



Employment Law Alert

Legal developments affecting human resource management

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No reasonable expectation of privacy in content posted to social networking websites, regardless of individual privacy settings

By *Renee M. Jackson*

A trial court recently found that a plaintiff had no reasonable expectation of privacy in what she posted to her Facebook and MySpace pages, regardless of the privacy settings she used to restrict access to such postings. This decision adds to the growing list of cases addressing novel legal issues relating to social media, and employers can apply the court's decision to issues that may arise in their workplaces, including investigation, discipline, and termination relating to an employee's use or misuse of social media.

In *Romano v. Steelcase, Inc.*, the Supreme Court of New York, Suffolk County, considered whether a plaintiff alleging permanent physical injuries must turn over to defendants information from her social networking pages relevant to her "activities and enjoyment of life." The public portions of plaintiff's Facebook and MySpace pages showed content in direct contradiction to her claims that she had sustained permanent injuries, and defendants sought access to the private portions of her pages in order to gain further contradictory evidence. Plaintiff had utilized the available privacy settings on Facebook and MySpace to restrict access to only those "friends" she wanted to share information with, but the court found that she could not shield relevant information from disclosure simply because she had adopted privacy settings to restrict access:

Thus, it is reasonable to infer from the limited postings on Plaintiff's public Facebook and MySpace profile pages, that her private pages may contain materials and information that are relevant to her claims or that may lead to the disclosure of admissible evidence. To deny Defendant an opportunity access [sic] these sites not only would go against the liberal discovery policies of New York favoring pre-trial disclosure, but would condone Plaintiff's attempt to hide relevant information behind self-regulated privacy settings.

Romano v. Steelcase, Inc., No. 2006-2233, 2010 NY Slip Op 32645U, *5 (Sep. 21, 2010). The court granted defendants access to plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted or archived content (which defendants could obtain from Facebook and MySpace directly).

In addition to addressing this discovery issue, the court also considered plaintiff's argument that production of the "private" portions of her social networking pages would be an invasion of her privacy under the Fourth Amendment,¹ and held that production of these portions would not violate her right to privacy, and that any such concerns were outweighed by defendants' need for the information.

Whether a right to privacy exists in what an individual posts to their social networking pages was an issue of first impression to New York courts. Indeed, very few courts have considered this issue. The court first sought guidance from cases in other jurisdictions—including New Jersey, California, and Ohio—which addressed the expectation of privacy in e-mails and other writings that have been shared with others. Those decisions indicated generally that privacy concerns are far less where the individual herself **chose to** disclose the information. The court then sought guidance from the privacy policies of Facebook and MySpace, which do not guarantee complete privacy and expressly indicate that information posted may become public, **regardless of privacy settings**.

Based on these sources, the court held that plaintiff had no reasonable expectation of privacy in the content she posted to Facebook and MySpace:

Thus, when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy.

Romano, 2010 NY Slip Op 32645U, at *7.

Applying this decision to the employment context, employees may well lack an expectation of privacy in what they post to their social networking sites, regardless of the privacy settings they have adopted. Outside of the litigation context addressed in the *Romano* case, this decision is most relevant in the employee discipline and investigation context. Take a situation where a human resources representative of the employer is presented with content from an employee's social networking page indicating or suggesting that the employee has violated company policy (i.e., committed sexual harassment against another employee) or misused social media in a way that could harm the company (i.e., posted a picture of themselves in company uniform acting unlawfully or using poor judgment). A printout of the social networking page is given to the HR representative by someone who is "friends" with the employee in question on that social networking site—which could be a co-worker, customer, or concerned citizen—but the HR representative is not "friends" with the employee and therefore cannot access the violating or potentially violating content herself.

In light of the *Romano* decision, the employee likely has no reasonable expectation of privacy in the content posted to a social networking site, and the employer may commence an investigation based on the content it received from the third party. The employer may then hand down discipline to the employee in question based on the investigation of that content.

¹ There is no statutory or common law right to privacy under New York law.

The *Romano* case adds to the patchwork of state and federal decisions addressing the privacy issues and discovery implications surrounding employee use of social media. No clear trend has emerged, and courts will continue to grapple with these issues and may reach divergent opinions.

Stay tuned for developments in these and other areas of employment law that are implicated by employee use and misuse of social media.

For further information, please contact your Nixon Peabody attorney or:

- Renee M. Jackson at 617-345-1028 or rjackson@nixonpeabody.com