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Limits on access to social media communications are inconsistent

By Adam J. Glazer

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Individuals suing companies, especially those raising personal-injury or employment claims, must recognize that their social media postings are increasingly subject to exploration in discovery. A plaintiff claiming debilitating back injuries, for example, would do well to avoid posting post-accident photos of herself on horseback.

Last month's column focused on an informative decision from an Atlanta federal court, *Jewell v. Aaron's Inc.*, 2013 WL 3770837 (N.D. Ga. July 19, 2013), where the defendant's sweeping request for access to sample class-action plaintiffs' Facebook postings was rejected under traditional evidentiary standards. Merely hoping to find something of relevance in Facebook postings did not, the court ruled, comport with established discovery standards.

The analysis is case-specific, however, and other recent federal decisions ruling on defendants' efforts to delve into the content of social media accounts have employed various, which is to say inconsistent, standards. "The challenge is to define appropriately broad limits — but limits nevertheless — on the discoverability of social communications." *EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430, 434 (S.D.Ind. 2010).

The cases demonstrate that "the relevance of the content of [a] plaintiff's Facebook usage … is more in the eye of the beholder than subject to strict legal demarcations." *Bass v. Miss Porter's School*, 2009 WL 3724968 (D.Conn.). Generally, if courts find that the online data can potentially contradict asserted claims, access is likely to be granted, privacy concerns notwithstanding. Classic fishing expeditions, as in *Jewell*, remain unwelcome.

For example, in a lawsuit arising from the 2009 crash of Continental Connection Flight No. 3407 in Buffalo, N.Y., that killed a 37-year-old wife and mother, a choice of law issue involved whether the decedent was domiciled in China or New Jersey. When her family brought suit, the court ordered production of social media accounts for the last five years of not only the decedent's, relating to her domicile, but also of her family members, who were asserting loss-of-support claims. *In re Air Crash Near Clarence Center, NY*, 2011 WL 6370819 (W.D.N.Y.).

With $1.5 million in damages claimed for physical injury and emotional pain and suffering in *Moore v. Miller*, No. 10-cv-651-JLK (D.Colo. June 6, 2013), the court relied on purported "other cases" to find a "particularly broad" scope of discovery and compel production of the plaintiff's entire Facebook activity.

The only case cited in support, however, was *Held v. Ferrellgas*, 2011 WL 3896513 (D.Kan. 2011), where the retaliatory discharge plaintiff was indeed ordered to produce all data from his Facebook account and from his online job searches during his employment period.

When public portions of Facebook accounts contain postings or photos that appear to contradict plaintiffs' claims, particularly relating to damages, making a threshold relevance showing in personal-injury, civil rights and employment cases appears near certain.

In *Reid v. Ingerman Smith LLP*, 2012 WL 6720752 (E.D.N.Y.), where public Facebook pages contained information contradicting the plaintiff's claims of mental anguish from her alleged sexual harassment, the court found that "plaintiff's private postings may likewise contain relevant information that may similarly be reflective of her emotional state." Production was ordered of all postings and photos relating to plaintiff's emotions, feelings or mental state since the alleged harassment.

Conversely, where publicly available information is not inconsistent with a plaintiff's claims, discovery requests aimed at private sections of Facebook accounts can be considered overly broad. Defendants do not have "a generalized right to rummage at will through information that [a] plaintiff has limited from public view." *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012).

Yet, deploying privacy settings to limit Facebook access does not often affect the content's discoverability. In *Howell v. The Buckeye Ranch, Inc.*, 2012 WL 5265170 (S.D.Ohio), the court viewed requesting the plaintiff's Facebook password as overly broad, but held: "Relevant information in the private section of a social media account is discoverable."

Targonski v. City of Oak Ridge, No. 3:11-CV-269 (E.D.Tenn. Feb. 5, 2013), presented an employment dispute where the defendant was accused of creating "a sexually objectionable environment." The plaintiff, a wife, mother and police officer, testified that as "a Christian" and "a moral person," she was highly offended by her supervisor's comments linking her to an orgy and lesbianism.

Her authenticated, contemporaneous Facebook postings revealed inconsistencies with her claimed sensitivities, however, including "her desire for a female friend to join her 'naked in the hot tub,'" and showed her "friends'" posting about female orgies involving the plaintiff. The district court permitted access to the plaintiff's social media accounts to explore whether an objectionable environment was truly created and later deemed these postings admissible at trial.

Other federal courts vary their approaches when social media discovery is requested.

In a recent civil rights case, *Gumbs v. CBI Acquisitions LLC*, No. 2011-129 (D.V.I., June 19, 2013), rather than compel the production of all requested social media content, the court essentially ordered the plaintiff's counsel to determine what was relevant and to produce such information.

The opposite tack was taken an auto accident suit, *Thompson v. Autoliv ASP, Inc.*, 2012 WL 2342928 (D.Nev.), where the plaintiff claiming severe physical injuries, emotional distress and impaired quality of life sought to redact portions of her Facebook and MySpace accounts. The court ordered production of the entire accounts, including the redacted portions, to defendant's counsel in confidence. Defense counsel was then to negotiate with the plaintiff over redacted material he deemed discoverable.

In *Reid*, the plaintiff was also ordered to produce all posted third-party photos in which she was "tagged." Whether producing "tagged" photos violates the privacy of Facebook friends who post them was raised in *Higgins v. Koch Development Corp.*, 2013 WL 3366278 (S.D.Ind. July 5, 2013). To support its conclusion that photos were discoverable if relevant, the court resorted to Facebook's own privacy policy, which cautions users that posting is done at one's own risk.

The recent decisions by district courts show that litigants may not rely on broad privacy expectations to shield their online content from the reach of discovery. Instead, demonstrating that specific content is irrelevant to the disputed issues appears more likely to gain traction in this still emerging subset of discovery practice.