Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Retailer Can't Demand Employee Facebook Posts In Break Suit

By **Abigail Rubenstein**

Law360, New York (July 24, 2013, 8:16 PM ET) -- A Georgia federal judge Friday denied a lease-to-own retailer's request that plaintiffs hand over records of all posts they made to Facebook and other websites during work hours in a collective action accusing retailer Aaron's Inc. of failing to give its workers meal breaks.

Despite the retailer's claim that some of the posts might have shown that employees involved in the collective action were in fact taking lunch breaks when they made them, U.S. District Judge Amy Totenberg concluded that Aaron's had not sufficiently shown that the material it sought was reasonably calculated to lead to the discovery of admissible evidence.

As such, she denied the retailer's request that the 87 opt-in plaintiffs randomly selected for discovery in the suit produce all the postings they made to websites such as Facebook, Twitter and MySpace dating back to 2009 during work hours at an Aaron's store.

"The court finds that the burden imposed on a class of plaintiffs to produce such an overly broad swath of documents, while technologically feasible, is far outweighed by the remote relevance of the information," the judge's order denying the request said.

Aaron's request for the social media information was based on posts made by the named plaintiff in the case Kurtis Jewell, which the company had received via an anonymous email.

Jewell originally launched the suit — which claims that although Aaron's automatically deducts 30 minutes from its employees' pay each day for a meal period, workers were not actually completely relieved from their duties for meal breaks — in Cleveland. The case was later transferred to Georgia where Judge Totenberg conditionally certified a class to bring Fair Labor Standards Act claims, and there are now more than 1,700 opt-in plaintiffs.

Jewell made numerous postings to Facebook during work hours, including at least one that directly referred to him taking a lunch break, according to the retailer.

Aaron's reasoned that it was likely that other plaintiffs would have similar social media posts.

Some of the posts might directly show that the employee was taking a lunch break at the time, while the date and time stamp of other posts may indicate that the poster spent a chunk of 30 minutes during the work day engaged in a series of successive personal posts, demonstrating that there was a 30-minute period of the work day that had been appropriately excluded from the compensable time, the retailer said in its request for the information.

The retailer further contended that the posts would directly refute the plaintiffs' claims that they could not take breaks during the day because they simply had too many work

pressures.

But Judge Totenberg said she was not persuaded that Jewell's Facebook activity supported the notion that the plaintiffs' postings would show that contrary to their claims, they were not forced to work through their meal periods.

The judge said she agreed with the plaintiffs that whether they made Facebook posts during work might not have had any bearing on whether they received bona fide meal periods.

Rather, the discovery request was supported by nothing more than the retailer's hope that there might be something of relevance in the plaintiffs' social media accounts, Judge Totenberg said.

She also noted that requiring all 87 opt-in plaintiffs involved in the discovery process to review all of their postings on potentially multiple social networking sites over a four-year period and match that information to their work schedules would be an extremely onerous and time-consuming task, saying it would be too big a burden compared to the potential results.

"We ran the numbers ... and it would have required literally thousands of attorney hours," said Jason R. Bristol of Cohen Rosenthal & Kramer LLP, who represents the plaintiffs, told Law360. "The court got right when it looked at the burden going through that kind of review because we may find something that may substantiate some aspect of their defense. It was a true fishing expedition."

Attorneys for the plaintiffs also said that the decision could be a significant one in the growing body of law concerning social media discovery.

"Based on our research, this is one of the better opinions on social media discovery — at least on the plaintiffs' side," said Anthony J. Lazzaro of The Lazzaro Law Firm LLC. "There still aren't very many of these decisions, but this is becoming a very, very battled issue, and there will be more decisions as people go to the courts with these issues."

An attorney for Aaron's was not immediately available for comment Wednesday.

The plaintiffs are represented by Jason R. Bristol of Cohen Rosenthal & Kramer LLP, Anthony J. Lazzaro of The Lazzaro Law Firm LLC and Gary Blaylock "Blake" Andrews Jr. and Thomas A. Downie of Andrews & Stembridge LLC.

Aarons is represented by Brett C. Bartlett, Louisa J. Johnson and Jeffrey L. Glaser of Seyfarth Shaw LLP.

The case is Jewell v. Aarons Inc., case number 1:12-cv-00563, in the U.S. District Court for the Northern District of Georgia.

--Editing by Melissa Tinklepaugh.