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## PLAINTIFFS, SAVE YOUR FACEBOOK PAGE: SPOILIATION RULING WILL AID EMPLOYERS

By Frank A. Custode

In a recent ruling, the United States District Court for District of New Jersey held that a plaintiff's deletion of his Facebook account in a personal injury action warranted an adverse inference against the plaintiff based on his failure to preserve the account. As set forth below, this ruling has significant ramifications for employers because, in essence, it confirms that social media access is discoverable in actions where plaintiffs allege injuries related to their physical and/or social activities.

### Factual Background

Plaintiff Frank Gatto ("Plaintiff") was employed as a grounds operations supervisor for JetBlue Airways Corporation. While unloading baggage on January 21, 2008, Plaintiff claims that a United Airlines, Inc. ("United") aircraft caused a set of fueler stairs to crash into him. As a result, Plaintiff filed a personal injury action, alleging a number of injuries, including but not limited to a torn rotator cuff, a torn meniscus and back injuries.<sup>1</sup>

During the course of discovery, United requested "documents and



information related to social media accounts maintained by Plaintiff as well as online business activities such as eBay." In response, Plaintiff provided signed authorizations for the release of information from social networking sites and other online services such as eBay and PayPal; however, he did not include an authorization for the release of records from Facebook. Subsequently, the Court ordered Plaintiff to execute an authorization for the release of documents and information from Facebook, and Plaintiff agreed to change his account password in order to give United access to the account.

On December 5, 2011, Plaintiff changed his password. Shortly thereafter, counsel for United accessed the account as did counsel for Allied. On December 9, 2011, Plaintiff's counsel notified defense counsel that Plaintiff received an alert from Facebook that an unfamiliar IP address from New Jersey accessed the account and asked defense counsel if they, in fact, had done so. On December 15, 2011, counsel for United confirmed that they had, in fact, accessed the account and that they sent Plaintiff's authorization to Facebook with a subpoena to obtain the entire contents of the account directly from Facebook. In response, Facebook recommended that the account holder (Plaintiff) download the entire contents of the account as an alternative method of obtaining the information. This issue was discussed during a January 6, 2012 telephone status conference with the Court.

Nonetheless, on January 20, 2012, Plaintiff's counsel advised defense counsel that Plaintiff deactivated his Facebook account on December 16, 2011, and that all of the account data was lost. The purported reason proffered by Plaintiff's counsel for the account deactivation was that Plaintiff deactivated the account after receiving notice that the account was accessed by an unfamiliar IP address on December 6 and 7. Counsel for United requested that Plaintiff immediately reactivate the account, but the account could not be reactivated because Facebook "automatically deleted" it 14 days following deactivation.

Defendants asserted that the information reviewed by counsel for United was relevant because it contained comments and photographs that directly contradicted Plaintiff's claims and deposition testimony regarding his alleged damages. Accordingly, Defendants filed a motion for sanctions seeking, among other things, an Order issuing an instruction at trial that the jury draw an adverse inference against Plaintiff for failing to preserve his Facebook account.

### **District Court Issues Sanctions**

Applying the above facts, the District Court determined that an adverse inference or "spoliation instruction" was warranted. In so doing, the Court found that Plaintiff had a duty to preserve his Facebook account because: (1) his Facebook account was clearly within his control, as he had the authority to add, delete, or modify the account's content; (2) the Facebook account was relevant to the litigation given that Plaintiff alleged serious injuries that have limited his ability to work and engage in social and physical activities; (3) the Facebook information sought focused on posts, comments and updates made subsequent to the alleged accident; and (4) it was reasonably foreseeable that his Facebook account would be sought in discovery since Defendants initially requested the information nearly five months prior to Plaintiff's deactivation of the account.

In addition, the Court found that, even if Plaintiff did not intend to

permanently deprive Defendants of the information associated with his Facebook account, there is no dispute that he intentionally deactivated the account. As such, the Court determined that Defendants were prejudiced because they lost access to evidence that was potentially relevant to Plaintiff's damages and credibility. Accordingly, the Court held that the spoliation inference was appropriate.

### ▶ Lessons Learned

Social media is becoming a more prevalent part of litigation. This is especially true in employment discrimination and sexual harassment actions given that plaintiffs frequently allege various forms of damages in connection with their physical and social activities. This ruling drives home the point that plaintiffs have a duty to preserve their social media accounts, and that there will be significant ramifications for the destruction of such accounts. The key is a prompt discovery demand -- if not a litigation hold -- on all such information. With that prerequisite, employers should expect to benefit from this ruling, and they should not hesitate to seek sanctions for the subsequent deletion of social media activities.

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<sup>1</sup> The fueller stairs were owned and operated by Allied Aviation Services, Inc. ("Allied"). Therefore, Plaintiff alleges claims in the lawsuit against Allied as well.

The Porzio Employment Law Monthly is a summary of recent developments in employment law. It provides employers with an overview of the various legal issues confronting them as well as practical tips for ensuring compliance with the law and sound business practices. This newsletter, however, should not be relied upon for legal advice in any particular matter.