

## What Happens On Facebook Stays On Facebook...Or Else

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A Magistrate Judge within the United States District Court for the District of New Jersey recently affirmed the significance of social media postings in litigation proceedings, finding deactivation of a plaintiff's Facebook account to constitute spoliation of evidence and warrant the issuance of an adverse inference against him at trial. Specifically, in *Gatto v. United Air Lines, Inc.*, [found here](#), a plaintiff alleged to have suffered an injury while working at the airport claimed, among other things, that his injuries precluded him from working and rendered him permanently disabled. In an effort to refute his claims, the defendants sought discovery relating to his social activities and alleged damages, including posts by plaintiff on his Facebook account.

Though he executed consent forms for various third parties, the plaintiff failed to authorize the release of records pertaining to his Facebook account, placing the parties before the Court to consider the issue. In doing so, the Court ordered the plaintiff to execute the authorization. Further, the plaintiff agreed to change his password to one provided to the defendants. Ultimately, defense counsel accessed the plaintiff's Facebook account, prompting messages to be sent from Facebook to the plaintiff indicating an unknown IP address had logged into his account. Upon inquiry, defense counsel advised plaintiff's counsel they had accessed the account. Defense counsel further sought to obtain a download of all information on plaintiff's Facebook account, which Facebook would not directly provide in response to a subpoena, and received a proposal from plaintiff that he download a copy of the information and certify that the data had not been altered since the time he had been ordered to provide defendants with access to his account. Rather than receiving such download, defendants were advised a month later that the plaintiff had deactivated his entire Facebook account (purportedly due to concerns associated with the notices he had received regarding unknown IP addresses accessing his account) and all data had been lost. Accordingly, the Court faced the issue of whether plaintiff's actions rose to the level of spoliation of evidence. Irrespective of the parties' disputes as to whether defense counsel improperly had authorized the account or whether plaintiff had deactivated or permanently deleted the account, the Court found an adverse inference instruction to be appropriately recourse for the loss of evidence. In reaching this conclusion, the Court found plaintiff to have controlled the evidence at issue, and that the evidence was both relevant and a reasonably foreseeable area for discovery. The Court further determined that the level of prejudice suffered by defendants in losing any access to the evidence warranted an adverse inference instruction to attempt to level the playing field. The Court, however, declined to award attorney's fees as a

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further sanction.

This case provides useful insights in all litigation matters for which social media could be sought. Not only does the case affirm the relevance and discoverable nature of social media posts such as those appearing on Facebook, but it provides a cautionary tale as to the potential consequences to parties who allow for the destruction of such evidence. Employers should be aware that this warning applies not only to plaintiffs, but also could be implicated in instances in which relevant information and posts are deleted from an employer's social media site or by decision makers on their personal accounts.