

The Impact of Social Media on Damages in Employment Litigation

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Everyone Facebook stalks - even (or shall I say especially) plaintiff and defense lawyers in Employment lawsuits. Mining Google, LinkedIn, Twitter, Instagram, and even Craigslist for information relating to the plaintiff's social activities while he/ she is allegedly suffering emotional distress or viewing LinkedIn to determine the appropriate defendant to sue can have a significant impact on damages. This new media that allows employers and employees alike to post a wide array of personal and professional data for our consumption is causing Courts to reexamine the appropriate scope of discovery in the social media age.

In *EEOC v. Simply Storage*,¹ Defendants sought discovery of two plaintiffs' Facebook postings in a sexual harassment case where plaintiff's alleged severe emotional distress resulting in post-traumatic stress disorder (as distinguished from garden variety emotional distress claims). *EEOC v. Simply Storage Management, LLC*, 270 F.R.D. 430, 437 (S.D. Ind. 2010). EEOC argued that the discovery of such information could reveal private information that may embarrass the plaintiff. *Id.* The Court rejected this argument finding that such potential embarrassment is part and parcel of a lawsuit alleging these types of injuries. *Id.* Moreover, the information at issue on the Facebook postings is information that the claimants have already shared with at least one other person through private messages or a larger number of people through postings. Another judge stated the obvious - "Facebook is not used as a means by which account holders carry on monologues with themselves." Leduc. 2009 CanLII 6838, at ¶31.

¹ This case was ultimately disposed of by way of summary judgment in favor of the Defendant on April 8, 2011.

As the Court noted in *Simply Storage Management*, despite the frequency with which discovery of social media issues would be expected to arise, remarkably few published decisions provide guidance on the issue. 270 F.R.D. at 434. The Court's analysis rested not on a challenge that was "unique to electronically stored information generally or to social networking sites in particular. Rather, the challenge is to define appropriately broad limits - but limits nevertheless - on the discoverability of social communications in light of a subject as amorphous as emotional and mental health, and to do so in a way that provides meaningful direction to the parties." *Id.* In reaching this balance, the Court found that such information is not shielded from discovery simply because it is "locked" or "private." *Id.* at 436; *see also Rexford v. Olczak*, 176 F.R.D. 90, 93 (W.D.N.Y. 2012) (holding that defendants were entitled to obtain plaintiff's diary where her contemporaneous account of meetings, conversations and other events central to the issues of the case provided relevant evidence). The Court also allowed discovery of pictures of the claimant taken during the relevant time period and posted on a claimant's profile as such would be discoverable because of the context of the picture and the claimant's appearance may reveal the claimant's emotional or mental status. *Id.* However, a photo posted on a third party's wall in which Claimant was merely tagged, was not discoverable as the court found that less likely to be relevant. *Id.*

Emotional Distress Damages

Garden variety emotional distress damages in employment litigation is one of the most frustrating issues for a defense lawyer to attack. Social media is most often used to limit emotional distress damages of a plaintiff when he or she can be found posting photos depicting involvement in social events where he or she appears to be enjoying life as

opposed to the tearful testimony during his deposition that he or she no longer has any enjoyment of life.

When a plaintiff puts her emotional status at issue by asserting claims of sexual harassment or discrimination, or other similar claims, some courts have found that Facebook usage depicts "a snapshot of the user's relationships and state of mind at the time of the comment's posting." *Bass v. Miss Porter's School*, 2009 WL 3724968, at *1 (D. Conn. 2009); *Reid v. Ingerman Smith, LLP* (holding that photographs and comments that plaintiff posted on her publically available Facebook page provided probative evidence of her mental and emotional state, as well as revealed the extent of activities in which she engaged).

A prime example of this is in a sexual harassment case where a pharmacist alleged she suffered severe emotional distress. (Complaint at 7, *Elam v. Pharmedium Healthcare Corp., et al.*, No. 2:07CV212-P-A (N.D. Miss. Nov. 13, 2007)). It was so severe, in fact, that she alleged it was the impetus which kept her from being able to appear for her deposition on multiple occasions. (Memorandum of Law in Support of Plaintiff's Motion to Reconsider at 4, *Elam v. Pharmedium Healthcare Corp., et al.*, No. 2:07CV212-P-A (N.D. Miss. Mar. 12, 2009), ECF No. 99). The Court dismissed Plaintiff's case for lack of prosecution. (Order Dismissing Case and to Show Cause at 4, *Elam v. Pharmedium Healthcare Corp., et al.*, No. 2:07CV212-P-A (N.D. Miss. Feb. 18, 2009), ECF No. 94). In her Motion to Set Aside the Order, Plaintiff alleged she was essentially unable to participate in the lawsuit because of the severity of her emotional distress which prevented her from even being able to contact the Court or Counsel to advise that she was unable to appear. (Memorandum of Law in Support of Plaintiff's Motion to Reconsider at 4, *Elam v. Pharmedium Healthcare Corp., et al.*, No.

2:07CV212-P-A (N.D. Miss. Mar. 12, 2009), ECF No. 99). Upon review of Plaintiff's undergraduate school social media page, during the very week her deposition was scheduled, Plaintiff was at the homecoming football game enjoying the attention of younger men, posting photos of herself tailgating with friends and enjoying the game. (Affidavit of Ursula Holmes at Exhs. A-B, *Elam v. Pharmedium Healthcare Corp.*, et al., No. 2:07CV212-P-A (N.D. Miss. May 19, 2009), ECF No. 104). Defendant submitted this evidence in Response to Plaintiff's Motion to Reconsider. The Court denied Plaintiff's Motion, finding that the plaintiff did not dispute that she was able to work at all relevant times and "attended parties and football games during the relevant time period. " The Court dismissed all of the plaintiff's claims, with prejudice.

Efforts (or lack thereof) to Mitigate Damages

Social media evidence has even provided defense attorneys with an avenue to challenge mitigation of damages when a plaintiff seeks front and back pay following an alleged wrongful termination. Social media evidence is often revealing of the plaintiff's efforts to mitigate damages by seeking employment. At least one court has compelled discovery of Plaintiff's online "chats" with a "professional consulting service" as relevant to the Plaintiff's efforts to mitigate damages. *See Glazer v. Fireman's Fund Ins. Co.*, 2012 WL 1197167 (S.D.N.Y. 2012) (finding that online chats revealed the plaintiff's work performance, relationships with coworkers, emotional state before, during, and after her employment, as well as her efforts to mitigate damages).

Another way in which defense attorneys can utilize social media evidence in their efforts to challenge a plaintiff's claimed damages is by confronting plaintiffs with conflicting

self-reported or self-identified employment statuses. In *Williams v. Harrah's*, Plaintiff alleged that she had tried to find another job and was unable to locate work after her alleged wrongful termination from Harrah's. (Complaint at 10, *Williams v. Harrah's Tunica Corp.*, No. 2:08-cv-02813 (W.D. Tenn. 2008)). The case proceeded to trial and, on cross examination, Defendant attacked Plaintiff's credibility by getting Facebook postings into evidence wherein Plaintiff had identified herself as "retired" and "self-employed." (Transcript of Nonjury Trial Proceedings at 115-16, *Tam/Williams v. Harrah's Tunica Corp.*, No. 08-2812 (W.D. Tenn. 2011)). The trial judge ultimately granted a defense verdict. The defense was able to effectively impeach the plaintiff with social media evidence so that her case was tainted by her credibility issue.

Evidence Regarding Joint Employment or Integrated Enterprise

Equally frustrating to the plaintiff's counsel is defendant's insistence that the plaintiff was an employee of the smaller (less profitable) subsidiary or separately owned Company as opposed to the employee of the deep pocket parent company – especially in cases involving punitive damages. In *Branson v. Harrah's Tunica Corporation*, the defense tried to argue that BL Development, the subsidiary which directly owned the casino where plaintiffs were employed, was the direct employer subject to the ADEA action, not Harrah's Entertainment, the parent company that owned BL Development. 832 F.Supp.2d 929, 936 (W.D. Tenn. 2011). Plaintiff used evidence from the LinkedIn profiles of defense witnesses, the Human Resources Manager and the casino's Vice President of Operations, to show that employees of the casino considered themselves employees of Harrah's Entertainment, despite their testimony that they did not work for Harrah's Entertainment. *Id.* at 932. Their LinkedIn

pages showed that both had self-identified as being employed by Harrah's Entertainment. *Id.* The Court even noted the Vice President of Operation's inconsistency undermined his credibility for his other testimony. *Id.* at 938. Because of his poor credibility as a witness, the Court specifically held that there the reasons the defense gave for terminating the plaintiff were just pretext for an unlawful action and ultimately found that the \$361,363.42 verdict of back pay, front pay, and liquidated damages, plus attorney's fees and costs, could be recovered from Harrah's Entertainment. *Id.* at 940.

Conclusion

Courts show a continuing trend of allowing broad discovery of social media evidence in employment cases. Defense attorneys use this type of evidence to defend against a plaintiff's claim for emotional distress or to challenge a plaintiff's mitigation efforts. Plaintiff's attorneys fire right back and use social media to challenge a defense of suing the wrong employer. The ways in which people communicate publically and personally via social media are always changing, but one thing is clear – social media evidence, namely a person's ability to self-report or self-identify their employment statuses, current feelings, current social interactions, etc., will become an increasingly important tool for attorneys to use to determine damages.