forcing the employee to quit, and (3) that she actually quit. This is judged under the reasonable person standard and numerous factors are reviewed in determining whether a reasonable person would have felt compelled to resign, including, whether the employee suffered: (1) a demotion; (2) a reduction in salary; (3) a reduction in job responsibilities; (4) a reassignment to menial or degrading work; (5) a reassignment to work under a younger supervisor; (6) was subjected to badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) was offered of early retirement or continued employment on terms less favorable than the employee's former status.

Ms. Stone had no evidence showing Coyote Ugly deliberately created intolerable working conditions calculated to encourage her to resign based on the two incidents involving Mr. Huckaby. Heck, the court found that Ms. Stone had not even proven that she was the intended target of Mr. Huckaby's Facebook post or later comment because she was never mentioned by name and neither was the suit.

Takeaways: This is good news for employers. Since Coyote Ugly's motion for summary judgment was denied, I have been presenting on this case and warning employers of the potential for retaliation and constructive discharge claims based on managers' social media posts. This case certainly does not let employers, and their managers and supervisors, off the hook for their social media postings, but it does indicate that courts will require more than conclusory, non-targeted statements made on social media that cause no actual harm before it will deem them "adverse actions" in the retaliation context or

amount to harassment or humiliation sufficient to support a constructive discharge claim.

Employers need to keep in mind that an adverse action for a retaliation claim is a lower threshold than that required for an adverse employment action for a discrimination claim. So employers keep this language in mind: "**might have dissuaded a reasonable worker from making or supporting a charge of discrimination.**" That is all an action needs to be able to do for an employer to be liable. So, if you, or one of your managers or supervisors, takes an action, whether it be during work, in the context of work, outside of work or on social media, it can be used by an employee, including a former employee, to base a retaliation claim if that employee has previously engaged in protected activity. It may also be used to support a constructive discharge claim depending on the actual content of the post and resulting damage. So please train your employees on this and also, try to dissuade your managers and supervisors from being Facebook "friends" with their subordinates or "following" them on Twitter. In addition, and although I don't know exactly how you stop a supervisor from engaging in Drunken Facebooking, I would also encourage you to warn your managers about engaging in this conduct as well. If you have ever seen either of these situations go well for an employer, please let me know because I have not, and am always looking for new material.

For another blogs about this case, I encourage you to check out the Delaware Employment Law Blog Manager's Drunk Facebook Post Leads to Retaliation Claim authored by Molly DiBianca. In that blog, Ms. DiBianca discussed the summary judgment motion denial in more detail and correctly predicted that neither the blog post nor the Facebook post would be viable. No doubt, she will have an interesting take on this case development as well.

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Court Uses "Traditional Relevance Analysis" to Order Production of Plaintiff-Employee's Social Media Postings on Emotional Distress and Alternative Potential Stressors

June 18, 2013 | Jay Yurkiw | Technology Law Report

In an ADA employment discrimination case, a federal court recently denied a defendant's request to compel the plaintiff to provide authorizations for all of her social media accounts, but still ordered the production of any social media postings relevant to the plaintiff's claimed emotional distress damages. *See* *Giacchetto-v-Patchogue-MedfordUnion*, No. CV 11-6323 (E.D.N.Y. May 6, 2013). The court followed the approach taken in *Howell v. Buckeye Ranch, Inc.*, No. 11-CV-1014 (S.D. Ohio Oct. 2012), and applied a "traditional relevance analysis," stating "[t]he fact that Defendant is seeking social networking information as opposed to traditional discovery materials does not change the Court's analysis." *Giacchetto*, slip op. at 3.

In reaching its result, the court rejected the approach taken by some federal courts that the private section of a Facebook account is discoverable only if the party seeking the information can make a threshold evidentiary showing that a plaintiff's public Facebook profile contains information that undermines her claims. According to the court, this approach can be too broad because "a plaintiff should not be required to turn over the private section of his or her Facebook profile (which may or may not contain relevant information) merely because the public section undermines the plaintiff's claims." *Id*. at 3 n. 1. This approach also can be too narrow because "a plaintiff should be required to review the private section and produce any relevant information, regardless of what is reflected in the public section." *Id*. "The Federal Rules of Civil Procedure do not require a party to prove the existence of relevant material before requesting it." *Id*.

Postings About the Plaintiff's Emotional and Psychological Well-Being

The court applied a traditional relevance analysis under Rule 26(b)(1) to the three categories of information sought by the defendant:

1. postings about the plaintiff's emotional and psychological well-being;

2. postings about the plaintiff's physical damages; and

3. any accounts of the events alleged in the plaintiff's amended complaint.

The court observed that there have been varying conclusions regarding the relevance of social media postings in cases involving claims for emotional distress damages. After considering these views, the court ruled that a plaintiff's entire social media account is not necessarily relevant simply because she is seeking emotional damages and that a more limited approach should be taken regarding the discovery of these materials:

The fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress. If the Court were to allow broad discovery of Plaintiff's social networking postings as part of the emotional distress inquiry, then there would be no principled reason to prevent discovery into every other personal communication the Plaintiff had or sent since [the] alleged incident.

Based on the foregoing information, the Court concludes that Plaintiff's routine status updates and/or communications on social networking sites are not, as a general matter, relevant to her claim for emotional distress damages, nor are such communications likely to lead to the discovery of admissible evidence regarding the same. The Court does find, however, that certain limited social networking postings should be produced.

Id. at 5, 7.

Based on this analysis, the court ordered the production of postings that specifically referred to the emotional distress the plaintiff claimed she suffered or treatment she received in connection with the events alleged in her amended complaint. The court further ordered the production of any postings that referred to "alternative potential stressors" because the plaintiff "opened the door to discovery into other potential sources/causes of that distress." *Id*. at 7.

Postings About Physical Damages

The court drew a distinction between the relevance of social media information to claims for emotional distress damages and claims for physical damages. Here, the court reasoned that while the relationship of a posting about someone's mood at a given point in time may have a tenuous relationship to a claim for emotional damages, "[p]ostings or photographs on social networking websites that reflect physical capabilities inconsistent with a plaintiff's claimed injury are relevant." *Id*. at 7.

Because it was unclear what physical harm the plaintiff was alleging, the court ordered her to confirm whether she was pursuing relief for physical damages and specify the claimed harm. At that time, the court would address the scope of social media discovery as it applied to physical damages.

Postings About Events Alleged in the Amended Complaint

The court ruled that any social media postings referring or relating to any of the events alleged in the amended complaint were relevant and must be produced.

Method of Production

The court also addressed the method of producing information from the plaintiff's social media accounts. The defendant had sought authorizations for the release of records from the plaintiff's accounts and presumably intended to subpoena the companies hosting the accounts.

The court did not see the basis for having the defendant go through the social media service providers when the plaintiff and her counsel had access to the accounts. Accordingly, the court ordered the plaintiff's counsel — and not the plaintiff — to review the plaintiff's social networking postings for relevance and produce any relevant material, "keeping in mind the broad scope of discovery contemplated under Rule 26." *Id*. at 10. The court did not address the form in which the postings should be produced.

Takeaways

As recently observed in a post on Bow Tie Law's Blog and in one of our previous posts, federal courts generally will not grant a defendant a generalized right to rummage at will through social media information that a plaintiff has limited from public view. There are still varying views by courts, however, regarding when the private section of a plaintiff's social media account becomes discoverable and the extent to which it becomes discoverable, particularly when the plaintiff claims emotional damages.

In *Giacchetto*, the court joined other courts in concluding that it should not matter whether social media information is posted in a party's

public or private section to determine whether the information is relevant and discoverable under Rule 26. Just like with other forms of ESI, the focus should be on what kinds of postings are relevant to the parties' claims and defenses in the case based on their content and general discovery principles. Moreover, it is up to a party and the party's counsel in the first instance to review the postings to determine which ones are relevant and must be produced.

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Twitter's Vine Video App is the Latest App to Sprout Social Media Risks for Employers

May 24, 2013 | Sara Hutchins Jodka | Employer Law Report

If There is no doubt you know what YouTube is, but do you know about Vine? Well, Vine is a video app released by Twitter earlier this year that allows users to capture and share short looping six-second videos to Twitter and allows the user to tag people in the post. The app is easy to use and works a lot like Instagram (many call it the Instagram of video). When you tweet from Vine, it embeds your looped video — or what looks like an animated GIF — in your tweet and includes sound. Videos from Vine's Make-a-Scene app appear in expanded tweets and play automatically. Vine videos can also include different clips stitched together into one video, rather than just allowing one continuous shot. In introducing the app, Twitter said the "brevity of the videos ... inspires creativity."

Sounds fun, right? Well, Vine already had a porn problem, and when employers hear the words "creativity" and "video" in the same sentence they get scared, and with good reason. It was only a matter of time until workplace videos started to pop up. In a recent article, "The Latest Social Media Concern for Employers", *The Wall Street Journal* focused on the app and how searching such terms as "bored," "work" or "hatework" brings up some troubling workplace postings. Examples include videos of employee venting about their employers, a uniformed employee smoking from a bong and another of an employee looking through what appeared to be confidential documents. You can take a look for yourself. Here are a few fun ones: #sick #job #work; #wishIWasWorkingForXbox; and #Job #bor3dness #work4it, which contains footage of warehouse employees appearing to attempt sexual relations with a shelving unit, running and screaming through the facility and playing with safety equipment.

Daniel A. Schwartz, an employment law attorney at Pullman & Comley LLC in Hartford, Connecticut and editor of Connecticut Employment Law Blog, has been on top of this issue from the get go and has written a couple of great posts on this subject, which include links to some Vine workplace videos. He also noted the dangers of this App and with smartphones in general in the WSJ article: "Employers who are just concerned about what their employees are just doing on Facebook are missing the bigger picture of how smartphones are infiltrating the workplace."

Takeaways: New technologies like Vine are popping up (or sprouting if you will) at an ever increasing pace, particularly for mobile devices. As more and more employees are bringing their mobile devices to work, employers must stay on top of these technological developments not only to take advantage of them for their own marketing purposes, but also to ensure that their workplace policies apply as broadly as possible to cover all new technologies, such as Vine, as they develop. This includes implementing proper BYOD policies and training employees to make clear what employees are and are not allowed to share on Vine and other social media platforms. With that, I'll leave it to Mr. Schwartz because I think he summed it up best: "Vine is one of the fastest growing social networks. And people aren't posting what they had for breakfast anymore."

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Court Rules Employer Cannot Force a Former Employee to Update LinkedIn Profile

May 17, 2013 | Sara Hutchins Jodka | Employer Law Report

In today's world of social media, we know that employees live online. With LinkedIn, this includes having a living resume for anyone with a LinkedIn account to see. The up-to-date part, or rather *how* up-to-date someone's LinkedIn profile (or resume) is, has become somewhat of a concern. The recent case of *Jefferson Audio Video Sys. Inc. v. Light* (W.D. Ky. May 8, 2013) demonstrates how the updating of a LinkedIn profile can become a concern for employers, particularly as it pertains to an employer's *former* employees.

Here is the situation: An employee leaves a company for whatever reason yet fails to update his or her LinkedIn profile. To anyone who views the individual's profile or searches the company's name, the individual appears to be a current employee.

In ***Jefferson***, the employer Jefferson Audio Video Systems, Inc. ("Jefferson") sued former employee Gunnar Light ("Light") in part because he said some pretty awful things about the company to a customer while employed and, in part, because he would not update his LinkedIn profile. So, how did that turn out for the employer? Not so well.

Jefferson hired Light as a Sales Manager. During a sales meeting with a customer, Light allegedly made some less-than-flattering statements about the company to the customer, including comments that Jefferson was "unorganized," that "they don't know what's going on," "they've made a mess of things," "I unfortunately am stuck with this Company that is very dysfunctional," and suggested that the fact that Jefferson had a business at all was "a miracle." While Light made the sale despite his employer bashing, the sale was for less than Jefferson had anticipated. Not surprisingly, when Jefferson became aware of Light's statements about the company, it fired him.

Jefferson sued Light alleging numerous state law claims including: defamation, tortious interference, breach of fiduciary duty, trade, disparagement, fraudulent misrepresentation, and breach of contract. Light moved to throw out Jefferson's lawsuit, and the court did.

Light's failure to update his LinkedIn profile provided the basis for Jefferson's claim for fraudulent misrepresentation. Jefferson claimed that for several months following Light's May 9, 2011 termination, he "falsely represented on social media outlets, such as LinkedIn, that he held the position as ... International Managing Director after his date of termination." According to the opinion, Jefferson had contacted Light twice in May 2011 to request that he update his social media to indicate that he was not a current employee of Jefferson. Light responded that "he intended to promptly update his employment profile," but he did not change his information until after he received a third request in June, in which the company said it would file a formal complaint with LinkedIn.

The court found that Jefferson failed to plead the claim with the required particularity because Jefferson failed to "indicate it reasonably relied on Light's misrepresentation" and admitted as much in its response brief that it was "not asserting that it a was defrauded by Light but, instead, is making a claim that Light's fraudulent misrepresentation to the world damaged [Jefferson]." Because Jefferson failed to assert facts that it reasonably relied on Light's misrepresentation itself, a requirement to the claim, the court found the claim lacking and threw it out.

The company also attempted to argue that it was somehow advocating that Light committed fraud on potential third-party customers, but the court did not buy that argument either.

> [C]iting no case law in support of its argument, [Jefferson] urges this Court to expand the scope of an actionable fraud claim by permitting it to assert a claim based upon third party rights. [Jefferson] wants to stand in the place of those customers with reference to the issues of intentional misrepresentation and reliance upon the same. While novel in its genesis, Kentucky courts have not recognized such an argument."

As an aside, the court's decision throwing out the employer's defamation claims is also instructive for employers because the court did a nice job of outlining what constitutes defamation in this setting and what does not. Here, the court tossed the employer's defamation claims because it found Light's statement to be "protected expressions of opinion," which are not actionable as they are expressions that merely voice "subjective thought". So employers a caution: Statements of opinion, rather than fact, typically won't provide a basis for a defamation claim.

Takeaways: Employers, while it is understandable that you do not want a terminated former employee holding out that he or she still works for you, it may not be worth your time to try to force the former employee to update their social medial through the courts. It might be more worthwhile to contact LinkedIn who may take up the issue with the user based on their user terms and conditions. In any case, if the saying "it's easier to find a job when you already have a job" is true, allowing a former employee to keep a "currently employed" status might allow your former employee to get a new job faster. The upside for you, it will stop unemployment payments to the former employee and, if the employee had a wrongful termination claim against you, it will stop any potential back pay from continuing to accrue. Another thought, you may include in the employee's offer letter and/or separation agreement a provision where the employee agrees to update all social media to reflect that he or she is no longer employed with the company no later than three days (or whatever you deem reasonable) after separation of employment for whatever reason.

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Benchbook for U.S. District Court Judges Adds New Section on E-Discovery and Jury Instructions for Jurors' Use of Social Media and Electronic Devices

May 8, 2013 | Jay Yurkiw | Technology Law Report

The Federal Judicial Center recently published the Sixth Edition of the *Benchbook for U.S. District Court Judges*. For the first time, the *Benchbook* includes a section on civil case management, including how to address e-discovery issues. The *Benchbook* also adds new jury instructions regarding the use of social media and electronic devices by jurors during trials.

The updated *Benchbook* reflects the impact that technology and e-discovery are having on pretrial litigation and trials. Although the current draft amendments to the Federal Rules of Civil Procedure are still a ways off from being approved, the *Benchbook* has included recommendations for addressing e-discovery issues which incorporate key concepts found in those draft amendments as well as in existing local federal court initiatives.

Addressing E-Discovery Issues

The *Benchbook* added the new Section 6.01 on civil case management as the result of a joint request by the Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules. This new section emphasizes the judge's role as an "active case manager" and discusses key e-discovery concepts such as proportionality:

Active judicial case management is an essential part of the civil pretrial process. No party has the right to impose disproportionate or unnecessary costs on the court or the other side. Many parties and lawyers want and welcome active judicial case management, viewing it as key to controlling unnecessary cost and delay.

The *Benchbook* acknowledges that "[e]xcessive discovery is one of the chief causes of undue cost and delay in the pretrial process," and that e-discovery alone "is often a source of dispute, excessive costs, and delays." Accordingly, the *Benchbook* encourages judges to use the case-management conference to help ensure that discovery "proceeds fairly and efficiently in light of the needs of the case" and not to rely solely on what the parties say in their Rule 26(f) discovery plan. "Even if the parties agree, that does not guarantee that discovery will be proportional or proceed on a timely basis."

Along these lines, the *Benchbook* recommends that judges remind the parties that Rule 26(f) requires them to discuss issues relating to the discovery of electronically stored information (ESI) and that judges advise the parties that they will be asked about ESI issues at the Rule 16(b) case-management conference. "While the parties have a duty to discuss the discovery of ESI at their Rule 26(f) conference and include it in the Rule 26(f) report, experience shows that many lawyers do not." The *Benchbook* identifies three specific issues relating to ESI that

should be addressed during the case-management conference to see if the parties can reach an agreement:

1. The form in which ESI will be produced;

2. Whether the discovery of ESI can be limited to certain sources or custodians; and

3. What search terms or methods will be used to find responsive ESI.

Proportionality

The *Benchbook* also recommends that federal judges remind the parties that current Civil Rules 26(b) and 26(g) require discovery to be proportional to the needs of the case and that judges advise the parties that they will be asked about proportionality at the case-management conference. According to the *Benchbook*, "parties are not entitled to all discovery that is relevant to the claims and defenses. The judge has a duty to ensure that discovery is proportional to the needs of the case."

Pursuant to Rule 26(b)(2)(C), a judge "must limit discovery that would be 'unreasonably cumulative or duplicative' or when 'the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.'"

The *Benchbook* suggests that judges consider these techniques for imposing proportionality limits on discovery:

- Limiting the number of depositions (or their length), interrogatories, documents request and/or requests for admission;

- Identifying whether discovery should initially focus on particular issues that are most important to resolving the case;

- Phasing discovery so that the parties initially focus on the sources of information that are most readily available and/or most likely to yield key information (i.e., guide the parties to go after "low hanging fruit" first);

- Limiting the number of custodians and sources of information to be searched;

- Delaying contention interrogatories until the end of the case, after discovery is substantially completed; and

- Otherwise modifying the type, amount, or timing of discovery to achieve proportionality.

Preservation

The *Benchbook* also recommends that judges explore whether the parties have discussed the preservation of discoverable information, especially ESI. If there are disputes, judges should resolve them quickly to keep the case on track and avoid spoliation issues later. "The principles of reasonableness and proportionality that guide discovery generally apply."

Cooperation

The *Benchbook* also embraces the concept of cooperation during the discovery process: "The discovery process is adversarial in the sense that the adversaries make choices about what information to seek and how to seek it. But that does not mean that lawyers cannot cooperate or that they must act in a hostile and contentious manner while conducting discovery." According to the *Benchbook*, judges should advise the parties that they "expect them to be civil, to find ways to streamline the discovery process where possible, and to avoid needless cost and delay."

Evidence Rule 502 Non-Waiver Orders

The *Benchbook* also notes that many parties still are not aware of the availability of a "non-waiver order" under Federal Rule of Evidence 502(d). "This order, which does not require party agreement, precludes the assertion of a waiver claim based on production in the litigation. It avoids the need to litigate whether an inadvertent production was reasonable." Accordingly, the *Benchbook* recommends that judges consider entering a non-waiver order as a means "for reducing the cost of discovery by reducing privilege review."

Last year, the Advisory Committee on Evidence Rules sponsored a symposium regarding Federal Rule of Evidence 502(d), which is discussed in the March 2013 issue of the *Fordham Law Review*. The purpose of the symposium was to address the lack of use of Rule 502 by courts and litigants. As part of the symposium, the participants collaborated in drafting a Model Draft of a Rule 502(d) Order.

Jury Instructions Regarding Jurors' Use of Social Media and Electronic Devices

In addition to adding a new section on e-discovery, the *Benchbook* also added suggested jury instructions regarding the use of social media and electronic devices by jurors. During the preliminary instructions to the jury, the *Benchbook* recommends that federal judges provide this instruction:

Now, a few words about your conduct as jurors.

* * *

I know that many of you use cell phones, Blackberries, the Internet, and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through email, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube.

You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result, which would require the entire trial process to start over.

The *Benchbook* also suggests that judges give a similar instruction at the end of a trial:

During your deliberations, you must not communicate with or provide any information to anyone by any means

about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer; the Internet, any Internet service, or any text or instant messaging service; or any Internet chat room, blog, or website, such as Facebook, MySpace, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

These recommended instructions reflect the results of a survey regarding juror use of social media and are taken from "Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case," prepared by the Judicial Conference Committee on Court Administration and Case Management in 2012.

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NLRB Issues Third Facebook Firing Decision (Employers 1, Employees 2). Would Bettie Page Roll Over In Her Grave?

April 25, 2013 | Sara Hutchins Jodka | Employer Law Report

The National Labor Relations Board (NLRB) has issued its third Facebook firing decision. In *Design Technology Group LLC dba Bettie Page Clothing* (Case No. 20-CA-035511, 359 NLRB No. 96), the Board found that the employer, a clothing store, violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by discharging three employees for engaging in what the Board deemed protected concerted activity after the employees posted messages on Facebook complaining about their working conditions. The Board also held the store violated the NLRA by maintaining a "Wage and Salary Disclosure" rule in its handbook prohibiting employees from disclosing information about wages or compensation to any third party or other employees.

The employees worked at a retail store in a tourist area in San Francisco. The store closed an hour later than other stores in the area, and employees claimed they felt unsafe leaving when the area was deserted. The employees directed their concerns to the manager, who they claimed did nothing. The employees went over the manager's head to the store owner who said they would close the store earlier. The manager got upset because the employees went around her to the owner and verbal arguments between the manager and employees ensued. So what did the employees do? Well, they did what every 20-something-disgruntled-clothing-store employee does when they are mad — they took to Facebook and posted about the situation to hundreds of their closest "friends." While some comments were clearly unprotected venting that were not directed specifically to work conditions, *e.g.*, "bettie page would roll over in her grave" and "I'm physically and mentally sickened," one zinger was a more than a rant: "hey dudes it's totally cool, tomorrow I'm bringing a California Worker's Rights book to work. My mom works for a law firm that specializes in labor law and BOY will you be surprised by all the crap that's going on that's in violation 8) [sic] see you tomorrow!"

And as many 20-something-clothing-store employees would do, one employee who saw the posts showed them to the owner who subsequently fired the other three employees. One of the terminated employees filed an unfair labor practice charge with the NLRB challenging the termination and the employer's policy that prohibited employees from discussing their wages and salary.

By now, I think we know how this story ends. The NLRB found the Facebook posts were part of the employees' efforts to get the clothing store to close earlier based on safety concerns and thus, the store committed an unfair labor practice when it fired the employees. Neither the ALJ nor the Board bought the employer's argument that the posts were an attempt to entrap the employer into firing the employees and were not intended for employees' mutual aid and protection. Going one step further, the NLRB held the posts themselves constituted protected concerted activity under the NLRA. Specifically, the NLRB found: "The Facebook postings were complaints among employees about the conduct of their supervisor as it related to their terms and conditions of employment and about management's refusal to address the employees' concerns," the board's decision said. "Such conversations for mutual aid and protection are classic concerted protected activity, even absent prior action." The Board ordered the store to reinstate all three employees and to give them back pay. That reunion should be interesting!

Takeaways:

- This should be old hat by now as it follows the Board's rulings in *Karl Knauz Motors, Inc*., case *i.e*., the "this is your car on drugs" and the *Hispanics United of Buffalo Inc.* case, *i.e.*, the "a coworker feels that we don't help our clients enough," but, nevertheless, here we go again. If an employee complains in any forum about their working conditions, including on social media, those complaints likely are protected and an employer may not take adverse action against the employee for those complaints/posts.

- Employers cannot issue gag orders and prohibit their non-management employees from talking about their wage and salary information. An employer can argue that this information is confidential, but they will lose this argument in favor of an employee's rights under the NLRA.

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SEC Social Media Guidance - Tread Carefully

April 5, 2013 | Erin F. Siegfried | Federal Securities Law Blog

As discussed in a post on April 2, 2013, the SEC issued a report on that date that contained guidance on the use of social media to publicly disclose material information under Regulation FD.

The report centered on the SEC investigation of Netflix and Netflix CEO, Reed Hastings, and whether Regulation FD was violated when Mr. Hastings disclosed on his Facebook page favorable news about the number of hours that Netflix streamed in a month. The SEC decided not to bring enforcement action against Netflix or Mr. Hastings, making recognition that there has been market uncertainty about the application of Regulation FD to social media.

Regulation FD provides that a public company, or anyone acting on its behalf, may not disclose material, nonpublic information to market professionals or securityholders when it is reasonably foreseeable that someone may trade on the basis of the information, unless such information is simultaneously disclosed to the public in a method reasonably designed to provide broad, non-exclusionary distribution of information to the public.

It is important to remember that whether disclosures comply with Regulation FD must be evaluated on a case-by-case basis. The SEC stated in the report that the disclosure of material nonpublic information on the personal social media site of a corporate officer, **without advance notice to investors that the site may be used for this purpose**, is unlikely to satisfy Regulation FD. The SEC explained that this is true regardless of the number of subscribers. The report focused on the fact that a company must notify the market about which forms of communication, including the social media channels, it intends to use for the dissemination of material nonpublic information.

The SEC expects issuers to rigorously examine the factors outlined in its 2008 website guidance that are taken into account when determining whether a particular channel is a recognized channel of distribution for communicating with investors. A company should ask itself several questions. Is the proposed channel of distribution one that is practical for investors to monitor? Do investors need "lead time" to register to use the channel of distribution? Is the company comfortable using only that channel of distribution for communications to investors? In any event, the company must be confident that the channel of distribution will provide for broad, non-exclusionary distribution of information to the public and it must provide adequate advance notice of the use of such channel to its investors. As best practices continue to evolve, companies should strongly consider continuing to use press releases, conference calls, and current reports on Form 8-K in addition to any social media channels to distribute material nonpublic information.

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SEC Confirms Use of Social Media for Company Announcements

April 2, 2013 | Erin F. Siegfried | Federal Securities Law Blog

The SEC issued a report today that clarifies that companies may use social media outlets to make key announcements in compliance with Regulation FD (Fair Disclosure) so long as investors have previously been alerted about which social media outlet(s) will be used to disseminate such information.

Regulation FD requires companies to distribute material information in a manner reasonably designed to get that information out to the general public broadly and non-selectively. Companies should review the SEC guidance issued in 2008 regarding the dissemination of information via websites, as that guidance also applies to questions relating to communication through social media.

The SEC report relates to an inquiry by the Division of Enforcement into a post made by Netflix CEO, Reed Hastings, on his personal Facebook page that Netflix's monthly online viewing had exceeded one billion hours for the first time. The SEC did not initiate enforcement action or allege wrongdoing by Hastings or Netflix, recognizing that there has been market uncertainty about the application of Regulation FD to social media.

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Facebook account deactivation leads to "spoliation instruction"

March 29, 2013 | Jay Yurkiw | Technology Law Source

A federal court has ordered that "an instruction be given at trial to the jury that it may draw an adverse inference against Plaintiff for failing to preserve his Facebook account," and for destroying evidence. *See Gatto v. United Air Lines, Inc.*, No. 10-cv-1090, 2013 U.S. Dist. LEXIS 41909, slip op. at 11 (D.N.J. Mar. 25, 2013). The plaintiff did not just try to "clean up" his Facebook page; he permanently deleted it. According to the court, the permanent deletion of the plaintiff's account prejudiced the defendants "because they have lost access to evidence that is potentially relevant to Plaintiff's damages and credibility." *Id*. at 10.

Plaintiff Argued Permanent Deletion of His Facebook Account was "Accidental"

In *Gatto*, the plaintiff alleged that he sustained permanently disabling injuries while working as a ground operations supervisor at JFK airport after an aircraft caused a set of fueler stairs to crash into him. The defendants sought discovery relating to the plaintiff's damages and social activities, and the plaintiff provided the defendants with signed authorizations for the release of information from certain social networking sites and other online services like eBay and PayPal. The plaintiff did not include, however, an authorization for his Facebook account.

After the court ordered the plaintiff to execute an authorization for his Facebook account, counsel for one of the defendants briefly accessed the account and printed some portions of the plaintiff's Facebook page. The plaintiff then received an alert from Facebook that his account was accessed from an unfamiliar IP address. Even though defense counsel confirmed with the plaintiff's counsel that the account had been accessed by counsel, the plaintiff "deactivated" his account. The deactivation of the plaintiff's account resulted in its permanent deletion. Accordingly, the defendants maintained that they could no longer retrieve any information from the plaintiff's Facebook account.

The plaintiff claimed he had merely deactivated his account and then neglected to reactivate it within fourteen days, thus accidentally causing the account to be "automatically" and permanently deleted in accordance with Facebook's policy at that time. According to the plaintiff, he had recently been involved in contentious divorce proceedings and his Facebook account had been "hacked into" on numerous occasions before the lawsuit. The plaintiff argued that he acted reasonably after receiving notice from Facebook that his account had been accessed from an unauthorized IP address which he was unfamiliar with. The court found that it was "irrelevant" whether the plaintiff had requested his account to be permanently deleted or merely deactivated, as either scenario ultimately resulted in the loss of evidence.

We note that had the plaintiff merely attempted to "delete" material while leaving his account active, or the account had not been permanently deleted with no option for recovery, chances are the defendants could still have discovered the information in the account through Facebook's built-in tools, as explained in our prior post.

Plaintiff Failed to Preserve Relevant Evidence and Prejudiced Defendants

In granting the defendants' motion for spoliation sanctions, the court applied a four-factor test to determine whether an adverse inference instruction was appropriate. The court examined the following four factors:

1. whether the evidence was within the party's control;

2. whether there was an actual suppression or withholding of evidence;

3. whether the evidence destroyed or withheld was relevant to the claims or defenses; and

4. whether it was reasonably foreseeable that the evidence would be discoverable.

First, the court found that the plaintiff's Facebook account was "clearly within his control," as he had "authority to add, delete, or modify his account's content." *Gatto*, slip op. 8. Interestingly, the court cited to *Arteria Property Pty Ltd. v. Universal Funding V.T.O., Inc.,* No. 05-cv-4896, 2008 U.S. Dist. LEXIS 77199 (D.N.J. Oct. 1, 2008), in support of its finding. In *Arteria Property*, the court held that a party had control over a website for purposes of spoliation because the party "had control over the content *posted* on [it]." *Arteria Property*, slip op. at 10. The court in that case further reasoned:

Although Defendants do not so posit, it may be argued that the website was maintained by a third party, perhaps a web design company who posted content on behalf of Defendants. But this is irrelevant, just as it'd be irrelevant if the website was maintained on a third party server rather than Defendant's own server (as is likely the case here). Despite the inevitable presence of an intermediary when posting content on the Web, the Court finds that Defendants still had the *ultimate* authority, and thus control, to add, delete or modify the website's content.

Id. at 10.

Second, the court in *Gatto* found that the posts, comments, status updates and other information posted on the plaintiff's Facebook page after the date of the alleged accident were relevant to the issue of damages. Comments and photographs printed from the plaintiff's Facebook page showed the plaintiff's physical and social activities, trips and online business activities.

Third, the court found that the plaintiff failed to preserve relevant evidence and that the defendants were prejudiced. The court was not persuaded by the plaintiff's arguments regarding whether the evidence had been intentionally deleted, stating that "so long as the evidence is relevant, the 'offending party's culpability is largely irrelevant.'" *Gatto*, slip op. 10.

Fourth, the court found that it was reasonably foreseeable that the plaintiff's Facebook account would be sought in discovery.

Based on its findings, the court concluded that an adverse inference instruction, or "spoliation instruction," was appropriate. According to the court, this instruction "permits a jury to infer that the fact that a document was not produced or destroyed is 'evidence that the party that has prevented production did so out of the well-founded fear that the contents would harm him.'" *Gatto*, slip op. 7.

Takeaways

Federal courts have moved past deciding the question of whether information posted on social networking websites is discoverable. Courts expect parties to preserve social media information if it is relevant to the claims and defenses in the case. If relevant social media information is not preserved, courts will consider whether they should impose sanctions for spoliation, just like they do with other forms of electronically stored information (ESI). Potential sanctions for spoliation include dismissal of claims or granting judgment in favor of a prejudiced party, exclusion of evidence, an adverse inference jury instruction, fines, and attorneys' fees and costs.

Additionally, the court's quick determination that the plaintiff's Facebook account was "clearly within his control" because he "had authority to add, delete, or modify his account's content" could be significant in future cases. As more data gets created and stored "in the cloud," a key e-discovery issue will be the extent to which parties are found to have "possession, custody, or control" over data stored with cloud service providers as well as the extent to which they have responsibility for any deletion or alteration of that data (including metadata). The court's test for "control" in *Gatto* (and the earlier *Arteria Property* case) indicates that parties will not be able to avoid the obligations and risks of e-

discovery when they move their applications and data storage to the cloud.

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Facebook Posts Not "Solicitation" Under Former Employee's Restrictive Covenant Agreement

February 26, 2013 | Jay Yurkiw | Technology Law Source

Describing it as a "rather novel issue," a federal court recently held that a former employee's public posts on his personal Facebook page did not constitute solicitation of his former co-workers under the terms of his non-solicitation agreement with his former employer. [See *Pre-Paid Legal Services, Inc. v. Cahill*, No. 12-CV-346, Doc. 31 (Jan. 22, 2013), Report and Recommendation affirmed and adopted, Doc. 32 (Feb. 12, 2013)] The court further noted that invitations sent to former co-workers to join Twitter were not solicitations under the agreement because the invitations did not request the co-workers to "follow" the former employee, they did not contain any information about the new employer, and they were sent by Twitter instead of as targeted email blasts by the former employee.

Though the court found that the former employee's social networking activities did not constitute solicitation under his agreement, it did enter a preliminary injunction against the former employee based on his direct solicitation of one of his former co-workers through a private in-person meeting and follow up text messages sent to the co-worker. The court entered the injunction until the issues could be presented to an arbitrator pursuant to the parties' arbitration agreement.

According to the court, the former employer did not present any evidence showing that the former employee's Facebook posts, which touted his professional satisfaction with his new employer and his new employer's products, resulted in the departure of any of his former co-workers, or any evidence showing that the former employee was targeting his former co-workers by posting directly on their walls or through private messages. The court then compared these facts to an Indiana state court case holding that a former employee's posting of an employment opportunity with his new employer on LinkedIn did not constitute solicitation [*Enhanced Network Solutions Group, Inc. v. Hypersonic Technologies Corp.*, 951 N.E.2d 265 (Ind. Ct. App. 2011)] and a Massachusetts state court case holding that a post announcing a former employee's employment with a new company on her Facebook page did not constitute solicitation even though the former employee had become Facebook friends with eight of her former clients after leaving her former employer. [See *Invidia, LLC v. DiFonzo*, 2012 Mass. Super. LEXIS 273 (Mass. Super. Oct. 22, 2012)]

Before the preliminary injunction hearing in *Pre-Paid Legal Services*, the former employer sought expedited discovery. Among other things, the former employer requested forensic images of the former employee's "cellular telephone(s), computer, iPad and/or any other electronic devices" used to conduct business, and all "e-mails, Facebook posting[s], Twitter postings or postings on any other social media" concerning his new employer or concerning employment with anyone other than his former employer. The parties apparently agreed to a third-party review of the former employee's electronic devices, and the court granted the motion for expedited discovery to the extent the parties were conducting limited discovery by agreement. The court also ordered "that all evidence currently in existence be preserved" and reiterated during the preliminary injunction hearing that it "continues to enforce the order directing parties to preserve all the evidence."

Takeaways

The *Pre-Paid Legal Services* case has some important takeaways. First, in this era of social media, there is a risk that language used in existing contracts and policies to prohibit certain types of conduct may not adequately protect a business from actions that can be taken through social networking websites. For example, based on the reasoning in *Pre-Paid Legal Services*, an employee may be able to

establish contacts with clients and co-workers through social networking sites and then attempt to circumvent his non-solicitation restrictions after the termination of his employment by communicating information to his former clients and co-workers through public posts on those sites. Accordingly, businesses may need to revise restrictive language they use in contracts and company policies so they can better deal with the risks presented by social networking.

Second, as previously reported in articles about discovery of social media information and e-discovery trends, information posted on social networking websites can be relevant to the parties' claims and defenses and, therefore, discoverable. This means that parties may have a duty to preserve social media information when litigation arises or is reasonably anticipated and that parties should think about requesting such information depending on the nature of the case. It also means that the law on social media discovery will continue to develop as more parties request social media information and more discovery disputes arise relating to the preservation, relevance, formatting, and production of such information.

Third, by entering a preliminary injunction against the former employee, the court effectively reaffirmed the principle that courts may enter injunctive relief in disputes that are otherwise referable to arbitration on the merits to preserve the status quo and ensure that the arbitration is not rendered "meaningless or a hollow formality." [See, e.g., *Performance Unlimited, Inc. v. Questar Publishers, Inc*., 52 F.3d 1373, 1380 (6th Cir. 1995).] Interestingly, the court in *Pre-Paid Legal Services* entered the preliminary injunction even though the parties had incorporated the American Arbitration Association's Optional Rules for Emergency Measures of Protection, which provide for the appointment of an emergency arbitrator within one business day of receiving notice of the requested emergency relief. [See Pl.'s Response to Def.'s Motion to Stay Pending Arbitration, Doc. 15 (Aug. 27, 2012)]

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Why You Can't Delete Your Way Out of Your Social Media Mess

February 11, 2013 | Colleen Marshall | Technology Law Source

Naked pictures? Drunken celebrations? Sexist comments? A click of a button and all evidence of your "Weekend at Bernie's" can disappear. Job seekers know to scrub clean their Facebook pages before they connect with potential employers, to remove all trace of their off-color on-line life. But here in Ohio you can't delete your way out of the mess you created through social media. Employers can legally ask employees and recruits to surrender their social media passwords, and thanks to Facebook's newly expanded access program, the result is a stunningly deep portal into private messages, deleted posts, photographs and *everything* you ever posted on your Facebook wall.

Where does an employer's right to screen applicants and monitor employee behavior end and personal privacy begin? It's a murky line drawn so far by only six states — and Ohio isn't one of them. After failing to win support for Senate Bill 351 in 2012, Ohio Senator Charleta Tavares will this month reintroduce her proposal to make it illegal for an employer to require an employee or potential employee to surrender their social media passwords. Tavares argues that employers should not be able to access personal thoughts and messages that employees never intended to be broadly distributed.

Tavares' legislation would not restrict employers from inspecting the social media that is readily available to an applicant's network of friends, and can legitimately help employers determine if a prospective employee would be a good organizational fit. Employers, for example, could still inspect your Facebook page, but they would do so without the personal password that gives them expanded access to your history and hidden files.

As our sister blog, the Employer Law Report, has noted in the past, whether such legislation really is necessary, however, is subject to debate. Few employers need — think law enforcement, finance and child care industries that require more in-depth screening — or want to delve deeply into their applicants' or employees' personal lives, but employers and recruiters rightfully argue that social media is a valid screening method that can reveal both negatives and positives about potential hires. A recruit who is not on LinkedIn and has no professional social media presence can appear to be not relevant. Your social media profile can paint a flattering picture of your volunteer efforts, your professional affiliations and your networking capabilities. Conversely it can expose your poor grammar and your lack of judgment. What exactly were you thinking when you posted that picture of yourself, half-naked, with a beer bottle in one hand, a joint in the other, wearing a ball-cap that says "Female Body Inspector?" We've all seen such pictures.

Beyond the hiring process, however, employers should know that a wealth of information is available to them if they obtain that magic password for other purposes, particularly during discovery in matters involving disputes with current or former employees. Employers can use social media to great advantage in such cases. It is difficult to sustain a claim for disabling injuries, for example, when the employer displays recent photographs of your weight-lifting workout at the gym. One manager who denied a personal relationship with a subordinate happily posted romantic pictures and glowing descriptions of their encounters.

By obtaining the personal password of a volunteer, a recent test of the new Facebook access program provided an astounding amount of personal information, hidden files, private conversations, and remarkably *every* item ever posted on the user's Facebook wall dating back to her original sign-on date in

2008. In a printed format (with small font) the wall posts were nearly one thousand pages long. Surprisingly, even the private conversations the volunteer typed into pop-up message boxes, directed at individuals, were recorded and stored and resulted in 200 printed pages of "private" conversations. Every photograph the volunteer ever posted, every person the volunteer had deleted from her friend list, and all files the volunteer thought to be "hidden" were readily available. Specific devices used by the volunteer to log-on, the time spent on Facebook, and a list of every ad viewed by the volunteer over the past five years were also accessible. It is a stunning amount of information that can provide undisputable evidence, particularly in the labor and employment context.

A recent survey by Jobvite, a company that provides applicant tracking software, shows that 92% of employers are using or planning to use social networks as a recruiting tool this year. Careerbuilder.com reports roughly 40% of employers are using social media as a screening tool, but there are no statistics that show how many employers require social media passwords to be surrendered.

Employers can establish a clear process that allows for legitimate inspection of a prospective employee's social media profile — without asking for personal passwords. A successful social media review process is one that minimizes the employer's chance for a charge of discrimination while allowing the employer to determine whether an applicant possesses reviewable, legal characteristics that make the applicant a good or bad fit for the company. You might wonder why the concern for a charge of discrimination comes in to play. Well, by just scanning an applicant's social medial profile, an employer can uncover a lot of information, and some of it is unlawful information for an employer to use or consider in the hiring process. This information includes an applicant's race, age, religious affiliation, national origin, gender, veteran status, pregnancy status, genetic information, sexual orientation (in some states and localities), and gender identify (some states and localities).

Successful policies usually include the following:

1. **Layout Search Criteria**: A standard written search policy that defines for the employer and the applicant what social medial sites will be searched and what information reviewed; e.g., engaging in hate speech, discriminatory conduct, criminal activity.

2. **Put a Wall Between Reviewer and Ultimate Decision Maker**: A two-tiered approach that provides for an initial screening of the social media before information is presented to the person who will make the actual hiring decisions. In turn, the reviewer will forward on to the ultimate decision maker only the information about the applicant that hit the employer's defined search criteria. This ensures that the person who makes the ultimate employment decision has never actually viewed the applicant's social media profile. This eliminates even the appearance that the applicant was hired or rejected on the basis of inadvertent access to legally protected information.

3. **Document, Document, Document**: You have a strict policy in place. Now prove it. Keep uniform records about what disqualifying information was obtained through the social media sites for use in the event a lawsuit ensues.

4. **Stay True To Your Policy**: Again, you have a strict policy in place — abide by it. Do not attempt to circumvent an applicant's privacy settings to collect more information about the applicant. This includes creating a false profile to gain access to the applicant's information or impersonating a "friend" for the same reason.

With proper guidance your social media policies can reflect the culture of your company, and will enhance — not ensnare — your workforce.

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Anything You Post or Are Tagged in on Facebook Will Be Used Against You: The Sixth Circuit Upholds Honest Belief Defense to Employee's FMLA Retaliation Claim Who Went on a Pub Crawl While on Leave, But Skirts Issue As Applied to FMLA Interference Claims

November 21, 2012 | Sara Hutchins Jodka | Employer Law Report

Jaszczyszyn v. Advantage Health Physician Network, (6th Cir. Nov 7, 2012) involves three seemingly-unrelated topics: social media, Polish festivals, and the honest belief defense to FMLA claims. When combined, however, they turn into a fun set of facts that the Sixth Circuit recently got to chew on.

The Facts

Advantage Health Physician Network ("Advantage") hired Sara Jaszczyszyn ("Plaintiff") to work at its Staffing Center Float Pool on a part-time basis. She eventually was promoted to a full-time customer service representative. Nine months in, Plaintiff began complaining of back pain, which was the result of an old accident, and asked for time off work from August 31 to September 7 because she would be "completely incapacitated". Because Plaintiff did not have enough paid time off under Advantage's attendance policy to cover her absences, her leave was considered FMLA leave to protect her job. As such, Plaintiff was asked to provide a "Certification of Health Care Provider" to show she suffered from a serious medical condition, as required under the FMLA. She also was reminded that she was to comply with Advantage's attendance policy, which expressly provided she was to inform her supervisor of any planned absences.

Plaintiff returned to work on September 8, and submitted paperwork from her doctor that she would need intermittent leave for flare ups, which were estimated to occur four times a month and last a few hours to a few days. While the Certification indicated the leave was to be intermittent leave for flare ups, Plaintiff treated the leave as continuous, open-ended, effective immediately leave and never returned to work after September 9th. Advantage reminded Plaintiff repeatedly that she had to inform her supervisor every day that she was in too much pain to work. Sometimes she gave notice and sometime she did not. When she did, it was typically through a voicemail left late at night or over the weekend when no one was around. There were also issues with Plaintiff turning in required paperwork. Despite these issues, Advantage treated Plaintiff's absences as being taken pursuant to intermittent FMLA. Because there had been some confusion with Plaintiff's leave entitlement, Plaintiff went to the doctor on September 22 and her doctor completed the Health Care Provider Certification form and put Plaintiff on leave from September 10 through October 5. Just eight days later, however, Plaintiff's doctor completed a work release form, as opposed to a Health Care Provider Certification form, and advised that Plaintiff was completely incapacitated for another three weeks, from October 5 through October 26. Advantage approved the September 10 through October 5 leave, but not the October 5 through October 26 leave extension.

The Fun Facts

So here's where it gets interesting. On October 3, while on her approved-FMLA leave, Plaintiff attended Pulaski Days, a Polish festival in Grand Rapids, Michigan with some friends. Plaintiff posted a number of pictures of herself, some of which showed her drinking, smoking and having a grand old time engaging in a pub crawl, on her Facebook page. Not too

shabby for a "completely incapacitated" gal! Even better, that same weekend, Plaintiff left *numerous voicemail* messages with Advantage letting Advantage know how much *pain* she was in and that she would not be at work Monday morning. But wait, the story gets better: Plaintiff was Facebook "friends" with several of her Advantage co-workers, including her supervisor for whom she left a voicemail message indicating she was too sick to come to work.

After one of Plaintiff's co-workers/Facebook "friends" brought the matter to her supervisor's attention, the supervisor, noting that other co-workers felt "betrayed or duped" by Plaintiff, reviewed the Facebook photos. Advantage then conducted an investigation. It reviewed Plaintiff's medical certifications and eventually confronted Plaintiff on October 8. During the meeting Advantage discussed Plaintiff's communications issues, including her request for extended leave through October 26 without discussing it with her supervisor; her job requirements; and the scope of her injuries that prevented her from being able to perform her job. Before confronting her with her Facebook pictures, however, Advantage asked Plaintiff whether she knew how seriously Advantage took fraud, and Plaintiff responded that she did. *Ah ... to be a fly on the wall the rest of that meeting*, where Advantage discussed the Facebook pictures and Plaintiff's time at the festival. Not surprisingly, Plaintiff disagreed with Advantage's characterization of the pictures. (You can judge for yourself. Some are available here). She also defended attending the festival by arguing that no one had told her it was prohibited. When asked to explain the discrepancy between her claim of complete incapacitation and her activity in the photos, Plaintiff did not have a response and was often silent, occasionally saying that she was in pain at the festival and just was not showing it. Advantage terminated Plaintiff for fraud.

The Lawsuit

In turn, Plaintiff sued Advantage for retaliation and interference under the FMLA. Advantage moved for summary judgment arguing there was no evidence showing anyone at Advantage had a retaliatory motive and because it had an "honest suspicion" Plaintiff was abusing her FMLA leave. The district court granted summary judgment.

The Sixth Circuit's Decision

The Sixth Circuit affirmed. The key for the Court in disposing of the retaliation claim was the honest belief rule. The "honest belief" rule provides, "**so long as the employer honestly believed in the proffered reason given for its employment action, the employee establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless**." Here, the Court held that Plaintiff failed refute Advantage's honest belief that her behavior in the photos was inconsistent with her claims of total disability.

The more difficult question, however, is whether the honest defense rule applies in FMLA interference claims. While the Sixth Circuit raised the issue, it skirted it, and here's how.

The Court first noted that the requisite proofs in interference versus retaliation cases differ. The key element in an interference claim is whether "the defendant denied FMLA benefits or interfered with FMLA rights to which [s]he was entitled." The key issue in a retaliation claim is whether "there was a causal connection between the protected FMLA activity and the adverse employment action." The difference is that the retaliation case requires proof of employer intent to retaliate while the issue of intent is irrelevant in the interference context. The Court, however, rejected the notion that interference cases are strict liability cases, noting that "interference with an employee's FMLA rights does not violate the FMLA if the employer "**has a legitimate reason unrelated to the exercise of FMLA rights for engaging in the challenged conduct**." The Court, however, did not reach

any conclusion on whether this carve-out precluded Plaintiff's FMLA interference claim.

The Court then jumped into its analysis of whether the honest belief rule applies in interference cases, noting that its prior decision in *Donald v. Sybra, Inc*., which we blogged on here, should *not be read as either adopting or rejecting the honest belief rule in FMLA interference claims*. With that, however, the Court failed to go further and decide if the honest belief rule in fact does apply to FMLA interference cases and/or to further explain what the legitimate, unrelated reason carve-out means in application to interference claims.

Instead, the Court ultimately settled on another of its decisions from earlier this year, *Seeger v. Cincinnati Bell Telephone Co.*, which we blogged on here, as the one that provided Advantage's defense to Plaintiff's interference claim. In *Seeger*, as in this case, an employee sued after he was terminated for attending Oktoberfest while on FMLA leave. The Court found Seeger instructive because, like the facts in this case, the employee received all the FMLA leave to which the employee was entitled and, therefore, there could be no interference.

Because Plaintiff limited her interference claim to Advantage's failure to reinstate her at the end of her FMLA-approved leave and never argued her termination interfered with her requested extension of leave, the Court never had to address the "honest belief. Had Plaintiff argued her termination was in connection with her second request for leave, instead of arguing it was because Advantage failed to reinstate her after her first approved leave, the Court probably would have resolved the issue.

As for Plaintiff's retaliation claim, the Court did what you expect it would given that Advantage acted appropriately. The Court applied the “honest belief” rule and found that Advantage's proffered reason for terminating Plaintiff, *i.e*., FMLA fraud, was not pretextual. The Court's decision focused in large part on Advantage's investigation and Plaintiff's conduct during the investigation interview.

Takeaways

- **Use the Honest-Belief Defense, and Make Sure You Do It Right By Performing a Thorough Investigation**. This case reinforces an employer's right to rely on the "honest belief" defense, especially in response to FMLA retaliation claims. It remains to be seen whether the "honest belief" defense will provide a defense to FMLA interference cases, but it is not likely given the Court's footnote, "[t]he honest rule is inextricably linked with questions of discriminatory intent, and as the *Donald* court noted, bringing that rule into the interference realm would further erode the boundaries between the interference and retaliation claims."

1. **Use Your Resources – all of them**. Employers should use their resources to determine if their employees are abusing FMLA leave or taking leave fraudulently. Social media sites, like Facebook and Twitter, are a treasure trove of information, if publicly available. More often than not, if your employee is gaming the system, one of his or her co-worker/Facebook "friends" will turn the employee in to human resources. So keep your ears open.

2. **Conduct a Thorough Investigation**. This case also highlights the importance of a thorough investigation. Had the employer been rash and automatically terminated Plaintiff after seeing the Facebook photos, the employer's honest belief defense may not have been given as much weight by the Court. Instead, the employer thoroughly reviewed the record, which included Plaintiff's medical certifications, its policy against fraud, and gave Plaintiff a sufficient opportunity to clarify the pictures. This played significantly in the Court decision to allow the use of the honest belief defense to bar Plaintiff's retaliation claim.

- **Be Aware of the "Legitimate, Unrelated Reason" Carve-Out When Terminating An Employee Who Has Not Yet Used All Their Certified Leave**. In this case, the Sixth Circuit endorsed an employer's reliance on a "legitimate, unrelated reason" as a defense to FMLA interference claims. Of course, however, the court will also be on the look out for evidence that the claimed unrelated reason is pretextual, and several question regarding this defense remain open: (1) what does "legitimate, unrelated reason" mean; (2) how does it differ in application from the honest belief rule; and (3) how can employers use it to terminate an employee mid-leave or who has not taken all their leave entitlement without FMLA-interference liability.

- **Employees, Stay Away from Festivals When You Are On FMLA Leave**. While it would appear that the Sixth Circuit's recent attention to the honest belief defense is focused on employees who flaunt their good condition in public, specifically at public festivals, it is likely that the Sixth Circuit would find the honest belief defense in other scenarios, but employees, you have been warned.

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Discovery of Social Media Information is Subject to Same Rules as Paper Discovery

October 23, 2012 | Jay Yurkiw | Technology Law Report

In a recent decision, a court in the Southern District of Ohio denied a motion to compel the plaintiff in an employment discrimination action to give the defendants her user names and passwords for each of the social media sites she uses. In *Howell v. The Buckeye Ranch*, Case No. 2:11-cv-1014 (S. D. Ohio Oct. 1, 2012), the court said "[t]he fact that the information defendants seek is an electronic file as opposed to a file cabinet does not give them the right to rummage through the entire file. The same rules that govern the discovery of information in hard copy documents apply to electronic files." Applying this reasoning, the court held that the defendants' discovery request was overbroad because turning over the plaintiff's user names and passwords would give them access to "all the information in the private sections of her social media accounts—relevant and irrelevant alike."

Although the court denied the motion to compel, it did find that relevant information in the private section of a social media account is discoverable, and that this information is not privileged or protected from discovery by a common law right of privacy. Moreover, the court stated that the plaintiff had a continuing duty to preserve all the information in her social media accounts and that the plaintiff's counsel should advise defendants' counsel if any information in the private sections of the accounts had been deleted since discovery was served.

The court's analysis of the discoverability of information on social media sites is consistent with how other federal courts have ruled recently. In *Mailhoit v. Home Depot U.S.A., Inc.*, Case No. 2:11-cv-03892-DOC-SS (C.D. Cal. Sep. 7, 2012), for example, the court held that discovery of content from social media sites requires the application of basic discovery principles such as relevancy and proportionality. It also requires that document requests describe the information to be produced with "reasonable particularity." According to the court, the discovery rules "do not allow a requesting party 'to engage in the proverbial fishing expedition, in the hope that there *might* be something of relevance'" in a party's social media account. *Id*. [quoting *Tomkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012)]. Rather, the discovery sought must be relevant to the parties' claims and defenses and "comply with the general principles underlying the Federal Rules of Civil Procedure that govern discovery."

In *Robinson v. Jones Lang LaSalle Americas, Inc.*, Case No. 3:12-cv-00127-PK (D. Ore. Aug. 29, 2012), the court likewise saw "no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms." The court then applied the same relevancy standards set forth in Federal Civil Rule 26(b)(1) that apply to other documents and also indicated that courts have the discretion to limit the scope of social media discovery through principles such as proportionality.

These decisions show that federal courts are inclined to analyze the discoverability of information on social media sites just like they evaluate the discovery of paper documents and other types of electronic files. Courts are finding that requesting parties are not necessarily entitled to obtain all the information posted to a social media site but that such information is discoverable if it is relevant to the parties' claims and defenses in the lawsuit. Courts also are finding that general discovery principles such as proportionality may limit the scope of social media discovery. Because courts are treating the discovery of information on social media sites just like other documents, parties need to be aware that they may have a duty to preserve social media information when litigation arises or is reasonably anticipated.

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