

Not too long ago, lawyers could honestly say that they didn't know if social media was discoverable for litigation. This year, courts have moved well past that question, granting broad discovery from Twitter, Facebook, and any other social media outlets. The focus this year was mainly on details of social media discovery, like whether social media could be used to determine how a person was feeling at a particular point in time.



Social media was a contentious issue on several fronts in 2012, which we wrote about [here](#) and [here](#). One issue that has been cleared up since this fall is the limits of trouble a person can get into at work for social media postings. The bottom line is, if you're concerned that something you've posted online could get you in trouble at work, you're probably right to be worried. The National Labor Relations Board has now ruled several

times that social media postings are not protected under federal labor law. And in fact, Facebook and Twitter have gotten quite a few people fired in 2012.

For example, an administrative judge ruled a Chicago-area dealership did not act unlawfully by firing a salesman for postings he made to his Facebook page. However, the NLRB has said that employers cannot ban employee communications on social media. On November 14, 2012, the agency **ordered Dish Networks** to change its social media policy in the employee handbook that prevented workers from making disparaging or defamatory comments about the company. The agency also **ruled in September** that Costco's policy was over broad and infringed on employee's rights in banning disparaging remarks about the company online. The emerging standard is that social media posts are not protected by the National Labor Relations Act unless it relates to working conditions, wages, or collective actions. Any other colorfully worded complaints you may have about your boss are probably not appropriate for Facebook or Twitter.

Facebook Feelings Matter

In addition, courts wrestled with social media discovery in a number of employment and discrimination cases, trying to draw the line for when social media evidence is relevant. In particular, the courts had to figure out when and how much social media evidence should be admitted in a case in order to establish a person's mental state. Mental state is a hard thing to establish, but it is clear that courts will often allow for broad discovery of social media content to illustrate a person's feelings or mental state at a particular time. (Again, be careful next time you are whining about your boss on Facebook.)

The most commonly cited case in social media law remains from 2010 **EEOC v. Simply Storage**.

This precedent-setting case applied broad social media discovery claims to a government agency, laying out a test that has been adopted and applied by a number of other court systems to determine if social media is discoverable in litigation.

In *Simply Storage*, the defendants asked for discovery of the plaintiffs' Facebook and MySpace content to identify signs of emotional distress resulting from alleged sexual harassment. The court allowed the discovery even though it was likely the disclosures would embarrass the plaintiffs, arguing that the privacy settings on the social media sites

are not a basis for shielding the content from discovery. According to the test, the defendant has to produce any:

(a) Email or text messages that plaintiff sent to, received from, or exchanged with any current and former employee of defendant, as well as messages forwarding such messages; or

(b) Online social media communications by plaintiff, including profiles, postings, messages, status updates, wall comments, causes joined, groups joined, activity streams, applications, blog entries, photographs, or media clips, as well as third-party online social media communications that place plaintiff's own communications in context;

(2) From July 1, 2008 to the present;

(3) That reveal, refer, or relate to:

(a) Any significant emotion, feeling, or mental state allegedly caused by defendant's conduct; or

(b) Events or communications that could reasonably be expected to produce a significant emotion, feeling, or mental state allegedly caused by defendant's conduct.

Simply Storage Sets the Bar

This summer, following on *Simply Storage*, [**Robinson v. Jones Lang LaSalle Americas, Inc., No. 3:12-cv-00127-PK \(D. Or. Aug. 29, 2012\)**](#), laid out a detailed set of standards for acquiring social media content for litigation. The broad discovery request in this matter included "photographs, videos, and blogs, as well as Facebook, LinkedIn, and MySpace" content that reveals the defendants "emotion, feeling, or mental state."

However, courts acknowledge that determining an individual's mental state through social media is a tricky proposition. [**Robinson v. Jones Lang LaSalle Americans, Inc., 2012 \(D. Or. Aug. 29, 2012\)**](#) followed the reasoning in *Simply Storage*, ordering discovery of digital comments that could attest to the defendant's mental state. However, the court acknowledged that, "it is impossible for the court to define the limits of discovery in such cases with enough precision to satisfy the litigant."

In order to better address the difficulties in social media review, some courts have allowed

limited and phased discovery. In the ongoing sexual harassment suit, **EEOC v. Original Honeybaked Ham Co ., 2012 (D. Colo. Nov. 7, 2012)**, the judge noted that although broad requests for discovery of social media are problematic, the defendant in the case has already produced compelling information from Facebook and pointed to other relevant Facebook comments related to the matter. Given that discovery of relevant information is likely, the judge allowed for broad social media discovery, although initially only for *in camera* review. If that round of discovery proved fruitful, the evidence could later be entered into the record.

However, a request for evidence relating to “any significant emotion” may not be immediately granted unless parties can demonstrate a posting is directly related to a party’s conduct. The recent ruling in **Danielle Mailhoit v. Home Depot U.S.A, Inc.(C.D. Ca. Sept. 7, 2012)** involved a battle over the discovery of social media content in an ongoing employment matter. Home Depot requested, “profiles, postings or messages (including status updates, wall comments, causes joined, groups joined, activity streams, and blog entries) from social networking sites ... that reveal, refer, or relate to any emotion, feeling, or mental state of Plaintiff.”

The court found it overly broad and denied most of the request. However, the Home Depot attorneys did craft part of their request a little more narrowly, which the court ruled was, “reasonably calculated to lead to the discovery of admissible evidence.” In making this more limited ruling, the court noted that the request was in keeping with the eDiscovery principles enacted in the **2006 updates to the Federal Rules of Civil Procedure**, underscoring that social media information is discoverable under the exact same discovery framework as any other type of media.

In addition, it is increasingly clear that social media content is your possession, custody, or control and every owner has a legal obligation to identify and preserve it for litigation. Courts have determined that a user typically has “control” of his or her own social media content – to the extent he or she can still access it – because the user typically has the “legal right, authority, or practical ability to obtain the materials sought on demand.” Most social media sites now specify in their terms of use that users have control of their own content. For example the Facebook Statement of Rights and Responsibilities, April 26, 2011, says, “You own all of the content and information you post on Facebook, and you can control how it is shared....”

Looking Forward to 2013

In related news, Congress appears ready to act in 2013 to finally update the Electronic Communications Privacy Act (ECPA). We **discussed the problems with ECPA earlier this year**. The act, which was originally drafted in 1986 has proven completely incapable of protecting digital content from warrantless wiretapping by law enforcement. (If you're wondering why the FBI could access David Petraeus' email without a warrant as part of an unrelated investigation, there's your answer.) The law has been interpreted broadly enough to encompass social media content, including private YouTube videos. Hopefully, Congress enacts this new bill, which Internet activists say is a strong defense against warrantless wiretapping on the Net, to extend more protections to social media and other digital content.

Thanks to rulings noted above, lawyers in 2013 can no longer pretend that there is no standard for the discovery of social media content- it's now clearly laid out in an easy-to-follow list. The only remaining question is how to prepare for the broad discovery of social media content that is now codified in the case law. In addition, it is clear is that failing to collect relevant data from social media sites when a preservation need arises or is anticipated is a bad idea.

The standard for social media discovery is the same as other digital records under the Federal Rules of Civil Procedure. Any technology employed to save social media must collect metadata as well as linked and associated content. Social media sites provide application programming interfaces (APIs) to interact with the social media sources to capture social media site data through automated means. Make sure that you are using this technology to collect, preserve, and archive a complete social media record. There is no excuse for ignoring social media discovery anymore.

