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Tweeting & Snapping: What You Need to Know about Preserving, Discovering, and Using Social Media

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This article focuses on how social media can be discovered and used in employment litigation, with an emphasis on (1) the duty to preserve evidence; (2) spoliation issues; and (3) the substantive use of social media discovery, including in screening job applicants and as evidence of discrimination or harassment.

I. The Duty to Preserve Evidence.

A. When the Duty Arises.

The duty to preserve material evidence arises not only when litigation becomes reasonably foreseeable but also extends to the period before litigation "when a party should have known that the evidence may be relevant to future litigation." *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *see also Smith v. Café Asia,* 246 F.R.D. 19, 21 n. 2 (D.D.C. 2007); *Baliotis v. McNeil,* 870 F. Supp. 1285, 1290 (M.D. Pa. 1994) (stating that a duty to preserve evidence arises when the plaintiff knows of the existence or likelihood of litigation). Indeed, the Advisory Committee comments to Rule 37(e) of the Federal Rules of Civil Procedure clarify that information systems' automatic deletion features must be turned off and a litigation hold implemented when a party learns of "pending or reasonably anticipated litigation." Fed. R. Civ. P. 37(e) advisory committee's note (2006); *Green v. McClendon*, 262 F.R.D. 284, 289 (S.D.N.Y. 2009) (describing this time as "the point where relevant individuals anticipate becoming parties in imminent litigation").

The phrase "reasonably foreseeable," as it relates to a party's preservation duties, sets an objective standard. *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1145 (N.D. Cal. 2012). In determining whether a duty to preserve evidence has arisen, the pertinent inquiry is "whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation." *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011). This

flexible and fact-specific standard provides the court discretion to "confront the myriad factual situations inherent in the spoliation inquiry." *Id.*

In the employment-law context, the duty to preserve evidence arises, at the latest, when the complainant files his or her administrative charge, or where the law does not require administrative exhaustion, when he or she files a complaint. *See Zubulake v. UBS Warburg*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("In this case, the duty to preserve evidence arose, at the latest, on August 16, 2001, when Zubulake filed her EEOC charge.").

Pre-filing correspondence *may* trigger an opposing party's duty to implement a litigation hold before formal litigation is commenced, where the letter specifically notifies the defendant of an intent to pursue litigation and not merely to negotiate a settlement. *See Apple Inc.*, 881 F. Supp. 2d at 1145 (holding that Apple's delivery of a "comprehensive summary of its specific patent infringement claims against specific Samsung products" put Samsung on notice that litigation was "at least foreseeable, if not on the horizon"); *see also Major Tours, Inc. v. Colorel*, No. CIV 05-3091(JBS/JS), 2009 WL 2413631, at *4 (D.N.J. Aug. 4, 2009) (the defendants' duty to preserve was triggered when they received the plaintiff's letter which alleged racial profiling claims, stated that the plaintiff was entitled to tens of thousands of dollars in monetary compensation, and demanded a response "within two weeks in order to avoid recourse to litigation"); *Washington Alder LLC v. Weyerhaeuser Co.*, No. CV 03 753, 2004 WL 4076674 (D. Or. July 27, 2004) (finding that the plaintiff's letter, which threatened to sue for antitrust violations, put the defendant on notice of possible litigation and thereby triggered its duty to preserve evidence).

Counsel must take care to ensure that correspondence aimed at triggering a litigation hold communicates the threat of impending litigation rather than a desire to amicably settle claims for the purpose of *avoiding litigation*. *See, e.g.*, *Indiana Mills & Mfg., Inc. v. Dorel Indus., Inc.*, No. 1:04-cv-01102-LJM-WTL, 2006 WL 1749410, *4 (S.D. Ind. Feb. 16, 2006) (concluding that the defendant could not reasonably anticipate litigation after receiving a letter from the patent holder which merely referred to infringement and the possibility of a negotiated resolution, but made no further threat of a lawsuit); *Claude P. Bamberger Int'l, Inc. v. Rohm and Haas Co.*, No. 96-1041, 1997 WL 33768546, *3 (D.N.J. Aug. 12, 1997) (concluding that the plaintiff's pre-filing correspondence did not trigger the defendant's duty to preserve because it did not threaten litigation, but sought a business remedy for a perceived business wrongdoing).

In *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, counsel for Cache La Poudre wrote to Land O'Lakes about her client's potential trademark claims, and stated that the purpose of the letter was:

> to clearly put [Land O'Lakes] on notice of our client's trademark rights and clearly establish the opportunities we have given Land O'Lakes to avoid exposure. The second purpose of this letter is to determine whether this situation can be resolved without litigation and media exposure . . . We think you will agree that the company's interests are best served by trying to resolve this unfortunate and difficult situation.

244 F.R.D. 614, 622-23 (D. Colo. 2007).

In subsequent correspondence, the plaintiff's counsel expressed concern that "Land O'Lakes is continuing to pursue registration of [its] mark as any use of such a mark in the feed industry would be likely to infringe our client's longstanding PROFILE trademark." *Id.* However, rather than threaten litigation, the plaintiff's counsel indicated that her client "would be willing to listen to what Land O'Lakes might propose." *Id.* After negotiations failed, Cache La Poudre Feeds filed suit against Land O'Lakes.

In evaluating when Land O'Lakes' duty to preserve evidence arose, the court recognized that "under different circumstances, a demand letter alone may be sufficient to trigger an obligation to preserve evidence and support a subsequent motion for spoliation sanctions." *Id.* However, it found that the plaintiff's letters failed to trigger the duty to preserve, because they were too "equivocal" and "did not threaten litigation and did not demand that Land O'Lakes preserve potentially relevant materials," but only "hinted at the possibility of a non-litigious resolution." *Id.*

Notably, in *Cache La Poudre Feeds, LLC*, the plaintiff did not include a separate demand that the defendant preserve evidence. In response to this failure, the court cautioned, "Given the dynamic nature of electronically stored information, prudent counsel would be wise to ensure that a demand letter sent to a putative party also addresses any contemporaneous preservation obligations." *Id.* Thus, in initial correspondence with an adversary, Plaintiff's counsel should clearly communicate his or her client's legal claims, demand for relief, and intent to pursue litigation. Additionally, counsel should demand that the defendant implement a litigation hold. Such an express demand will minimize confusion about whether the adverse party reasonably should have anticipated litigation and therefore, preserved evidence moving forward.

B. What Evidence the Duty Encompasses.

Adequate preservation requires a party to "suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 218 (S.D.N.Y. 2003). "Relevant documents are those that a party should reasonably know are relevant in the action, reasonably calculated to lead to the discovery of admissible evidence, reasonably likely to be requested during discovery and/or are the subject of a pending discovery request." *Adorno v. Port Auth. of N.Y.*, 258 F.R.D. 217, 227 (S.D.N.Y. 2009).

Further, the EEOC regulations require employers to preserve personnel and employment records for one year after the later of: (1) the date on which the records were generated; or (2) the date on which the personnel decision memorialized in the records was made. 29 C.F.R. § 1602.14. Such records include requests for reasonable accommodations, application forms submitted by applicants and other records concerning hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, among others. *Id.* Employers must also preserve personnel documents relevant to pending EEOC charges, until final disposition. Such documents include "personnel or employment records relating to the aggrieved person" and those relating to his or her comparators. *See id.*

The duty to preserve applies with equal force to electronically stored information (ESI) and evidence stored on social media platforms. *See, e.g.*, *Thurmond v. Bowman*, 199 F. Supp. 3d 686, 690 (W.D.N.Y. 2016) (assuming arguendo that a litigation hold encompassed relevant evidence on social media accounts, "particularly in cases of alleged discrimination involving claims for emotional distress damages"); *Lewis v. Bellows Falls Congregation of Jehovah's Witnesses, Bellows Falls, Vt., Inc.*, Case No. 1:2014cv00205-jgm, 2016 WL 589867, *1–2 (D. Vt. 2016) (applying the duty to certain categories of Facebook posts relevant to plaintiff's claims of "severe, life-changing, permanent, emotional damages"); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 388 (S.D.N.Y. 2015) (ruling that a litigation hold applied to Facebook posts and text messages); *Gatto v. United Air Lines, Inc.*, No. 10-CV-1090-ES-SCM, 2013 WL 1285285, at *3–4 (D.N.J. Mar. 25, 2013) (finding that plaintiff had a duty to preserve his Facebook account when he filed a personal injury action); *Lester v. Allied Concrete Co.*, 83 Va. Cir. 308 (Va. Cir. Ct. Sept. 6, 2011) *aff'd in part, rev'd in part on other grounds*, 285 Va. 295 (Va. Jan. 10, 2013) (imposing sanctions for failing to preserve Facebook account and specific photographs on it); *see also Reid v. Ingerman Smith LLP*, No. CV 2012-0307 ILG MDG, 2012 WL 6720752, at *1 (E.D.N.Y. Dec. 27, 2012) (finding portions of plaintiff's public social media postings relevant to her claims for mental and emotional damages); *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 571 (C.D. Cal. 2012) (holding that plaintiff's social media communications were conceivably relevant to her claims for emotional distress and therefore, were discoverable); *Holter v. Wells Fargo & Co.*, 281 F.R.D. 340, 344 (D. Minn. 2011) ("given that plaintiff has placed her employment with and termination of employment from defendant, along with her mental disability and emotional state at issue, the defendant is entitled to information from her social media websites that bear on these topics"); *E.E.O.C. v. Simply Storage Mgmt., LLC,* 270 F.R.D. 430, 435 (S.D. Ind. 2010) ("It is reasonable to expect severe emotional or mental injury to manifest itself in some [social network site] content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress. Further, information that evidences other stressors that could have produced the alleged emotional distress is also relevant.").

C. To Whom the Duty Extends.

The duty to preserve evidence runs to counsel, "who has a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction." *Orbit One Commc'ns, Inc. v. Numerex Corp.,* 271 F.R.D. 429, 437 (S.D.N.Y.2010) (internal quotation marks and citation omitted). The duty to preserve also extends to those employees of a party who are likely to have relevant information. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003). Such employees include the managers of a corporate party, who "are responsible for conveying to their employees the requirements for preserving evidence." *Id.*

A party's discovery obligations do not end with the implementation of a litigation hold. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004). Rather, counsel must continue to oversee compliance with the litigation hold and to monitor the party's efforts to retain and produce relevant documents. *Id.*

II. Spoliation and Sanctions.

A. Background.

Spoliation is defined as "the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010); *see also* The Sedona Conference, The Sedona Conference Glossary: E-discovery & Digital Information Management (Second Edition) 48 (2007) ("Spoliation is the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation or audit.").

Where a party spoliates evidence, it subjects itself to a range of potential sanctions, including monetary sanctions in the form of fines, attorney's fees, and costs, preclusion of certain lines of argument, and the issuance of an instruction permitting the jury to draw an adverse inference from the spoliator's destruction of evidence. In extreme circumstances, a court may dispose of a case by entering a default judgment in the plaintiff's favor or dismissing the case outright. Federal courts' authority to impose sanctions for spoliating ESI derives from Rule 37(e) of the Federal Rules of Civil Procedure, which was amended in 2015, and enables federal courts to "order measures no greater than necessary to cure prejudice." *See* Fed. R. Civ. P. 37(e) advisory committee's notes (2015).[1]

Rule 37(e) of the Federal Rules of Civil Procedure is premised upon the common-law duty to preserve evidence when litigation is reasonably foreseeable and provides:

> (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;

[1] Notably, some states retain independent causes of action for the tort of spoliation, which may apply to the negligent destruction of evidence. *See, e.g.*, *Smith v. Atkinson*, 771 So. 2d 429 (Ala. 2000) (recognizing a cause of action for negligent spoliation against a third party); *Oliver v. Stimson Lumber Co.*, 993 P.2d 11 (Mont. 1999) (recognizing a cause of action for negligent and intentional spoliation against third parties); *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846 (D.C. 1998) (recognizing an independent tort for the negligent or reckless spoliation of evidence); *Thompson v.* Owensby, 704 N.E.2d 134 (Ind. Ct. App. 1998). *But see Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998) ("As we indicated above, obligations not to destroy evidence arise in the context of particular lawsuits; consequently, spoliation is best remedied within the lawsuit itself, not as a separate tort.").

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e).

Rule 37(e) was promulgated, in part, to ensure that the federal courts applied a uniform standard for imposing sanctions when ESI is spoliated and for determining the severity of the sanctions, although the courts retain substantial discretion in crafting remedies under the amended rule. Rule 37(e) does not create a new duty to preserve, but rather, draws upon the existing common law duty.

In determining whether to impose sanctions for the spoliation of evidence under Rule 37(e), one district court set forth the following roadmap:

- "Does the alleged spoliation involve ESI?"
- "Was the allegedly spoliated ESI evidence that should have been preserved?"
- "Was the allegedly spoliated ESI lost because a party failed to take reasonable steps to preserve it?"
- "Is the allegedly spoliated ESI evidence that cannot be restored or replaced through additional discovery?"

Living Color Enters., Inc. v. New Era Aquaculture, Ltd., Case No. 14-cv-62216, 2016 WL 1105297, at *4-5 (E.D. Fla. Mar. 22, 2016).

If the answer to any of the above questions is "no," then "the Court need proceed no further under Rule 37(e), and a motion for spoliation sanctions or curative measures must be denied." *Id.* at *5. If, however, the above questions are all answered affirmatively, the court must analyze the case under subsection (e). *Id.* Specifically, where the court finds that the failure to preserve has resulted in prejudice to the opposing party, it should proceed to subsection (e)(1), and where it finds that the spoliating party acted with "intent to deprive," it should proceed to subsection (e)(2). *Id.*

With respect to subsection (e)(1), the rule vests discretion with the court to determine the extent, if any, to which a party seeking a curative measure must prove prejudice. As the advisory committee's 2015 notes explain, in some circumstances, it may be unfair to require the party which did not lose the ESI to prove not only the content of the lost information but also that the loss was prejudicial. However, when the content of the lost information is "fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties," it may be reasonable to require the party seeking sanctions to prove prejudice. Fed. R. Civ. P. 37(e) advisory committee's notes (2015); *see also Living Color Enters., Inc.*, Case No. 14-cv-62216, 2016 WL 1105297, at *5 (finding that no prejudice resulted where the plaintiff failed to alleged a direct nexus between the missing ESI and the allegations in its complaint).

Subsection (e)(2) permits the most severe spoliation sanctions, upon a showing of "intent to deprive." The Rule expressly rejects case law allowing courts to issue adverse-inference instructions upon a finding of negligence or gross negligence. Fed. R. Civ. P. 37(e) advisory committee's notes (2015); *see also Living Color Enters., Inc.*, Case No. 14-cv-62216, 2016 WL 1105297, at *6 & n.6 (discussing, without deciding, that the "intent to deprive" standard may be synonymous with a "bad faith" standard, which requires culpability and resulting prejudice but not malice).

The courts are divided about the appropriate standard of proof to apply to claims of spoliation. As one district court explained:

> Some utilize the preponderance of the evidence standard applicable in most contexts in civil litigation. *See, e.g., Krause v. Nevada Mutual Insurance Co.*, No. 2:12-cv-342, 2014 WL 496936, at *7 (D. Nev. Feb. 6, 2014); *In re Napster, Inc. Copyright Litigation*, 462 F. Supp. 2d 1060, 1072 (N.D. Cal. 2006). Others require that the more demanding "clear and convincing" standard be met. *See, e.g., Aptix Corp. v. Quickturn Design Systems, Inc.*, 269 F.3d 1369, 1374 (Fed. Cir. 2001); *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1476-77 (D.C. Cir. 1995). Still others have found it unnecessary to define the evidentiary requirement in circumstances where the higher standard was met in any event. *See, e.g., Haeger*, 793 F.3d at 1131; *Lewis v. Ryan*, 261 F.R.D. 513, 519 n. 2 (S.D. Cal.2009).

CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 498-99 (S.D.N.Y. 2016).

The *CAT3* Court explained that in determining the appropriate standard, courts must consider multiple factors: "a high standard is appropriate where the sanction sought is case-terminating or otherwise punitive in nature"; and "the appropriate standard of proof depends in part on the specific issue to be decided. For example, clear and convincing evidence of bad faith may be appropriate, . . . while prejudice is better judged by the preponderance standard . . . ." *Id.* at 499 (employing a clear and convincing evidence standard in considering "terminating sanctions" and a party's state of mind in failing to preserve evidence).

B. Application to Social Media Discovery.

1. Lester v. Allied Concrete Co.: A Lesson in Social Media Preservation.

Lester v. Allied Concrete Company is the first reported decision in which a court imposed sanctions for a party's failure to preserve social media evidence. 83 Va. Cir. 308 (Va. Cir. Ct. Sept. 6, 2011) *aff'd in part, rev'd in part on other grounds*, 285 Va. 295 (Va. 2013). In that case, the defendant issued a request for the production of documents and sought copies of all pages of the plaintiff's Facebook page, "including, but not limited to, all pictures, his profile, his message board, status updates, and all messages sent or received." The defendant attached to its discovery request a copy of the plaintiff's Facebook photograph, which depicted the plaintiff holding a beer can and wearing a t-shirt that read, "I ♥ hotmoms." The following day, the plaintiff's attorney instructed his paralegal to tell the plaintiff to "clean up" his Facebook page

because "[w]e don't want blow-ups of this stuff at trial." In turn, the paralegal emailed the plaintiff, requested information about the photograph, and stated that "some other pics . . . should be deleted" from his Facebook page. In a follow-up email, the paralegal reiterated counsel's instructions to her, telling the plaintiff to "clean up" his Facebook page because "[w]e do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace!"

Although Plaintiff's counsel later produced a privilege log and an "enhanced" privilege log, he never listed the paralegal's email to the plaintiff, which contained his instructions. Likewise, the paralegal failed to respond to a subpoena *duces tecum*, which requested copies of the paralegal's correspondence with the plaintiff.

Subsequently, the plaintiff deactivated his Facebook account, and in response to the request for the production of documents, stated that as of the date of his response, he did not maintain a Facebook account. After the defendant filed a motion to compel, the plaintiff's attorney instructed him to reactivate his account. However, based upon plaintiff's counsel's earlier instruction to "clean up" his Facebook page, the plaintiff proceeded to delete sixteen photographs from his account. The plaintiff testified at his deposition that he never deactivated his Facebook account, and the defendant subpoenaed Facebook to verify the testimony.

Ultimately, the sixteen photographs were produced to defense counsel. Nonetheless, in ruling on the defendant's motion for sanctions, the court required plaintiff's counsel to submit all correspondence for *in camera* review. The court concluded that plaintiff's counsel intentionally omitted his paralegal's email from the privilege logs and attempted to blame the deficiency on her. It also found that the plaintiff spoliated evidence by deleting his Facebook photographs, and attempted to mislead opposing counsel by deactivating his account, claiming that he did not maintain a Facebook account, and lying at his deposition about deactivating his account. As a result, the court imposed sanctions against plaintiff in the amount of $542,000 and plaintiff's counsel in the amount of $180,000, to cover the defendant's attorney's fees and costs in addressing the misconduct. It also referred plaintiff's counsel to the Virginia State Bar for his violation of the disciplinary rules, and the plaintiff to the prosecutor's office for his alleged perjury.

2. Deletion and Deactivation of Accounts.

Courts have frequently sanctioned parties when they outright delete their social media accounts or portions thereof, particularly after litigation has commenced and the deleted content was relevant to the parties' claims or defenses.

- In *Congregation Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona*, 138 F. Supp. 3d 352 (S.D.N.Y. 2015), the defendants' mayor informed one of the members of the Defendant's Board of Trustees that he was concerned about the trustee's Facebook post and feared that the court or plaintiffs would learn of it. The trustee responded by deleting the Facebook post and ensuring the mayor that she had "reviewed all [her] accounts to make sure there [were] no other unfortunate mistakes." In ruling on the plaintiff's motion for sanctions, the court determined that "this is the rare case where bad faith, and a clear intent to deprive Plaintiffs of the evidence at issue, is

sufficiently clear from the face of the record." Accordingly, the court issued an adverse inference instruction and prohibited the defendants from presenting evidence to rebut that inference. The court also awarded the plaintiffs attorneys' fees and costs due to the defendants' bad faith conduct.

- In *Backes v. Misko*, 486 S.W.3d 7 (Tex. App. 2015), *review denied* (Nov. 13, 2015), the defendants asserted a counterclaim for conspiracy to commit libel based upon comments posted to the "Who to Breed To" Delphi Forum. The comments discussed genetic horse testing and allegedly attacked the defendants. Upon learning that the plaintiffs deleted some of the posts at issue, the defendants sought an adverse inference instruction. The court denied the motion, holding that the defendants failed to establish that the deletion was prejudicial, because they did not show that the posts would have established a conspiracy.

- *Federico v. Lincoln Military Hous., LLC*, No. 2:12-CV-80, 2014 WL 7447937 (E.D. Va. Dec. 31, 2014) involved a case in which the plaintiffs produced 5,527 Facebook records, including records from every plaintiff with a Facebook account. However, because gaps existed within the production, the defendant sought sanctions for spoliation. The court denied the motion because only "small gaps" existed and "the overwhelming consistency in the hundreds of records which were submitted to the Court for review does not suggest any bad faith or the loss of evidence in the few materials which may have been omitted."

- In *Hosch v. BAE Sys. Info. Sols., Inc.*, No. 1:13-CV-00825 AJT, 2014 WL 1681694 (E.D. Va. Apr. 24, 2014), the court found that for a period of nearly two years beginning after the plaintiff resolved to sue the defendant, the plaintiff engaged in the willful and intentional spoliation of evidence. Perhaps most notably, on the same day that the court notified the plaintiff that failure to comply with its discovery orders may result in sanctions, and two days before the plaintiff turned his iPhone over to counsel, he completely wiped its contents. As a result, all data, including social media evidence, was deleted. Moreover, the plaintiff deleted two years' worth of information stored on his Blackberry device before producing it to the defendant. The court emphasized that the plaintiff deleted this data after the defendant issued its litigation hold, document preservation notices, and multiple requests for the production of documents, and after the court issued multiple discovery orders and admonished the plaintiff. As a result, the court granted the defendant's motion for sanctions by dismissing the plaintiff's lawsuit with prejudice and awarding defendant attorney's fees and costs.

- *Painter v. Atwood*, No. 2:12-CV-01215-JCM, 2014 WL 1089694 (D. Nev. Mar. 18, 2014), involved an employer's alleged constructive discharge of a former employee and other intentional torts against her. The plaintiff admitted that after she retained counsel, she deleted certain Facebook comments discussing her opinion on working and interacting with the defendant, and the defendant sought sanctions. The court rejected the plaintiff's arguments that: (1) the deleted comments were irrelevant because she already admitted that she enjoyed working for the defendant and because

her constructive discharge claim was based solely upon a particular event which was not the subject of her comments; and (2) that she was a twenty-two year old female who did not know better than to delete her comments.

With respect to the former, the court emphasized that "Plaintiff's entire lawsuit centers around her assertion that the work environment . . . was sexual in nature" and her theory of the case that defendant required his employees to accept his sexual advances or be fired. As such, the court held that the deleted comments were undoubtedly relevant. Further, the court highlighted counsel's obligation to inform Plaintiff of the full extent of her duty to preserve evidence. Because "Plaintiff knew or should have known that the at-issue Facebook comments were relevant to Defendants' case at the time she deleted them and, therefore, there was some degree of culpability in the destruction of the above-mentioned Facebook comments," the court imposed an adverse inference instruction.

- In *Gatto v. United Air Lines, Inc.*, No. 10-CV-1090-ES-SCM, 2013 WL 1285285 (D.N.J. Mar. 25, 2013), the plaintiff filed a personal injury suit against the defendants, and claimed that he sustained serious injuries that limited his ability to work and to engage in social and physical activities. In July 2011, the defendants requested information from the plaintiff's Facebook account. Further, the parties discussed the account during a December 1, 2011 settlement conference, and the account was the subject of a court order related to discovery information. While the defendants were in the process of gathering information from the account pursuant to the court's order, on December 16, 2011, the plaintiff deactivated his account. Although defense counsel requested that the plaintiff reactivate the account, it could not be reactivated, because Facebook automatically deleted the account fourteen days after its deactivation.

  Based upon the defendants' discovery request five months earlier and the court's discovery order, the court found that the plaintiff's duty to preserve his Facebook account was "beyond dispute" at the time it was deactivated and deleted. Further, the court reasoned that the plaintiff *intentionally* deactivated the account then failed to reactivate it within the requisite time, thereby effectively causing the account to be permanently deleted. As a result, the court imposed an adverse inference instruction.

However, another court denied the defendants' motion for sanctions in which defendants alleged that plaintiff deleted eight Facebook posts, upon finding that the plaintiff inadvertently deleted three of the posts, and that the remaining five posts had not been deleted, but rather, were no longer publicly available after the plaintiff modified her privacy settings. *Thurmond v. Bowman*, 199 F. Supp. 3d 686, 690 (W.D.N.Y. 2016).

III. Using Social Media Discovery Substantively.

A. The Role of Social Media in Screening Job Applicants.

In *Nieman v. Grange Mutual Ins. Co.*, No. 11-3404, 2013 WL 1332198 (C.D. Ill. Apr. 2, 2013), the forty-two year old plaintiff alleged that the defendant denied him a position due to his age, and in retaliation for his lawsuit against his former employer. The plaintiff claimed that the employer's hiring manager learned his age and prior lawsuit while researching his LinkedIn profile. Although the court did not reject his theory of the case, it found the theory unsupported, given the hiring manager's uncontested testimony that she never used any social media sites to research candidates and LinkedIn's response to a subpoena that the hiring manager never opened a LinkedIn account. As such, the court entered summary judgment in the defendant's favor.

B. Social Media's Role as the Modern Water Cooler.

A split among the United States Courts of Appeals exists about whether conduct outside of the workplace may be considered as part of the totality of the circumstances in lawsuits alleging a hostile work environment. While the First, Second, Seventh, and Eighth Circuits consider harassment outside the physical confines of the workplace, if the conduct occurred in a forum that is an extension of the workplace, courts in the Fifth and Tenth Circuits have declined to do so. *Compare Lapka v. Chertoff*, 517 F.3d 974 (7th Cir. 2008); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387 (1st Cir. 2002); *Ferris v. Delta Airlines, Inc.*, 277 F.3d 128 (2d Cir. 2001); *and Dowd v. United Steelworkers of Am.*, 253 F.3d 1093 (8th Cir. 2001), *with Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503 (5th Cir. 2003); *Sprague v. Thorn Am., Inc.* 129 F.3d 1355 (10th Cir. 1997).

For courts that already consider outside conduct with the requisite workplace nexus, evidence collected from social media platforms would seem to follow the general analysis. Courts declining to consider outside conduct are presented with a murkier situation. Unlike traditional extra-workplace conduct, social media can permeate the walls of the workplace, particularly where employers encourage employees to bring their own devices to work, or where they rely upon employees' interaction with social media outlets.

- *Meng v. Aramark Corp*., No. 12-CV-8232, 2015 WL 1396253, at *5 (N.D. Ill. Mar. 24, 2015): An employee filed Title VII hostile work environment and retaliation claims against her employer after her co-workers created obscene graffiti depicting the plaintiff in various sexual acts, uploaded it to Facebook, and viewed the photographs during work. The trial court denied Aramark summary judgment, holding that a reasonable juror could conclude that its response to the photographs—refusing to view them and merely shrugging off the plaintiff's concerns--was insufficient to preclude liability.

- In *Knowlton v. LaHood, Sec'y, Dep't of Transp.*, EEOC Agency No. 2012-24254-FAA-05 (June 15, 2012), *available at* http://www.eeoc.gov/decisions/01201216 42.r.txt, the EEOC overturned the Federal Aviation Administration's final decision,

which dismissed the plaintiff's Title VII claim for racial harassment, partially premised on a co-worker's facially discriminatory Facebook post. The EEOC explained that the various incidents comprising the plaintiff's hostile work environment and harassment claim must be considered collectively as part of the unlawful employment practice, and as such, implied without expressly stating that an employee's racially discriminatory comments on Facebook about his co-workers could be considered in determining whether a complainant has stated a hostile work environment claim.

- In *Espinoza v. County of Orange*, No. G043067, 2012 WL 420149 (Cal. Ct. App. Feb. 9, 2012) the plaintiff alleged that his co-workers harassed him based on his disability and that his employer failed to prevent the harassment in violation of the California Fair Employment and Housing Act. The plaintiff sought to admit his co-workers' derogatory blog postings about his disability, some of which specifically referenced him by name. The postings discussed work-related issues, and were accessed by employees on work computers. Although management directed its employees to stop posting improper comments on the blog, the employees disregarded instructions. The trial court admitted the evidence, and the employer appealed.

  The appellate court affirmed and rejected the employer's argument that it was not liable for employees' derogatory comments on the blog because they were posted outside of the workplace. The court explained that in the context of a harassment claim, an employer's liability is premised upon its response to harassing conduct, if and when it learns of the conduct. Because the evidence showed that the employer learned of its non-supervisory employees' harassing conduct, the employer's response was subject to scrutiny. In so holding, the court emphasized that the key inquiry was whether the employer was or should have been aware of the conduct, and whether it took remedial measures, regardless of *where* the conduct occurred, because workplace harassment, by definition, involved conduct outside the scope of necessary job performance.

- *Yancy v. U.S. Airways*, Civil Action No. 10-983, 2011 WL 2945758 (E.D. La. July 20, 2011) (noting that the plaintiff filed a charge of discrimination with the EEOC, alleging that she was subject to sexual harassment based on a photograph her co-workers posted to Facebook, which depicted her leaning over a table while at work, revealing a portion of her underwear; the present action, however, concerned the plaintiff's retaliation charges).

- *Guardian Civic League v. Phila. Police Dep't.*, No. 2:09-cv-03148-CMR (E.D. Pa. filed July 15, 2009) (complaint on behalf of 2,300 African American Philadelphia police officers alleging that the Philadelphia Police Department created a racially hostile work environment by allowing white police officers to create, operate, and post racists and offensive comments on Domelights.com, a website geared toward law enforcement, while at work, and to discuss and joke about the website's racist content in front of minority officers at work; although African American police

officers complained to the Police Department, it took no action to restrict the website or to discipline its officers who engaged in discriminatory or harassing conduct) (subsequently settled for monetary and injunctive relief).

- In *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000), the New Jersey Supreme Court addressed an employer's duty to monitor internet forums it provided for employees' use in the context of a hostile work environment claim. Soon after the plaintiff qualified to become the airline's first female captain to fly an Airbus or A300 aircraft, she began experiencing sexual harassment from male employees who subjected her to pornographic photographs and vulgar gender-based comments in her plane's cockpit and other work areas. She filed a Title VII lawsuit for sexual discrimination and retaliation in federal court, but while that action was pending, several of her co-workers published harassing, gender-based messages on an online computer bulletin board (the "Forum"). The Forum was accessible to at least 250 Continental pilots and crew members through their personal computers via CompuServe, a wholly owned subsidiary of America Online, Inc. CompuServe provided membership kits to pilots and crew members, some of which arguably held managerial positions. Plaintiff filed a state law claim, after which Continental Airlines moved for summary judgment.

  The trial court granted summary judgment against the plaintiff on the basis that an employer is liable for harassment by co-employees only when that conduct occurred inside the workplace setting, at a place under the physical control of the employer. The appellate court affirmed.

  On appeal, the New Jersey Supreme Court focused on whether the Forum was "the equivalent of a bulletin board in the pilots' lounge or a work-related place in which pilots and crew members continue[d] a pattern of harassment." It explained that the pertinent inquiry was not whether employees accessed the Forum outside the confines of the workplace, but whether the conduct at issue arose out of the employment relationship. As such, the New Jersey Supreme Court held that merely because the Forum was located outside of the workplace did not mean that employer had no duty to correct off-site harassment by co-employees.

  It analogized the situation to one in which the District Court for New Hampshire refused to exclude evidence of workplace harassment that continued outside the employer's confines at a nearby bar. *See McGuinn-Rowe v. Foster's Daily Democrat*, No. 94623–SD, 1997 WL 669965, *3 (D.N.H. July 10, 1997) ("Given that [the] plaintiff experienced harassment at the work site and the incident at the bar may have formed part of a pattern of such harassment, the bar incident may well be relevant to the issue of whether [the] plaintiff experienced a hostile environment at her place of work."). The court explained that an employer's liability for such remarks turns not upon *where* the conduct took place, but upon whether the employer knew or should have known of the harassment and whether it took reasonable steps to halt it.

Because the plaintiff produced evidence that the employer was on notice of the online harassment, the court held that the employer's liability depended on whether the Forum "was such an integral part of the workplace that harassment on [it] should be regarded as a continuation or extension of the pattern of harassment that existed in the Continental workplace." It continued, "We believe that severe or pervasive harassment in a work-related setting that continues a pattern of harassment on the job is sufficiently related to the workplace that an informed employer who takes no effective measures to stop it, sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser."

As such, the New Jersey Supreme Court ordered the trial court to determine whether the employer "derived a substantial workplace benefit" from its overall relationship with CompuServe and the Forum. If it did, such that the Forum could be considered an extension of the workplace, the court cautioned that summary judgment against the plaintiff would be improper.

- *But see Amira-Jabbar v. Travel Servs., Inc.*, 726 F. Supp. 2d 77 (D.P.R. 2010) (granting the employer's motion for summary judgment on the plaintiff's harassment claim and finding that the employer's remedial action of blocking its employees' access to Facebook following allegations of Facebook-based harassment constituted a prompt and appropriate response to the employee's hostile work environment claim).

- *Hispanics United of Buffalo, Inc. v. Ortiz*, No. 3-CA-27872 N.L.R.B. (Sept. 2, 2011) (ordering the reinstatement of employees discharged posting comments about the plaintiff's work performance on Facebook because the comments were not made at work or during working hours and did not implicate any prohibited basis that could create an intimidating, hostile, or offensive work environment).

Further, social media evidence that demonstrates discriminatory animus may be admissible as "other evidence" of discrimination, provided that the courts do not characterize the evidence as stray remarks. *See Almoghrabi v. Gojet Airlines, LLC*, No. 4:14-CV-00507-AGF, 2016 WL 393580, at *5 (E.D. Mo. Feb. 2, 2016), *appeal dismissed* (Apr. 26, 2016) (finding that social media comments of the individual who terminated Plaintiff's employment, which concerned United States President Barack Obama and allegedly indicated a negative feeling about Middle Easterners and the Muslim faith, did not constitute direct evidence of discrimination in Plaintiff's Title VII case, because the comments were "stray political remarks" that did not demonstrate the requisite animus).

In *Hannah v. Northeastern State Univ.*, Dr. Hannah asserted race-based discrimination and retaliation claims against individual co-workers and his university-employer under Title VII and Section 1981, following his denial of tenure. No. CIV-14-074-RAW, 2015 WL 501933, at *1 (E.D. Okla. Feb. 5, 2015), *rev'd and remanded sub nom. on other grounds*, 628 F. App'x 629 (10th Cir. 2016). As evidence of discriminatory animus, Dr. Hannah cited racially based Facebook comments that individuals who ruled on his tenure application made about him. In considering the defendant's motion for summary judgment on the plaintiff's discrimination

claim, the court found that Dr. Hannah demonstrated an issue of fact for the jury regarding causation, by showing that the same individuals who made race-based Facebook comments voted on his tenure application, for which the votes were split three to three, with one abstention. The trial court also denied the defendant's motion for summary judgment with respect to Dr. Hannah's hostile work environment claim, emphasizing that he presented evidence that hostility remained prevalent within his workplace by admitting evidence of the Facebook posts, among other evidence.

C. Other Cases Involving the Substantive Use of Social Media.

- *Jones v. Gulf Coast Health Care of Del., LLC*, No. 16-11142, 2017 WL 1396165 (11th Cir. Apr. 19, 2017) (reversing the trial court's entry of summary judgment for the defendant because a genuine issue of material fact existed about whether the defendant's proffered reason for terminating the plaintiff's employment—that he posted certain photographs on Facebook in violation of workplace policy—was pre-textual and the real reason was retaliation for taking FMLA leave).

- *Carney v. City of Dothan*, 158 F. Supp. 3d 1263, 1282 (M.D. Ala. 2016) (recognizing a cause of action for defendant's allegedly discriminatory enforcement of its social media policies but finding that the employee failed to present evidence that the policies were, in fact, enforced disparately).

- *Freeman v. Fla. Pars. Juv. Det. Ctr.*, No. CV 14-2461, 2016 WL 4241905 (E.D. La. Aug. 11, 2016) (granting the employer's motion for summary judgment and holding that plaintiff's allegation that white male supervisors were entitled to access social media from the workplace facility, but she was not, did not amount to an adverse action and did not materially alter her job).

- *Redford v. KTBS, LLC*, 135 F. Supp. 3d 549 (W.D. La. 2015) (denying Defendants' motion for summary judgment with respect to a former employee's Title VII claims on the basis of race and sex where the employer contended that it terminated plaintiff for violating its social media policy, but the plaintiff presented sufficient evidence to show that similarly situated employees may have violated the same policy and were not terminated).

- *Bush v. Gulf Coast Elec. Coop., Inc.*, Case No. 5:13cv369-MW/GRJ, 2015 WL 5610852 (N.D. Fla. Sept. 23, 2015): Two former employees filed suit against their former employer for gender discrimination, after they were terminated, allegedly for violating the employer's social media policy. The court denied the employer's motion in limine to exclude evidence that it failed to discipline other employees for worse conduct, including criminal conduct, because such evidence would tend to show that the employer's proffered reason for terminating the plaintiffs was pre-textual.

- *Verga v. Emergency Ambulance Serv., Inc.*, No. 12-CV-1199 DRH ARL, 2014 WL 6473515, at *1 (E.D.N.Y. Nov. 18, 2014): On the same day that the plaintiff reported sexual harassment to his former employer's human resources department, he published a Facebook post, in which he threatened physical violence against the individual "who thought today was a joke." The employer caused the harasser to apologize to the plaintiff and undergo sexual harassment training, and upon reviewing the plaintiff's Facebook post, it determined that the plaintiff should attend a Violence in the Workplace training seminar. It prepared a letter, asking the plaintiff to consent to the training and to acknowledge that it had dealt with his complaint of sexual assault appropriately. Although he did not refuse training, he did refuse to sign the letter because he felt that the employer had not adequately addressed his concerns. Subsequently, the employer discharged him. The trial court denied the employer's motion for summary judgment, holding that the plaintiff had set forth evidence from which a trier of fact could infer that the employer's proffered reason for his termination was pre-textual, and that the real reason was retaliation.

- *Talbot v. Desert View Care Ctr.*, 328 P.3d 497 (Idaho 2014) (affirming the Industrial Commission's decision to reverse an award of unemployment benefits to a former employee where it found substantial evidence in support of the Commission's finding that the employer discharged the employee for violating its social media policy by posting a Facebook comment which threatened a stakeholder).

- *Rodriquez v. Wal-Mart Stores, Inc.*, 540 F. App'x 322 (5th Cir. 2013) (affirming summary judgment for employer and finding that employer terminated former employee not because of her age or national origin but because she violated the employer's social media policy and improperly discounted store merchandise for her own purchase).