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Trials&TRIBULATIONS

Discovery of social networking sites

As the use of Facebook and other social networking sites becomes more common, so too do issues related to the discoverability of information contained on those sites. Despite the ubiquity of these sites, case law in this area is relatively sparse.

In fact, the Canadian courts seem to have dealt with the issue more frequently than federal and state courts in the United States. Decisions in the United States even cite to Canadian case law on the issue.

The first reported New York case to deal with the discoverability of social networking site information was published on Sept. 21. The Suffolk County Supreme Court held in *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (Suffolk Co S Ct 2010), that the defendant in a personal injury action was entitled to discovery of the plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information.

The court rejected the plaintiff's argument that disclosure would infringe upon her privacy rights, reasoning that there was no reasonable expectation of privacy with respect to the information on these sites, regardless of the plaintiff's privacy settings.

The plaintiff had refused to answer questions at her deposition regarding her MySpace and Facebook accounts, and she also refused to provide authorizations so that the defendant could obtain full access to and copies of the plaintiff's social networking sites. The court noted that the Stored Communications Act, 28 U.S.C. §2701 et seq. prohibits an entity, such as Facebook or MySpace, from disclosing information contained on social networking sites without the consent of the owner of the account, see 18 U.S.C. §2702(b)(3) (permitting provider of electronic communications or remote computer service to divulge contents of communication "with the lawful consent of the originator or of an addressee or intended recipient of such communication").

However, the court determined that the plaintiff was required to provide that consent, particularly in view of her claims that she sustained permanent injuries, including loss of enjoyment of life, as a result of the alleged incident.

In support of its argument to the court, the defendant noted that the public portions of the plaintiff's MySpace and Facebook pages revealed that the plaintiff had an active lifestyle and had frequently traveled, notwithstanding her claims in the litigation that she was essentially confined to her home because of her alleged injuries.

In reaching its decision, the court cited to a number of decisions from Canada, although it noted that "Canadian law requires that each party disclose every document relating to any matter in the action over which he has possession or control absent a claim of privilege."

The court also cited to *Ledbetter v. Wal-Mart Stores, Inc.*, 2009 WL 1067018 (D. Colo. April 21, 2009) (case no. 06-cv-01958), where the court refused to quash subpoenas served by the defendant in a personal injury action (arising from an electrical accident at a Wal-Mart store) seeking the content of the plaintiffs' social networking sites.

The court also relied upon an unreported case from the U.S. District of New Jersey in *Beye v. Horizon Blue Cross Blue Shield of New Jersey* (case no. 06-5337), decided on Dec. 14, 2007. In *Beye*, the magistrate held that the plaintiffs in an action filed against health insurance providers for failure to cover various eating disorders were required to produce "writings shared with others" including entries on Facebook and MySpace.

Surprisingly, the Suffolk County Supreme Court in *Steelcase* did not cite to the case of *EEOC v. Simply Storage Mgmt, LLC*, ___ F.R.D. ___, 2010 WL 3446105 (S.D. Ind. 2010) (case no. 09-CV-1223), decided May 11.

In *Simply Storage*, the magistrate held that the defendant was entitled to specifically defined information contained on two named claimants' social networking sites, but not to everything. The EEOC had commenced a sexual harassment claim on behalf of two named claimants and similarly situated individuals.

The two named claimants, Joanie Zupan and Tara Strahl, alleged severe emotional distress as part of their claimed damages, including post traumatic stress disorder. The defendant employer argued that it was entitled to all postings and profiles related to the claimants' Facebook and MySpace usage.

The EEOC objected, arguing that the requests were overbroad and not relevant and that the requests infringed on the claimants' privacy rights.

The court noted that the EEOC expressly identified the severe nature of Zupan's and Strahl's emotional distress when detailing

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By **ELIZABETH A. WOLFORD**

Daily Record
Columnist

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its claimed damages, for which both women had allegedly sought medical treatment, and noted that the alleged emotional distress was not the “garden variety” type purportedly suffered by some of the other employees who did not claim ongoing emotional harm.

The court also noted that while the context in which the information was sought was unique, the dispute really only required the court to apply “basic discovery principles in a novel context.”

The EEOC sought to limit the Facebook and MySpace disclosures to only that content that directly addressed or commented on the matters alleged in the complaint. The defendant employer argued that it was entitled to all postings and profiles of the claimants’ Facebook and MySpace usage. The court rejected both positions, instead reaching a compromise regarding the discoverability of the information.

Also citing to Canadian case law on the issue, the court rejected the notion that locking a profile from public access prevented discovery. Any privacy concerns, according to the court, could be addressed by an appropriate protective order. Moreover, any privacy concerns were outweighed by the fact that the claimants had already shared the information with at least one other person by their use of Facebook and MySpace.

On the other hand, the court rejected the position that all information contained on the social networking sites must be disclosed. Instead, the court concluded that the information contained on the sites could be relevant in revealing whether or when onset of severe emotional or mental injury occurred and the degree of distress.

The court further concluded that the information may evidence other stressors that could have produced the alleged emotional distress. Therefore,

the appropriate scope of relevance was “any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and SNS (social networking sites) applications for claimants Zupan and Strahl for [the relevant time period] ... that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.”

The court further held that any third-party communications to the two claimants must be produced if they placed the claimants’ own communications in context, and that photographs depicting the claimants would be governed by the same test. Thus, photographs posted on the claimants’ site during the relevant time period would likely be discoverable, but a photograph posted on a third party’s profile in which the claimant is merely “tagged” (i.e. process by which a third party posts a picture and links people in the picture) would likely not be discoverable. Similarly, photographs of third parties would likely not be discoverable.

The court explained that its order could be implemented as part of the regular discovery process. Counsel for the producing party should review and identify the material that falls within the scope of the disclosure request and produce that information.

In other words, counsel for the EEOC would determine which material to produce based upon the guidelines provided by the court. Defense counsel could make further inquiries regarding the responsiveness of the material during depositions and then challenge the production if it was concluded that the production fell short of the court’s guidelines.

A handful of other courts have considered this issue, and reached somewhat

differing results.

In *Mackelprang v. Fidelity National Title Agency of Nevada*, 2007 WL 119149 (D. Nev. 2007), the magistrate held that the plaintiff in a sexual harassment case was required to produce her Myspace.com private messages containing information regarding her sexual harassment allegations or which discussed her alleged emotional distress. The plaintiff was not required to produce private email messages between herself and third persons regarding sexually explicit or promiscuous emails not related to plaintiff’s employment.

In *Cirspin v. Christian Audigier, Inc.*, 2010 WL 2293238 (C.D. Cal. 2010), the district court reversed the magistrate’s order, which denied the plaintiff’s motion to quash subpoenas directed to various social networking sites. In this commercial litigation involving claims of copyright infringement, the court engaged in an extensive analysis of the Stored Communications Act and concluded that the subpoenas should be quashed to the extent that they sought private messages.

The subpoenas also sought Facebook wall postings and MySpace comments, and the defendants argued that those postings were publicly available. The court remanded that issue to the magistrate to obtain further evidence on whether there was restricted access to this information, appearing to suggest that if the information contained on those sites was not available to the public, then it should not be subject to subpoenas.

In *Bass v. Miss Porter’s School*, 2009 WL 3724968 (D. Conn. 2009) (case no. 08-1807), the court ordered disclosure of a plaintiff’s Facebook usage where the plaintiff claimed that she had been wrongfully expelled from school and asserted, among other things, claims for

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intentional infliction of emotional distress. The court concluded, after an in camera review, that the plaintiff's own determination as to what was relevant was too narrow, and the plaintiff was required to produce material from Facebook.

While the case law in this area is continuing to develop, some constants are apparent. Courts will evaluate a

party's entitlement to this information under basic principles applicable to discovery.

To the extent that the party seeking discovery can establish the relevancy of this information with either publicly available information from the social networking sites or otherwise, there will be a higher likelihood of success when seeking a court order compelling the production of

this information. Finally, a party's claims of privacy rights in an effort to prevent the disclosure of this type of information will likely not prevail.

Elizabeth A. Wolford is a partner with The Wolford Law Firm LLP, a litigation firm that handles both civil and criminal matters. She concentrates her practice in the areas of commercial litigation, employment defense and personal injury.