

Court Allows Discovery of Private Posts on Facebook

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Facebook is a seemingly endless source of juicy intel. As such, I always recommend that users lock down their privacy settings if they want to keep “the man” out of their timeline. Public posts are fair game for employers and anyone else who is interested. So after making the recommended changes to our various profiles, we enthusiastically post all of those choice pics from the weekend—confident that we are safely shielded by the invisible fence provided by Facebook. Right?

Don’t get too comfortable. Especially if you see litigation in your future. TLNT and employment lawyer [Eric B. Meyer](#) tipped me off with a post on an intriguing case out of the Eastern District of New York. The court made some bold pronouncements, breaking down the privacy wall in a pending sexual harassment case. Without going into all of the messy details, the plaintiff in *Reid v. Ingerman Smith LLP* alleged that her female boss grabbed and squeezed her breasts, calling them “huge”. The plaintiff claims emotional distress, making a claim for pain and suffering due to her damaged emotional state.

Next stop for the defense—Facebook. In the discovery process, the defense found some revealing public posts including a picture of the plaintiff in a low cut top with a [suggestive caption](#), references to pole dancing classes and panties. The public posts seem to contradict any emotional frailty. So the defense asked the court if they could dig deeper, requesting access to private posts. This is where it gets interesting.

The court first said that social media information is a source of relevant information and thus discoverable. “Facebook usage depicts a snapshot of the user’s relationships and state of mind at the time of the content’s posting.” Going one step further, the court said any information regarding her emotional state was fair game—and that her “private postings may likewise contain relevant information that may be similarly reflective of her emotional state.” In other words, regardless of your settings, there is no reasonable expectation of privacy when you post something on Facebook. Friends share with friends.

For employers involved in litigation I say this: expand your discovery requests to include social media. Once a situation has escalated to litigation, there is potential for some choice and relevant information and very little downside. It doesn’t hurt to ask, and a sympathetic court may allow you to dive through the privacy wall.

For employers engaged in pre-employment screening or routine background checks of employees, respecting the privacy wall is still the recommended SOP. Moreover, several jurisdictions have made it illegal to request employee passwords and have prohibited access to personal accounts.

For users of social media, this opinion certainly opens up the privacy debate. What’s the point of privacy settings if all communication is fair game? I’m interested in your opinion.