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Trials & TRIBULATIONS

Emerging issues in social media discovery

The use of social media as evidence in civil lawsuits has become increasingly valuable to defendants and plaintiffs in personal injury, employment law and civil rights lawsuits. Recent decisions from New York state and federal courts have refined the requirements for establishing the relevance of social media and further defined the appropriate scope for ordering the production of materials from a party's social media account. Moreover, improperly destroying social media, even where the destruction is unintentional, can result in the imposition of an adverse inference.

Potential relevance and scope of social media discovery

In determining whether social media content is discoverable, courts generally require the moving party to demonstrate some factual basis for the party's belief that the account contains relevant information. In *Fawcett v. Altieri*, 38 Misc.3d 1022, 1027 (N.Y. Sup. Ct. Richmond Co. 2013), the court noted that "[t]here must be a clear factual predicate in order to compel the production of social media records ..."

In *Fawcett*, the court held that the defendants in a personal injury lawsuit were not entitled to review plaintiff's Facebook account. In support of defendant's motion to compel, defendants argued that plaintiff's social media account was "material and necessary" to plaintiff's alleged physical and emotional damages.

Because the defendants could not provide specific facts supporting their belief that plaintiff's account contained "material and necessary" information, the court declined to compel discovery. The court noted, however, that it would revisit the issue once depositions had been conducted in the event that the depositions revealed a factual predicate for discovery related to plaintiff's social media account, *Id.*

Where a party is, however, able to show a basis for their belief that a social media account contains relevant information, the

court will then consider ordering full or at least partial access to the account.

For example, in *Pereira v. City of New York*, 40 Misc.3d 1210(A) (N.Y. Sup. Ct. Queens Co. June 19), defendants moved for the production of a personal injury plaintiff's Facebook and MySpace accounts to refute plaintiff's deposition testimony that he was unable to participate in sports activities after he had been injured on a construction site.

In support of its motion, the defendant provided photographs from the public portion of plaintiff's Facebook account, which depicted plaintiff playing golf after the accident. Based on defendant's evidence, the court ordered plaintiff to provide all photographs depicting sporting activities from plaintiff's Facebook and MySpace accounts for in camera review.

Even where a moving party can offer some factual predicate for their belief that a social media account will yield relevant information, a court may weigh the likelihood of discovering relevant evidence against the burden on the producing party. In another recent decision, *Jewell v. Aaron's, Inc.*, No. 1:12cv0563, U.S. Dist. LEXIS 102182 (N.D.Ga. July 19), a Northern District of Georgia court reviewed a request for social media in

the context of a class action wage and hour lawsuit.

In *Jewell*, the defendant employer requested that 87 randomly selected opt-in plaintiffs provide "[a]ll documents, statements, or any activity available that you posted on any internet Web site or Web page, including, but not limited to, Facebook, MySpace, LinkedIn, Twitter, or a blog from 2009 to present during your working hours at an Aaron's store," *Id.* at *6.

The plaintiffs claimed that they were not paid for time spent working during their purported lunch breaks. Defendant sought this information to show that opt-in plaintiffs who were using Facebook and other social media during work hours may have

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actually been taking their lunch breaks as opposed to working. The plaintiffs' attorneys objected to this request as overly burdensome.

Defendant based its requests on "anonymous information that named Plaintiff Kurtis Jewell often made posts on Facebook during work hours," *Id.* Further, defendant argued that "given the prevalence of social media today and the ability to post on personal social media accounts and blogs from personal smart phones, it is likely that many of the opt-in plaintiffs have made posts ... Some of the posts may directly show that the poster was taking a lunch break at the time," *Id.* at *10 (internal citation omitted).

The court, however, concluded that the exemplar evidence regarding Kurtis Jewell's Facebook activity, along with defendant's argument that plaintiffs' posts "may" provide relevant evidence, was not sufficient to overcome the burden of requiring 87 opt-in plaintiffs to review all of their postings on potentially multiple social media sites for over a four-year period. The court therefore denied defendant's motion to compel in its entirety.

Once a court has established that a factual predicate exists for seeking a party's social media account information, the court must determine the appropriate scope of production for that information. The use of social media content is appropriate to support or refute whether a personal injury plaintiff has the physical injuries alleged, particularly in relation to a permanent physical disability, see e.g., *Romano v. Steelcase, Inc.*, 30 Misc.3d 426 (N.Y. Sup. Ct. Suffolk Co. 2010). The scope of relevant discovery pertaining to alleged "emotional distress" or "psychological damages," however, is still evolving.

A recent Eastern District of New York decision addressed this issue. In *Giacchetto v. Patchogue-Medford Union Free School Dist.*, No. 11-6323, ___ F.R.D. ___, 2013 U.S. Dist. LEXIS 83341 (EDNY May 6), the plaintiff, a school teacher who had been diagnosed with attention deficit hyperactivity disorder, filed suit against her employer for allegedly discriminating against her based upon her disability and retaliating against her for filing a complaint with the New York State Division of Human Rights.

The plaintiff alleged she suffered from emotional distress damages as a result of the defendant's conduct. The school district initially sought unlimited access to all of plaintiff's social media accounts, but agreed to limit its motion to compel to postings about the plaintiff's emotional well-being (along with physical damages and events alleged in the complaint). The defendant argued that information from plaintiff's social media accounts

was relevant because it reflected her "levels of social interaction and daily functioning and her emotional and psychological state," *Id.* at *1 (internal citation omitted).

With regard to the emotional distress damages claim, unlike physical injury and physical activity, "the relationship of routine expression of a mood to a claim for emotional distress damages is much more tenuous," *Id.* at *3. The court also noted that "[t]he 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," *Id.* at *2.

As a result, routine updates were deemed generally not relevant. The court did, however, order plaintiff to produce any postings on social networking websites with (1) specific references to the emotional distress she claimed to suffer, (2) the treatment she received for the underlying incidents alleged in her complaint, and/or (3) any postings on plaintiff's social networking websites that referred to "an alternative potential stressor," *Id.* at *4.

Spoliation of social media evidence

While there has not yet been a significant New York state or federal court decision dealing with the spoliation of social media evidence, a recent decision from the U.S. District of New Jersey *Gatto v. United Airlines, Inc.*, 2013 U.S. Dist. LEXIS 41909, No. 10cv1090 (D.N.J. March 25), imposed an adverse inference against the plaintiff for the improper deletion of his Facebook account.

In *Gatto*, the plaintiff filed a personal injury suit against United Airlines for an accident that occurred at the John F. Kennedy airport. As a result of the accident, the plaintiff claimed to be permanently disabled, and claimed damages for limitations to his physical and social activities. Defendant sought authorizations from plaintiff for access to his social media accounts and plaintiff refused to provide a release for Facebook.

During a settlement conference on Dec. 1, 2011, the judge ordered the plaintiff to execute an authorization for the release of documents and information on Facebook and the plaintiff agreed to change his Facebook password to "alliedunited." On Jan. 20, 2012, plaintiff's counsel informed defendant that plaintiff's entire Facebook account had been deleted, and the content could not be recovered. While the plaintiff claimed to have accidentally deleted his account, defense counsel disputed that plaintiff's actions, as described, could have been accidental.

The court ultimately found that the deletion of plaintiff's Facebook account warranted the imposition of sanctions in the form of an adverse inference. In reaching this determination, the court

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applied the four factors set forth in *Mosaid Technologies v. Samsung Electronics*, 348 F. Supp 2d 332 (D.N.J. 2004). Specifically, the court found that plaintiff's actions warranted an adverse inference as to the content of his Facebook account because (1) plaintiff had control over his Facebook account, (2) plaintiff's actions resulted in destruction of the content of that account, (3) plaintiff's Facebook posts were relevant to plaintiff's alleged physical disability and damages claim,

and (4) plaintiff knew at the time he deleted his account that the content was discoverable. The court, however, declined to impose monetary sanctions, holding that plaintiff's conduct did not appear to be motivated by fraudulent intent.

Conclusion

As the use of social media has grown more prevalent in our society, so has the importance of pursuing and preserving it for discovery. While New York and federal case law is continuing to evolve, courts are becoming more savvy regarding the

relevance of social media in specific areas of civil litigation, and are beginning to compel production of specific subsets of social media content according to its relevance.

Further, courts are recognizing the evidentiary significance of social media evidence and applying traditional standards governing the spoliation of evidence to social media content.

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