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#CaughtOnSocialMedia

By Okechi C. Ogbuokiri

Courts have addressed the discoverability of social media posts; however, the new trending issue is the admissibility of such posts, specifically regarding their authenticity. Recently the Supreme Court of Delaware issued an opinion regarding the authenticity of social media posts. In *Parker v. State of Delaware*, 85 A.3d 682 (2014), the Court held that social media posts that were purported to be authored by the defendant-appellant were appropriately authenticated by circumstantial evidence. Although this is a criminal case, it discusses two different approaches for authenticating social media posts, which can either be beneficial or detrimental to employers who seek to use such evidence in litigation.

The Facts

In December 2011, Parker, the defendant-appellant, and another young woman engaged in a physical altercation, which stemmed from a disagreement between the women regarding a mutual love interest. Through testimony of an eye-witness, Parker appeared to be the aggressor in the altercation despite her claim of self-defense. Among other offenses, Parker was indicted on one count of second degree assault. The State sought to introduce Facebook posts that were allegedly authored by Parker after the altercation to demonstrate her role in the incident and discredit Parker's self-defense argument. The posts, which originated from Parker's account, included direct threats toward the alleged victim.

To authenticate the posts, the prosecution introduced a copy of each post with Parker's picture, her full name, and the time stamp for each entry. The alleged victim also testified on behalf of the prosecution, explaining how she "shared" Parker's Facebook posts on her own personal profile page. Despite Parker's objection, the trial court admitted the posts into evidence and held that they were sufficiently authenticated. The trial court noted that the jury must ultimately decide whether to rely on the Facebook posts and the related circumstantial evidence.

The jury convicted Parker of second degree assault. She appealed the decision to the Delaware Supreme Court, arguing that the trial court erred when it admitted the alleged posts from her Facebook profile.

The Delaware Supreme Court Ruling

The Delaware Supreme Court found that the trial court did not err when admitting the Facebook posts into evidence. The Court underscored *D.R.E.* 901(a), which states "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Court noted that:

1. testimony from a witness who states that the evidence is what it is claimed to be,
2. distinctive characteristics of the evidence itself, such as "appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances," that can authenticate the documentary evidence, or
3. evidence that shows that the documentary evidence is accurately produced through a process or system,

are all sufficient ways to authenticate social media posts.

Despite ruling in favor of the prosecution, the Court noted that there is genuine concern with the falsification and forgery of social media posts. Such concern has led to two leading approaches to authenticate such evidence. The Court cited to a Maryland opinion and a Texas opinion to illustrate both approaches.

The Maryland Approach

In *Griffin v. State*, 419 Md. 343 (2011), the Maryland Court of Appeals adopted a high standard for authenticating social media posts. The *Griffin* Court held that just a picture of the alleged author appearing on a MySpace page with the post, including her birth date and location, was insufficient to properly link the defendant's profile with the post. The *Griffin* Court noted that the prosecution failed to ask the defendant to authenticate the post or introduce electronic records that definitively show that the defendant authored the page. In its holding, the *Griffin* Court stated that to properly authenticate social media posts, a party should (1) ask the alleged author if he or she created the post, (2) introduce electronic records through the Internet history on the alleged author's hard drive to verify that the post originated from the individual's computer, or (3) obtain information from the social networking website to confirm the author's identity.

The Texas Approach

In *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012), the court took a less stringent approach. There, the prosecution introduced evidence of the names and account information of three MySpace profiles, which demonstrated the defendant's knowledge of and responsibility for a murder. Within the posts the author complained of an ankle monitor, which the defendant was required to wear prior to the trial. The *Tienda* Court held that authenticating social media posts depends on the nature of the evidence and the circumstances of the case. It held that the standard for determining admissibility of social media posts is whether a jury could reasonably find the supporting evidence authentic. The *Tienda* Court concluded that the photos linked to the page and the contextual reference to the defendant's personal life was sufficient circumstantial evidence to admit the posts into evidence for the jury's consideration.

The Delaware Supreme Court aligned its ruling with the *Tienda* Court and held that a party should be able to provide any form of verification under *D.R.E.* 901, as described above. The Court held that the trial judge is the gatekeeper of evidence and has the responsibility to ensure that there are sufficient proofs to support the authenticity of a social media post;

however, the jury is the fact-finder to determine whether to accept or reject the evidence and what weight to give it.

Implications for New Jersey Employers

There is a great deal of value in social media posts for purposes of court proceedings. For example, in many employment cases, an employer will discover fodder for cross-examination, and perhaps even helpful admissions, in social media posts. An employer will need to authenticate such posts in employment actions filed by former employees.

The New Jersey courts have yet to issue an opinion directly related to this issue. However, the language of *N.J.R.E.* 901 is very similar to *D.R.E.* 901. Pursuant to *N.J.R.E.* 901, evidence can be authenticated through direct proof or circumstantial evidence. Without predicting how New Jersey courts will rule in such a case, it would be beneficial for employers if the Texas approach was adopted. The Texas approach allows for a variety of means to authenticate a social media post, and would be potentially less expensive to proffer evidence, as an employer would not need to expend funds on obtaining electronic data for independent verification as required by the Maryland approach. An employer should be able to authenticate a social media post by simply offering into evidence the testimony of the individual who observed and reported the post to the employer.

Many courts and commentators have focused on the discoverability of social media posts. However, employers also need to consider how it will get such posts before the trier of fact. *#authentication*

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