



Workplace Privacy, Data Management & Security Report

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Employee's Failure to Understand Facebook's Settings Does Not Support Privacy Claim Against Employer

An employee's claim that he did not realize his employer could view posts he made to a co-worker's Facebook wall did not support his claim that the employer intruded upon the employee's seclusion, a Texas Court of Appeals held last week. [Sumien v. Careflite \(Tex. App. 2012\)](#).

In this case, the plaintiff and some of his emergency medical technician co-workers were commenting on Facebook about wanting to "slap" or otherwise constrain patients who are difficult to control while they are being transported. The company terminated Sumien and another technician following the company's Compliance Officer learning of these posts and receiving complaints about the comments.

In addition to wrongful termination and other claims, the plaintiff alleged that the employer's viewing these comments amounted to an impermissible "intrusion upon seclusion." To prove an intrusion upon seclusion claim, the former employee needed to show "(i) an intentional intrusion, physical or otherwise, upon another's solitude, seclusion, or private affairs or concerns that (ii) would be highly offensive to a reasonable person." The court found that not knowing his employer could view his comments did nothing to support the employee's claims that the employer intentionally intruded upon his seclusion, and denied the appeal.

In addition to providing some authority to defend intrusion upon seclusion claims in similar circumstances, this case also shows that employers need to think through whether and to what extent they need to be more involved in controlling and shaping employee activity on social media. This case involved complaints from other employees about the posts, but also could have involved patient complaints relating to disclosures of protected health information under HIPAA. The posts also could have been viewed by the company's business partners or potential business partners in a negative light, adversely affecting the company's reputation. A well-drafted policy, training and consistent enforcement generally are good steps to minimizing these risks.

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