

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 6:14-cv-00956-PGB-TBS

DEBRA ARTT, an individual,
BRADLEY HUGHES, an individual,
ADAM ISRAEL, an individual,
STEPHEN RANIERO, an individual,
SOPHIA ROGERS, an individual,
SHANE SAVAGE, an individual, and
SCOTT GAYNE, an individual, on behalf
of themselves and those similarly situated,

Plaintiffs,

vs.

ORANGE LAKE COUNTRY CLUB
REALTY, INC., a Florida corporation,

Defendant

**DEFENDANT ORANGE LAKE COUNTRY CLUB REALTY, INC.'S MOTION TO
COMPEL PRODUCTION OF DOCUMENTS**

Defendant, Orange Lake County Club Realty, Inc., by and through undersigned counsel hereby moves to compel Plaintiffs' responses to Defendant's Second Request for Production of Documents, and states as follows:

1. The instant action, filed in this Court on June 19, 2014, arises out of Plaintiffs' allegations under the Fair Labor Standards Act that they were not compensated for certain overtime hours worked off the clock while employed with Defendant. Plaintiffs are all former sales representatives who sold vacation ownership opportunities for Defendant. Defendant has adamantly denied the allegations.

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2. On June 22, 2015, Defendant served substantively identical copies of Defendant's Second Request for Production of Documents on each of the eight (8) above named Plaintiffs (collectively referred to as the "Discovery Requests"). As set forth in more detail below, the Discovery Requests sought production of a limited scope of Plaintiffs' relevant social media content. The Discovery Requests are attached as **Composite Exhibit A**.

3. On or around July 22, 2015, Plaintiffs' Counsel served each of the eight (8) Plaintiffs' Responses to Defendant's Second Request for Production of Documents (collectively referred to as "Plaintiffs' Responses"). The responses from each of the eight Plaintiffs were substantially identical, asserting various objections to the Discovery Requests, and asserting that Plaintiffs will not produce or permit inspection of the documents and information sought in the Discovery Requests. Plaintiffs' Responses are attached as **Composite Exhibit B**.

4. Defendant's Request No. 1 read in its entirety as follows:

1. All online profiles, postings, messages (including, without limitation, tweets, replies, retweets, direct messages, status updates, wall comments, groups joined, activity streams, and blog entries), photographs, videos, and online communications that you posted at any time between 7:00 am and 7:00 pm on any date between June 19, 2011 and your last day of employment with Orange Lake.

5. Plaintiffs' Responses to Request No. 1, which were substantially identical to each other, read in their entirety as follows:

RESPONSE: Objection. This request seeks irrelevant, immaterial, and private information that is not reasonably calculated to lead to the discovery of admissible evidence. To the extent Defendant believes this request is relevant to determine whether Plaintiff was using social media "during work time" and, thus, not properly on the clock, the requested information, to the extent it exists, will not reveal how long it took to post the requested information or whether Plaintiff was at work, on a rest/break period of 20 minutes or less, waiting to be engaged while at work (for example, waiting for a sales tour), on a day off, on vacation, or otherwise away from work when the requested information may

have been posted. Additionally, Defendant's Employee Handbook provides that it "monitors its facilities to ensure compliance" with its restriction on "engaging in social media activity during work time" and the use of "facilities for non-work-related social media activities...." Thus, if such records exist, Defendant's records are a less intrusive source for this information. Moreover, the requested information is irrelevant and immaterial because it will not indicate the number of overtime hours (or, indeed, any hours) worked or not worked by Plaintiff for Defendant. At most, the information may show a date and time of a social media post. Further, to the extent any of the requested information exists and was posted by using the internet while working for Defendant during the identified time frame, Defendant's employee handbook allows for limited use of the internet for personal, non business purposes. This request appears to be made simply in an effort to cause Plaintiff annoyance, embarrassment, oppression, or undue burden or expense.

Objection. This request is overly broad. The request seeks information "on any date" between June 19, 2011 and Plaintiff's last day of employment. It does not limit the request to days and times when Plaintiff was actually working for Defendant. Plaintiff worked for Defendant from approximately [October 2012 until September 2013].¹ The request also fails to limit the request to posts relating to overtime and off the clock information.

Subject to and without waving these objections, Plaintiff responds that she will not produce or permit inspection of the documents and information sought in this request.²

(footnotes and brackets added).

6. Defendant's Request No. 2 read in its entirety as follows:

¹ The objections filed on behalf of Plaintiffs Debra Artt, Nic Pineda, Shane Savage and Adam Israel do not raise the issue of their dates of employment, as these individuals presumably do not dispute that they were employed during the entire relevant time period.

The objections filed on behalf of Plaintiff Stephen Raniero specify his dates of employment as "approximately February 2012 until June 2013."

The objections filed on behalf of Plaintiff Scott Gayne specify his dates of employment as "approximately May 2012 until October 2013."

The objections filed on behalf of Plaintiff Bradley Hughes specify his dates of employment as "approximately July 2012 until April 2013."

The objections filed on behalf of Plaintiff Sophia Rogers specify her dates of employment as "approximately October 2012 until September 2013."

² With respect to Plaintiff Stephen Raniero only, opposing counsel further states in the objections to Requests No. 1 and 2 that "Plaintiff does not have any active social media accounts." It is unclear to Defendant whether this assertion means that Plaintiff Raniero does not have any responsive social media documentation, even if currently inactive, from the relevant time period.

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2. *Any and all information contained in your Facebook, MySpace, Instagram, LinkedIn or other social networking account that you posted at any time between 7:00 am and 7:00 pm on any date between June 19, 2011 and your last day of employment with Orange Lake.*

To retrieve this information from a Facebook account, you must log into your Facebook Account, select “Settings” from the dropdown menu in the top right hand corner of the screen (the drop-down menu appears under the triangle symbol), select “General” in the upper left hand corner of the screen, and then select “Download a copy of your Facebook data”.

7. Plaintiffs’ Responses to Request No. 2, which were substantially identical as to all eight (8) Plaintiffs, read in their entirety as follows:

RESPONSE: Objection. This request seeks irrelevant, immaterial, and private information that is not reasonably calculated to lead to the discovery of admissible evidence. To the extent Defendant believes this request is relevant to determine whether Plaintiff was using social media “during work time” and, thus, not properly on the clock, the requested information, to the extent it exists, will not reveal how long it took to post the requested information or whether Plaintiff was at work, on a rest/break period of 20 minutes or less, waiting to be engaged while at work (for example, waiting for a sales tour), on a day off, on vacation, or otherwise away from work when the requested information may have been posted. Additionally, Defendant's Employee Handbook provides that it “monitors its facilities to ensure compliance” with its restriction on “engaging in social media activity during work time” and the use of “facilities for non-work-related social media activities...” Thus, if such records exist, Defendant's records are a less intrusive source for this information. Moreover, the requested information is irrelevant and immaterial because it will not indicate the number of overtime hours (or, indeed, any hours) worked or not worked by Plaintiff for Defendant. At most, the information may show a date and time of a social media post. Further, to the extent any of the requested information exists and was posted by using the internet while working for Defendant during the identified time frame, Defendant's employee handbook allows for limited use of the internet for personal, non-business purposes. This request appears to be made simply in an effort to cause Plaintiff annoyance, embarrassment, oppression, or undue burden or expense.

Objection. This request is overly broad. The request seeks information “on any date” between June 19, 2011 and Plaintiff's last day of employment. It does not limit the request to days and times when Plaintiff was actually working for Orange Lake. Plaintiff worked for Defendant from approximately [October

2012 until September 2013]. The request also fails to limit the request to posts relating to overtime and off the clock information.

Subject to and without waving these objections, Plaintiff responds that she will not produce or permit inspection of the documents and information sought in this request.³

(footnote and brackets added).

8. As of the date of this motion, Plaintiffs persist in their refusal and failure to produce any and all relevant documents responsive to Defendant's Requests.

LEGAL ARGUMENT

Pursuant to Fed. R. Civ. P. 26(b)(1), unless otherwise limited by court order,

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

"Social media" refers to websites for online-based social networking and interaction. It allows users to share thoughts or information, which often consist of statements or descriptions about the users' daily lives or activities. This information may be "posted" or "shared" by the user about oneself, or by other users about that individual, all of which is collected on the subject user's profile page. Activities on social media websites, such as Facebook, LinkedIn, MySpace, Instagram, and others, can take the form of posts, tweets, messages, status updates, comments, blog entries, etc., all of which are collectively referred to as an individual's "social media content."

The Middle District of Florida has held that "[g]enerally, SNS [social networking site] content is neither privileged nor protected by any right of privacy." *Davenport v. State Farm Mutual Automobile Insurance Co.*, 2012 WL 555759, *1 (M.D. Fla 2012) (internal citation

³ See *supra* note 2.
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omitted). “A request for discovery must still be tailored, however, so that it ‘appears reasonably calculated to lead to the discovery of admissible evidence.’” *Id.* (citing Fed. R. Civ. P. 26(b)(1)). “The Federal Rules require that requests for discovery...be focused and specific.” *Id.* (internal citation omitted). The Middle District of Florida has granted a motion to compel discovery of social media content when such content is relevant to a matter at issue in a case, and where the request is appropriately tailored to lead to the discovery of admissible evidence. *See Davenport*, 2012 WL 555759, at *2 (granting defendant’s motion to compel discovery where plaintiff’s physical condition was at issue, and requiring plaintiff to produce photographs depicting her on social media, even if posted by other users, because “the potential relevancy of such photographs outweighs any burden of production or privacy interest therein”).

Contrary to Plaintiffs’ counsel’s misleading objections, Defendant’s Requests for Plaintiffs’ social media content are absolutely relevant to Plaintiffs’ allegations that they worked an average of fifteen (15) to twenty (20) hours of overtime per week off the clock. In fact, the requested social media documents are particularly critical because *none of the Plaintiffs have any documentation establishing the exact number of hours they worked off the clock*. Plaintiffs maintain that their estimate of fifteen to twenty hours off the clock per week is merely a “guesstimate,” because they have no way of knowing the exact hours worked. Plaintiffs allege that their work day would begin as early as 7:00 am, and could end as late as 7:00 pm. They allege that they would work on this schedule five to six days per week, although the days of the week on which they worked would vary.⁴ Therefore, any information that is part of Plaintiffs’ social media content, if any, which was created between the hours of 7:00 am and 7:00 pm—

⁴ For this reason, it is not possible for Defendant to limit the scope of the request to any particular days of the week, as Plaintiffs did not work a consistent weekly schedule of days worked.

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when Plaintiffs claim they were working off the clock—and which indicates, either directly or indirectly, that Plaintiffs were engaging in non-work related activities outside the workplace, is directly relevant to proving or disproving Plaintiffs’ off the clock claim. For example, the content on Plaintiffs’ social networking accounts may indicate days and times when an individual Plaintiff was off from work, out to dinner, engaging in childcare, grocery shopping, or engaging in recreational or other personal activity away from the workplace, all of which would negate the possibility that that individual was working off the clock during those times. Furthermore, in addition to the substance of an individual’s social media content (*e.g.*, what he was doing), content is often logged by the individual’s geographic location (*i.e.*, where he was doing it), which is designed to facilitate social interaction. If the geographic location from which Plaintiffs posted to their social media accounts, if at all, are seen to be outside the city in which they were working, for example, such evidence would indicate that that individual was not working on that particular day and time.

Plaintiffs’ counsel attempts to skirt the relevance of such information by mischaracterizing the purpose for which it is sought. In Plaintiffs’ objections to Defendant’s Requests, Plaintiffs’ counsel erroneously states that the social media content is being requested in order to “determine whether Plaintiff was using social media ‘during work time’ and thus, not properly on the clock,” as if to prove some violation by Plaintiffs of a workplace policy. Plaintiffs’ use of social media while *at work* is not at issue. Quite to the contrary, the focus of the disputed requests is Plaintiffs’ social media content, if any, that relates to times they *were not at work*, as this is relevant to Plaintiffs’ off the clock claim.⁵ Thus, Plaintiffs’ counsel’s

⁵ Although the focus of the disputed requests is the time when Plaintiffs were not actually working, Plaintiffs should not be permitted to produce only content that relates to times when *they claim* they were not at work, as this is the #4400753 v1

argument is disingenuous, and does not justify Plaintiffs' failure to produce the requested relevant documentation.

Furthermore, Plaintiffs' argument that the requests are "intrusive" because Plaintiffs' social media content may contain personal information must fail. Plaintiffs have created an issue of the time they claim to have worked off the clock, and therefore, Defendant must be afforded an opportunity to independently evaluate the documents and defend against such allegations. Notwithstanding, Defendant has only asked for content created during the time when Plaintiffs claim they were working, between the hours of 7:00 am and 7:00 pm. Any social media content that may be of a personal nature which was posted outside of those hours is not subject to the disputed requests. Therefore, the relevancy of Plaintiffs' social media content during the hours they claim to have worked off the clock outweighs any privacy interest as to such content.

Defendant's Requests are reasonably limited in every other way, so as to elicit relevant information in the least burdensome manner. The time period for which documents are sought is limited to three (3) years, the statute of limitations for claims pursuant to the Fair Labor Standards Act wherein plaintiffs allege a willful violation, as they do in the instant action. As to named Plaintiffs, this period dates back no earlier than three (3) years from the date the Complaint was filed, June 19, 2014. As to opt-in Plaintiffs, the period dates back no earlier than three (3) years from the date when Plaintiff filed his or her Consent to Sue.⁶

central off the clock dispute between the parties. Plaintiffs should be required to produce *all* of their social media content created during the relevant three-year period and falling within the hours between 7:00 am and 7:00 pm, when they claim they were working off the clock. This would enable Defendant to analyze that information in its entirety, make an independent judgment as to what such information shows about the times when Plaintiffs claim they worked, and if necessary, cross examine Plaintiffs on those issues.

⁶ Defendant concedes that any Plaintiff whose employment with Defendant did not span over the entire three (3) year statute of limitations period need not produce social media documents for any period of time when he or she

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Finally, in a good faith attempt to ease any burden associated with Plaintiffs' production of the requested social media documentation, Defendant provided Plaintiffs with complete instructions on how to most easily obtain the requested information from their Facebook account(s), if any. These instructions were included in the requests, as set forth fully in Paragraph 5, above:

To retrieve this information from a Facebook account, you must log into your Facebook Account, select "Settings" from the dropdown menu in the top right hand corner of the screen (the drop-down menu appears under the triangle symbol), select "General" in the upper left hand corner of the screen, and then select "Download a copy of your Facebook data".

The undersigned counsel has made a good faith effort to resolve this discovery dispute by conferring with opposing counsel prior to the filing of this motion. However, as of the date of the filing of this motion, Plaintiffs' counsel maintains opposition to the instant motion. Plaintiffs and their counsel have failed and refused to produce the responsive documents without any viable legal basis for doing so. Notably, Plaintiffs have never represented that they do not have any social media content responsive to the requests, with the sole exception of Plaintiff Stephen Raniero, as to whom it is unclear whether he has any "inactive" but responsive social media documentation.

For all the reasons stated above, Defendant respectfully asks the Court to compel Plaintiffs to produce the relevant documentation responsive to the disputed requests.

WHEREFORE, Defendant Orange Lake Country Club Realty, Inc. respectfully requests that this Court enter an order compelling Plaintiffs to produce the social media content sought by the instant requests, ordering Plaintiffs to refrain from deleting or altering any social media

was not employed by Defendant, as such period of non-employment would not be relevant to Plaintiffs' claim of off the clock work.
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content until the discovery is produced, and awarding such other and further relief as this Court may deem just and proper.

Dated: July 29, 2015
Miami, Florida

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 29, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF System. I further certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the below Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

By: s/Ingrid H. Ponce
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SERVICE LIST

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