1. **Romano v. Steelcase, Inc., 2010 WL 3703242 (N.Y. Sup. Ct. Sept. 21, 2010) – lack of expectation of privacy**

   In Romano, plaintiff filed suit for injuries that she claimed caused her to be "largely confined to bed." Defendant then requested discovery of both public and private content from plaintiff's social media sites, specifically Facebook and MySpace. Information—including pictures—in the public area of plaintiff's social media sites appeared to contradict her claims, and defendant understood that the private areas of the sites included further similar content. Plaintiff objected to the production of private content from the sites, citing a violation of privacy.

   Plaintiff's objection was rejected on multiple counts. Regarding the expectation of privacy protection of social media content, the court cited Facebook and MySpace policies, which warn users that they should have no expectation of privacy with regard to content posted on the sites. The court reasoned that, since information contradicting plaintiff's claims was included on the public sections of plaintiff's social media site, it was reasonable to believe that the private sections might contain additional relevant information. Therefore, the court determined that the information requested by defendant was "both material and necessary to the defense of this action and/or could lead to admissible evidence" and ordered plaintiff to provide defendant with access to private postings, including deleted material, from both Facebook and MySpace.

2. **Crispin v. Christian Audigier, Inc., 717 F.Supp.2d 965 (C.D. Cal May 26, 2010) – some social media content protected by Stored Communications Act**

   In the Crispin copyright infringement case, defendant sought the production of plaintiff's private social media messages. In support of that specific discovery request, defendant issued subpoenas to several third-parties, including Facebook and MySpace. Plaintiff objected, saying that the messages should be protected information under the Stored Communications Act (SCA), that the subpoenas were overbroad in scope, and that the information the subpoenas were attempting to uncover was irrelevant to the case.

   A magistrate judge disagreed with plaintiff's argument that these communications fell under the SCA, and ruled that the providers of the messaging service should release the private messages. Over plaintiff's objections, the magistrate judge ruled that the social media sites' messaging services were used solely for public display. However, the district court subsequently reversed the ruling, holding that Facebook and MySpace allow private message or email services which are separate from the general public posting. The opinion in this case held that the SCA protects Facebook and MySpace messages that aren't publicly available (i.e., private messages).

Therefore, these messages cannot be subpoenaed in civil litigation. In addition, the court left the door open for further clarification, noting that "Facebook wall postings and the MySpace comments are not strictly 'public,' but are accessible only to those users plaintiff selects."

3. **EEOC v. Simply Storage Management LLC, 270 F.R.D. 430 (S.D. Ind. May 11, 2010) – defendant sought and won discovery of MySpace and Facebook pages**

In Simply Storage Management LLC, defendant sought content from all of claimants' social media site profiles, specifically MySpace and Facebook, in order to assess claimants' claims of emotional distress. The EEOC objected, asserting that the content in question was not relevant to the case; that the discovery request was overbroad; and that complying with the request would be unduly burdensome and would infringe upon claimants' privacy.

The court described the discovery of social media site data as, "requir[ing] the application of basic discovery principles in a novel context," and ordered claimants to produce all content that was arguably relevant to the case, erring on the side of production. Within the parameters laid out by the court, claimants were to produce what content they deemed relevant; this order did not preclude defendant from requesting additional production if defendant determined that there was additional content that was relevant to the case.

As to the privacy objection, the court held that, "a person's expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery." In addition, the court found that any privacy concern therein was lessened since the information requested was "information that claimants have already shared with at least one other person through private messages or a larger number of people through postings." Therefore, the requested content was ordered to be produced, regardless of privacy settings within the social media sites.

4. **Bass v. Miss Porter's School, 2009 WL 3724968 (D.Conn.) – relevance and discoverability of social media and ordering the production of more than 750 profile pages**

As a part of discovery in Bass, defendant requested documents from plaintiff's social networking sites, including Facebook. Initially, plaintiff produced approximately 100 pages of Facebook content, but objected to producing the entirety of defendant's request, claiming (a) the additional requested documents were not relevant to the case; and (b) the documents would be difficult to retrieve, based on defendant's termination of plaintiff's email and internet access.

The accessibility objection was overcome when plaintiff served a subpoena on Facebook for the additional requested pages; plaintiff subsequently reached an agreement with Facebook to produce over 750 pages of documents. When addressing the relevancy objection, the court reviewed a sample of the original subset of documents produced by plaintiff as well as a sample of the full set of Facebook-produced documents. Plaintiff claimed that only the original subset

of documents contained content relevant to the case, but the court ruled that there was no "meaningful distinction" between the two sets of documents with regard to relevance and that some of the documents in the larger set were clearly relevant to the case. The court also stated that the relevancy of Facebook content is "more in the eye of the beholder than subject to strict legal demarcations," and ruled that plaintiff was not allowed to solely determine which of its documents would be relevant and likely to be ruled admissible evidence. Therefore, production of the entire set of Facebook documents was ordered.

5. **Quigley Corp. v. Karkus, 2009 WL 1383280 (E.D.Pa.) – Facebook "friends" status of co-defendants held no significance**

   Plaintiff alleged that defendants had an undisclosed, personal relationship (in violation of the Securities and Exchange Act), partly evidenced by defendants' status as "friends" on Facebook. The case centered around a proxy contest and allegations by plaintiff that defendants constituted a "group" as defined by Section 13(d) of the Exchange Act. Such a group would be required to file certain disclosures with the SEC, which defendants did not file.

   In an opinion discussed well beyond the legal community, the court, "assign[ed] no significance to the Facebook 'friends' reference." Specifically, the court found that "electronically connected 'friends'" do not constitute an SEC-prohibited relationship. The court also noted the fleeting nature of Facebook "friends," where simply pressing the delete button severs the relationship. Facebook "friend" status, therefore, was disregarded in this case.

6. **Ledbetter v. Wal-Mart Stores, 2009 WL 1067018 (D.Colo.) – granting discovery of plaintiff's Facebook, MySpace and other social media content**

   In a case concerning injuries sustained in the course of performing electrical work at a Wal-Mart location, defendant requested content from plaintiff's social media site profiles, including Facebook and MySpace. Plaintiff objected to defendant's discovery request, citing physician-patient confidentiality.

   Since plaintiff had waived his physician-patient confidentiality rights in filing the lawsuit, the court rejected the objection. The court ordered plaintiff to execute consent for the social media providers to produce the information sought by defendant.

7. **Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc., 2008 WL 4513696 (D.N.J. Oct. 1, 2008) – sanctions for failure to preserve website**

   While not specifically related to social media sites, this case focused on the preservation (or lack thereof) of website content. Plaintiff requested copies (electronic or paper) of defendant's website at a particular point in time. Initially, defendant agreed to provide the requested content, but never produced the copies.

Even though the website was maintained by a third-party, the court determined that the content was still under the control of defendant, and thus defendant was responsible for the requested content even after it was deleted from the website. The court allowed plaintiff to file a spoliation motion, and granted plaintiff's request for an adverse inference instruction to the jury.

8. **Mackelprang v. Fidelity National Title Agency of Nevada, Inc., 2007 WL 119149 (D.Nev.) – defendant sought and was denied discovery of all records, including private messages, on plaintiff's MySpace page (allowed limited discovery)**

   Plaintiff alleged that she had been sexually harassed by her employer. Hoping to reveal that plaintiff was having an extramarital affair and impeach her credibility, defendant sought all records, including private messages, on plaintiff's MySpace pages. Plaintiff objected, citing a lack of relevance to the case and a violation of privacy.

   When denying defendant's motion to compel, the court noted that the broad discovery request (i.e., all communications) amounted to "a fishing expedition." Although finding that communications and posted data on social networking websites may be relevant, the court held that there was no valid basis for the request that extended beyond "suspicion or speculation as to what information might be contained in the private messages." Defendant was therefore barred from obtaining "private e-mail messages between plaintiff and third persons regarding allegedly sexually explicit or promiscuous e-mails not related to plaintiff's employment with Fidelity." However, the court did not prohibit defendant from obtaining records by serving "properly limited requests for production of relevant email communications." (emphasis in original).

9. **Griffin v. Maryland, 419 Md. 343, 19 A.3d 415 – admissibility of social media data**

   This 2011 case involved an appeal of a murder conviction, where plaintiff sought to have his conviction overturned on the basis of unauthenticated MySpace content presented as evidence in his original trial. The prosecutors in the underlying trial did not attempt to ascertain the authenticity of the MySpace content by directly questioning the alleged MySpace user (the girlfriend of the accused) or by examining her computer for evidence of accessing and posting information on the MySpace site. Instead, prosecutors had attempted to establish authenticity through questioning of another witness, who had visited MySpace and had retrieved and printed pages from the site. In a split decision, the appeals court ruled that the MySpace content (considered to be a key component of the case against the accused) was not properly authenticated during the original trial; the conviction was overturned.

10. **National Labor Relations NLRB, *Report of the General Counsel*, Memorandum OM 11-74, August 18, 2011**

    The NLRB has recently issued a series of opinions addressing employees' use of social media – specifically, statements that disparage the employer or cast it in a negative light. In each of the

cases, the employer terminated the employee(s) because of the negative statements. While the cases are fact specific, they provide assistance to those companies drafting social media policies and considering taking an adverse employment action based on an employee's use of social media.

The central issue addressed by the NLRB was whether the negative statements made by the employees about the employer were considered "concerted activity" that fell under the protections of Section 7 of the National Labor Relations Act (the "Act"). The NLRB explained that an activity is "concerted" when an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself." Specifically, the NLRB found that when employees use social media to discuss the company amongst themselves, their communications constitute protected activity. Moreover, when a sole employee makes a statement that appears to be made on behalf of other employees or appears to discuss working conditions in general, the statement is also protected. When the use of social media is protected, no adverse employment action (including demotion or termination) can result.

In some instances the employer terminated the employee in accordance with a restrictive social media policy. However, the NLRB still considered concerted activity to be protected—even when the employer's social media policy supported the adverse employment action. To that end, the NLRB determined that a social media policy violates Section 8 of the Act if it restricts an employee from making negative or disparaging statements about the company, or if it prohibits an employee from depicting the company in the media without the company's consent, unless the policy also informs the employees that it does not apply to Section 7 activity.

With the exception of the final NLRB summary, the above information was compiled from Westlaw case summaries. Additional information about each of the cases may be found on Westlaw, as well as through other publicly available sources.

Contact Us: For further information or if you have any questions regarding this Alert, please contact your Redgrave LLP attorney or Managing Partner Victoria Redgrave at (202) 681-2599 or vredgrave@redgravellp.com.