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New Jersey Appellate Division Rules That Private Social Media Posts Are Subject to Discovery

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In a recent decision, the New Jersey Appellate Division provided new guidance on whether private social media posts, profiles, and comments may be compelled in litigation. In *Davis v. Disability Rights New Jersey*, Norma Davis sued her former employer, Disability Rights New Jersey, for wrongful termination in violation of the New Jersey Law Against Discrimination. In the lawsuit, she alleges that she suffers emotional distress that led to physical manifestations, including migraines, insomnia, and worsening of diabetes and blood pressure.

During discovery, Disability Rights NJ requested copies of all Davis' social media content, including private content, "concerning any emotion, sentiment, or feeling." Over her objection, the trial court ordered Davis to produce copies of her private social media posts, profiles, and comments depicting emotions, the allegations of the litigation, celebrations, vacations, employment, and health, and any pictures of Davis. Davis appealed, arguing that she had a legally protected privacy interest in her private social media accounts.

The Appellate Division upheld the trial court's ruling that Davis' private social media content was discoverable and relevant to her emotional distress claim. The court noted that New Jersey court rules are to be construed liberally in favor of broad pretrial discovery and state that a party may obtain discovery on "any matter, not privileged, which is relevant to the subject matter involved in the pending action." While the court agreed that Davis had a privacy interest in her private social media posts, it acknowledged that there are many types of privacy interests that must yield to discovery requests if the information sought is relevant, including, personal financial information, credit cards and checkbook activity records, medical records, and psychologist/patient communications.

The court rejected Davis' comparison to financial records, which are discoverable upon a showing of good cause, because there is no confidentiality requirement or legal authority preventing an approved private recipient from sharing another's private posts. The court also rejected Davis' reliance on New Jersey's Social Media Privacy Law and the federal Stored Communications Act, noting that those laws pertain only to unauthorized access by employers and others and do not prevent court-ordered civil discovery. The court further noted that although there may be a large number of Davis' posts that would need to be reviewed to determine relevancy, given that she posted daily, the arduous nature of the task should not be a bar to discovery.

New Jersey now joins several states that have allowed the discovery of private social media posts when the information sought is relevant to the claims asserted. Although New Jersey courts may now find private social media posts, profiles, pictures, and comments to be discoverable, counsel should still narrowly draft

demands to ensure the information sought is relevant to the plaintiff's claims.

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