

Invasion of Privacy Possible In New Jersey When Supervisor Coerced Co-Worker to Provide Access to Employee's Facebook Posts

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A New Jersey court has held that an employee stated a claim for invasion of privacy against her employer when she alleged that her supervisor viewed her private Facebook page by forcing a co-worker to provide access. The employee, a registered nurse and paramedic who was also president of the employee union, posted an entry on Facebook criticizing paramedics who responded to a shooting. The employee alleged that a supervisor coerced one of the employee's co-workers, who was friends with the employee on Facebook, into accessing Facebook so that the supervisor was able to view and copy the employee's postings, which were only visible to the employee's Facebook friends. In analyzing the employee's invasion of privacy claim, the court noted that the employee would have to demonstrate that the invasion would "highly offend a reasonable person." Whether invasion of social media is highly offensive to a reasonable person is not settled in the courts – although courts generally find that there is no reasonable expectation of privacy for posts to a public website, but that there is an expectation of privacy where online communications are password-protected. There is no consensus yet for online activity falling in between those two extremes, where the activity may be both password-protected but also visible to a number of other people. The court found that the employee in this case had stated a plausible claim for invasion of privacy, as she took steps to make sure her Facebook profile was not available to the public. The court noted that whether behavior is reasonable or offensive is highly fact-intensive, and the employee's claim was more properly decided by a jury. Although the court allowed the employee's invasion of privacy claim to proceed, it dismissed the employee's claim that the employer violated the New Jersey Wiretapping and Electronic Surveillance Control Act, because the employee had not alleged that the Facebook posting was being transmitted at the time the supervisor viewed it, as required to state a claim under that law.

Tip: Employers should be cautious about accessing the private social networking sites of employees that are not publicly available. Accessing employees' social media sites may lead to potential employer liability, including claims of invasion of privacy or discrimination based on information learned from the social media site.

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