New York Law Journal
Labor&Employment
WWW.NYLJ.COM
An ALM Publication
VOLUME 252—NO. 76
MONDAY, OCTOBER 20, 2014

Cases Illustrate Creative Uses Of **Social Media Evidence**

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As Internet communications quickly replace the use of pen and paper, the field of electronic discovery continues to increase in importance. Many articles have been written about the ability to request and receive electronic discovery including various forms of social media—such as information from Facebook, LinkedIn, Myspace, Twitter and Instagram.

However, the right to obtain discovery and its actual use to support a claim or defense are two very different battles. In the employment law context, once an employer has obtained social media evidence (whether through discovery or from its own investigation) the question becomes: How is this evidence actually used—if at all—in the course of litigation? Several recent cases around the country have demonstrated unique or creative ways in which social media evidence has been used to either support or defend a claim of employment discrimination.

Litigators representing employers should consider ways in which they can use social media evidence to demonstrate that the employer had a reason to terminate or discipline the employee and that the stated reason was not pretexual. For example, one employer used social media evidence to support its claim that it terminated an employee due to her failure to follow office procedure, when she had an opportunity to do so, and not because of any discriminatory motive. In Tabani v. IMS Associates, an x-ray technician claimed that she was discriminated against based upon her sex in violation of Title VII of the Civil Rights Act of 1964.1 The employee informed her employer that she was being hospitalized on Jan. 3, 2011, due to pregnancy complications, and thus, would be absent from work. The employee was admitted and did not communicate with her employer again until Jan. 6, 2011. On Jan. 7, 2011 the employee informed her employer that she was being released, at which time the employer notified her that she was being terminated. The employee claimed that by this conduct "[s]he was singled out for termination on account of her pregnancy."2 The employer moved for summary judgment, arguing that the employee was terminated because she violated company policy when she failed to inform her employer of her absences on January 4, 5 and 6. In order to demonstrate that the employee could have informed her employer of her absence despite being admitted to the hospital, the employer submitted Facebook screen captures of the employee's "posts" during the relevant time frame.

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Although the Nevada District Court found that a material issue of fact existed as to whether or not the employee failed to adhere to the employer's policy and as to whether or not the employee performed her job responsibilities in a satisfactory fashion,3 this creative strategy and use of social media evidence demonstrates how an employer may use an employee's posts as powerful evidence regarding material factual issues during a relevant time frame.

Similarly, Facebook posts on social media websites have been used to demonstrate an employee's ability to access the Internet during a relevant time frame, and thus, as evidence that the employee had the ability to retrieve information concerning company policy. This strategy proved to be successful in Odam v. Fred's Stores of Tennessee, when the U.S. District Court for the Middle District of Georgia granted an employer's motion for summary judgment and dismissed an employee's claims of sexual harassment, constructive discharge and retaliation.4 In Odam, the employer established an affirmative defense to plaintiff's sexual harassment claim by demonstrating that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer or otherwise to avoid harm. Specifically, the employer in Odam had an anti-harassment policy in place that outlined complaint procedures, and thus the first element of the affirmative defense was satisfied. The defendants established the second element of the affirmative defense using, among other things, plaintiff's own Facebook posts during the relevant time frame. The court in Odam found that the plaintiff had no justifiable excuse for failing to follow reporting procedures because, inter alia, "[j]udging by plaintiff's Facebook posts on the day after she quit her job, she had Internet access and could reasonably have discovered the designated procedure for reporting sexual harassment even if she had mislaid [the employer's] anti-harassment policy."5 Thus, by utilizing the plaintiff's own social media activity, counsel for the employer demonstrated the ease by which plaintiff could have discovered the employer's complaint procedures, and therefore could have reported any harassment in accordance with company policy.

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Social media evidence can also be useful in hostile work environment claims as a means of demonstrating an employee's comfort with conversations and/or humor of a sexual nature. As set forth by the U.S. Supreme Court in Faragher v. City of Boca Raton, in order to establish a hostile work environment claim under Title VII "[a] sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."6 Thus, in order to demonstrate the latter prong—the victim's perception of whether or not the sexual environment was offensive—some attorneys are creatively turning to a plaintiff's activity on social media. For example, in Targonski v. City of Oak Ridge, a police officer filed a hostile work environment claim, among other gender discrimination claims, which began with sexual rumors about the plaintiff.7 Specifically, plaintiff claimed that a fellow police officer was spreading rumors about the plaintiff's sexual orientation and desire to participate in an orgy, which led to plaintiff's fellow employees approaching her about the rumors as well as "[s]ix unwanted calls on her cell phone '[w]ith heavy breathing and giggling' perhaps 'having been made by a male disguising his voice in a manner to sound scary.'" At her deposition, plaintiff testified that "[I]'m a Christian and I strive really hard to be a moral person. So for someone to start thinking of me as someone who has orgy parties at my house while my son is at home, that's severely humiliating to me." In opposition, in order to demonstrate that the plaintiff would not have found the rumors offensive, the defendant pointed to plaintiff's own conduct on her Facebook page on which she had discussions relating to her desire for a female friend to join her naked in the hot tub, naked Twister, and female orgies involving plaintiff and others. Although the court noted that the Facebook conversations may have been the source of the rumor and that the argument presented was "very enticing," the court declined to grant summary judgment.8 However, subsequent to the court's decision on the motion for summary judgment, when addressing the plaintiff's motion in limine, which included a request to exclude the plaintiff's Facebook entries, the court specifically noted the relevance of such evidence when it stated that "[t]he evidence is relevant to the source of the alleged rumors and to whether plaintiff could truly have found those alleged rumors offensive."9

In contrast to Targonski, in Gelpi v. Autozoners, Judge Benita Y. Pearson of the Northern District of Ohio relied in significant part on social media evidence to conclude that allegedly harassing conduct was not, in fact, unwelcome by the plaintiff. In Gelpi, the plaintiff claimed that she was subjected to comments of a sexual nature every day for four years and that she received text messages of a sexual nature from a manager.10 Defendant moved to dismiss and, among other

things, argued that plaintiff welcomed the sexual banter. The court noted the legal proposition that "[w]here the plaintiff was a frequent or welcome participant in the sexual hijinx or banter at issue, it is fatal to her sexual harassment claim."11 In holding that the conduct in question was not unwelcome, the Northern District of Ohio relied upon, among other things, plaintiff's Facebook page. The court noted that plaintiff's Facebook page "[r]eveal[ed] that she is very comfortable with sexual humor and contains numerous comments and e-cards making sexual references and jokes" and that since plaintiff was "Facebook friends" with nearly all of her former coworkers, "[h]er Facebook posts and status updates are indicative of jokes her coworkers would reasonably believe she found funny, particularly given her participation in the sexual jokes and banter at work."12 Thus, litigators faced with hostile work environment claims should not discount the possibility of using a plaintiff's social media activity to strengthen their argument that the plaintiff did not find the questioned conduct offensive.

Although litigators may tend to think to use social media evidence in connection with the question of whether or not the questioned conduct amounts to employment discrimination, such evidence has also been used to prove or disprove that the defendant was, in fact, an employer of the employee. This question arose in Blayde v. Harrah's Entm't, where, in response to plaintiff's age discrimination claims the defendants, Harrah's Entertainment and Harrah's Operating Company, claimed that they were not the corporate entities that employed the plaintiff.13 However, the plaintiff successfully attacked this position through the creative use of social media evidence. While the plaintiff's supervisor testified for the defendants at trial and denied that he and the plaintiff were employees of the defendants, plaintiff's supervisor's LinkedIn page listed Harrah's Entertainment Company as his employer. Based on the LinkedIn page (and other evidence), the court concluded that Harrah's Entertainment and Harrah's Operating Company met the definition of "employer" under the Age Discrimination in Employment Act and further found that plaintiff was an employee of those entities.14

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Similarly, in Dooling v. Bank of the West, plaintiff brought an action for employment discrimination under the Family Medical Leave Act (FMLA) against (her former employer) GSB Mortgage and Bank of the West.15 Defendants moved for summary judgment arguing, in part, that plaintiff was only employed by GSB Mortgage, which was not an "employer" under the FMLA because GSB Mortgage only had 12 employees. Plaintiff responded that the defendants were integrated or joint employers under the statute, and, because together the Defendants had more than 50 employees, they were an "employer" for purposes of the FMLA. Although the court found that the defendants were not joint employers, the court found that there was an issue of fact as to whether or not the defendants were integrated employers. In coming to this determination, the court looked to, among other things, the fact that the defendants had a shared Facebook page.16 Thus, the plaintiff successfully defeated the defendants' motion for summary judgment by, among other things, using the defendants' social media activity to her advantage.

As the use of social media continues to increase in contemporary American society, litigators in employment discrimination cases must be cognizant of the support social media evidence can provide (or the damage it can cause) to their clients' cases. In all likelihood, social media evidence will continue to play a meaningful role in discrimination cases. Apart from admissibility considerations,17 the recent case law suggests that a litigator who is willing to expend the time and resources necessary to obtain discovery of social media evidence will only be constrained by his own creativity and thus should try to think "outside the box" when developing his litigation strategy.

1. *Tabani v. IMS Assocs.*, 2:11-cv-00757-MMD-VCF, 2013 U.S. Dist. LEXIS 20090, at *2 (D. Nev. Feb. 14, 2013).
2. *Tabani*, 2013 U.S. Dist. LEXIS 20090, at *5.
3. *Tabani*, 2013 U.S. Dist. LEXIS 20090, at *11. A review of the District Court of Nevada's docket reveals that the parties settled this matter after the court's decision. See Order Dismissing Case, Sept. 11, 2013, ECF No. 56.
4. *Odam v. Fred's Stores of Tennessee*, No. 7:12-CV-91 (HL), 2013 U.S. Dist. LEXIS 175040 (M.D. Ga. Dec. 11, 2013).
5. *Odam*, 2013 U.S. Dist. LEXIS 175040, at *28-29.
6. *Faragher*, 524 U.S. 775 (1998) (citing *Harris v. Forklift Sys.*, 510 U.S. 17 (1993)).
7. *Targonski v. City of Oak Ridge*, No. 3:11-CV-269, 2012 U.S. Dist. LEXIS 99693 (E.D. Tenn. July 18, 2012).
8. *Targonski*, 2012 U.S. Dist. LEXIS 99693, at *n.2, *28.
9. *Targonski v. City of Oak Ridge*, 921 F. Supp. 2d 820, 30 (E.D. Tenn. 2013). The Eastern District of Tennessee Docket indicates that the parties subsequently filed a Stipulation of Dismissal. See Stipulation, February 8, 2013, ECF No. 64.
10. *Gelpi v. AutoZoners*, No. 5:12CV0570, 2014 U.S. Dist. LEXIS 38477, at *3-4 (N.D. Ohio March 24, 2014).
11. *Gelpi*, 2014 U.S. Dist. LEXIS 38477, at *12 (citing *Romaniszak-Sanchez v. Intl. Union of Operating Eng'rs, Local 150*, 121 Fed. App'x 140, 146 (7th Cir. 2005); *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991); *Balletti v. Sun-Sentinel*, 909 F. Supp. 1539, 1546-47 (S.D. Fla. 1995) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982)); *Orton-Bell v. Indiana*, No. 1:11-cv-805-WTL-TAB, 2013 U.S. Dist. LEXIS 1333, at *10 (S.D. Ind. Jan. 4, 2013); *Ripley v. Ohio Bureau of Emply. Servs.*, 2004 Ohio 881 (Ohio App. 10th Dist. 2004).
12. *Gelpi*, 2014 U.S. Dist. LEXIS 38477, at *14.
13. *Blayde v. Harrah's Entm't*, No. 2:08-cv-02798-BBD-cgc, 2010 U.S. Dist. LEXIS 133990 at *3 (W.D. Tenn. Dec. 17, 2010).
14. *Blayde*, 2010 U.S. Dist. LEXIS 133990 at *16.
15. *Dooling v. Bank of the West*, No. 4:11-cv-00576, 2013 U.S. Dist. LEXIS 99618, at *1 (E.D. Tex. July 17, 2013), report and recommendation adopted by 2013 U.S. Dist. LEXIS 140001 (E.D. Tex. Sept. 30, 2013).
16. *Dooling*, 2013 U.S. Dist. LEXIS 99618, at *10-13. The court's docket shows that a Stipulation of Dismissal was subsequently filed. See Stipulation, April 30, 2014, ECF No. 91.
17. The court's decision in *Targonski* suggests that the admissibility of social media evidence would be governed by the application of traditional principles of relevance, prejudice and hearsay. See 2012 U.S. Dist. LEXIS 99693, at *24-27.