

Don't Forget About Social Media When Preserving Information for Discovery

Gatto v. United Airlines Inc.

Gatto v. United Airlines Inc., No. 10-cv-1090, slip op. at 11, New Jersey District Court, 25 March 2013

US courts have moved past deciding the issue of whether information posted on social networking websites may be discovered during civil discovery. Courts now expect parties to preserve information on those sites if it is relevant to the claims and defences in a case, just like courts expect with other forms of electronically stored information (ESI). If relevant social media information is not preserved by a party, courts will consider whether they should impose sanctions for spoliation of evidence against that party. Potential sanctions for spoliation include the following: dismissal of claims; default judgment against the spoliating party; exclusion of evidence; an adverse inference jury instruction; and payment of attorneys' fees and costs.

Deletion of Facebook account leads to 'spoliation instruction' to jury

A federal district court recently ordered that a 'spoliation instruction' be given at trial to the jury, permitting it to draw an adverse inference against the plaintiff for permanently deleting his Facebook account during the case. See *Gatto v. United Airlines, Inc.*¹, No. 10-cv-1090, slip op. at 11 (D.N.J. Mar. 25, 2013). According to the court, the permanent deletion of the plaintiff's account prejudiced the defendants 'because they have lost access to evidence that is potentially relevant to Plaintiff's damages and credibility.' *Id.* at 10.

The plaintiff claimed that he sustained permanently disabling injuries while working as a ground operations supervisor at JFK International Airport after an aircraft caused a set of fueler stairs to crash into him. The defendants sought discovery relating to the plaintiff's claims that his injuries

limited his social and work activities and made him unable to work. The plaintiff provided the defendants with signed authorisations for the release of information from certain social networking sites and other online services like eBay and PayPal, but he did not include an authorisation for his Facebook account.

After the court ordered the plaintiff to execute an authorisation for his Facebook account, the plaintiff agreed to change his password so that his account could be accessed. The parties disputed whether they agreed that defence counsel would directly access the plaintiff's Facebook account. The parties did not dispute that the password was provided to defence counsel for the purposes of accessing documents and information from Facebook.

Shortly thereafter, counsel for one of the defendants briefly accessed the account 'to confirm the password was changed' and also printed some portions of it. The plaintiff then received an alert from Facebook that his account had been accessed from an unfamiliar IP address. Even though defence counsel confirmed with the plaintiff's counsel that the account had been accessed by counsel, the plaintiff 'deactivated' his account. The deactivation of the plaintiff's account resulted in its permanent deletion² after it was not reactivated within fourteen days.

In the meantime, defence counsel served a *subpoena* on Facebook along with the plaintiff's authorisation to obtain the contents of the plaintiff's account directly from Facebook. Facebook objected to providing certain information from the account due to the Federal Stored Communications Act, 18 U.S.C. § 2701 et seq. Facebook instead recommended that the plaintiff

download the entire contents of his account as an alternative method for obtaining the information. After the defendants agreed to obtain the information through the plaintiff, the plaintiff's counsel advised of the account's permanent deletion and the inability to retrieve any information from it. As a result, the defendants moved for sanctions for spoliation.

In granting the defendants' motion for spoliation sanctions, the court applied a four-factor test to determine whether an adverse inference instruction was appropriate. The court examined the following four factors: (1) whether the evidence was within the party's control; (2) whether there was an actual suppression or withholding of evidence; (3) whether the evidence destroyed or withheld was relevant to the claims or defences; and (4) whether it was reasonably foreseeable that the evidence would be discoverable.

First, the court found that the plaintiff's Facebook account was 'clearly within his control,' as he had 'authority to add, delete, or modify his account's content.' *Gatto*, slip op. 8 (citing *Arteria Property Pty. Ltd. V. Universal Funding V.T.O., Inc.*³, No. 05-cv-4896 (D.N.J. Oct. 1, 2008)).

Second, the court found that the posts, comments, status updates, and other information posted on the plaintiff's Facebook page after the date of the alleged accident were relevant to the issue of damages. The comments and photographs that were printed from the plaintiff's Facebook page before it was deleted showed the plaintiff's physical and social activities, trips, and online business activities.

Third, the court found that the plaintiff failed to preserve relevant evidence and that the defendants were prejudiced. The court was not

persuaded by the plaintiff's arguments that the account had not been 'accidentally' deleted, stating that 'so long as the evidence is relevant, the "offending party's culpability is largely irrelevant.'" Gatto, slip op. 10.

Fourth, the court found that it was reasonably foreseeable that the plaintiff's Facebook account would be sought in discovery.

Based on its findings, the court concluded that an adverse inference instruction was appropriate. According to the court, this instruction 'permits a jury to infer that the fact that a document was not produced or destroyed is "evidence that the party that has prevented production did so out of the well-founded fear that the contents would harm him.'" Id. at 7.

'Clean up' of Facebook account leads to monetary sanctions and adverse jury instruction

State courts also have sanctioned plaintiffs for failing to preserve social media information. In *Allied Concrete Co. v. Lester*⁴, 736 S.E.2d 699 (Va. 2013), the trial court ordered monetary sanctions of \$180,000 against the plaintiff and \$542,000 against his attorney for spoliation of evidence on the plaintiff's Facebook page.

Following the death of his wife in a car accident, the plaintiff brought a wrongful death action seeking compensatory damages for economic and non-economic losses, including mental anguish. During discovery, the defendant saw a picture on the plaintiff's Facebook page that depicted the plaintiff holding a beer can while wearing a T-shirt that said, 'I [love] hot moms' across the front. After being advised to 'clean up' his Facebook page to avoid 'blow-ups of this stuff at trial,' the plaintiff deactivated his Facebook account,

deleted 16 photographs from his Facebook account after reactivating his account, and then lied about having deactivated his account. Id. at 702-03.

In addition to monetary sanctions, the trial court also gave the following adverse inference instruction to the jury:

"The Court instructs the jury that the Plaintiff, Isaiah Lester, was asked in discovery in this case to provide information from his Facebook account. In violation of the rules of this Court, before responding to the discovery, he intentionally and improperly deleted certain photographs from his Facebook account, at least one of which cannot be recovered. You should presume that the photograph or photographs he deleted from his Facebook account were harmful to his case.'

Id. at 703. The trial court read the instruction twice, once while the plaintiff was testifying and again before the closing arguments. Id. The Supreme Court of Virginia did not disturb the trial court's ruling on this issue on appeal.

Takeaway

Although both of these cases involved the intentional destruction of Facebook evidence by personal injury plaintiffs, litigants should not discount the willingness of the courts to issue spoliation sanctions simply as being the result of extreme misconduct. All parties, including companies, need to understand that they may have a duty to preserve social media information when litigation arises or is reasonably anticipated if the information is potentially relevant to the case. Depending on the circumstances, this duty of preservation could include corporate social media accounts and the personal accounts of key players in the case.

Accordingly, parties should include social media in their litigation hold notices as a potential source of discoverable information, and they should ask about the use of social media during custodian interviews. They also should consider whether the scope of preserving such information would present any unreasonable burdens or costs or other problems. If it would, parties should address these issues sooner rather than later and not simply ignore the potential relevance of social media evidence and the risk of deleting it.

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