NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-0269-22
A-0270-22

NORMA DAVIS,

Plaintiff-Appellant,

v.

DISABILITY RIGHTS NEW JERSEY, GWEN ORLOWSKI, and ELLEN CATANESE,

Defendants-Respondents.

APPROVED FOR PUBLICATION
March 16, 2023
APPELLATE DIVISION

Argued February 14, 2023 – Decided March 16, 2023

Before Judges Sumners, Susswein, and Fisher.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Union County, Docket No. L-4093-20.

Andrew Dwyer argued the cause for appellant (The Dwyer Law Firm, LLC, attorneys; Andrew Dwyer, of counsel and on the briefs).

Virginia L. Hardwick argued the cause for respondents (Hardwick Benfer, LLC, attorneys; Virginia L. Hardwick, of counsel and on the briefs).

Laura M. LoGiudice argued the cause for amicus curiae National Employment Lawyers Association/New

Jersey (Green Savits, LLC, attorneys; Laura M. LoGiudice, of counsel and on the briefs).

Edward J. Herban argued the cause for amicus curiae New Jersey Association for Justice (Sattiraju & Tharney, LLP, attorneys; Ravi Sattiraju, of counsel and on the brief).

The opinion of the court was delivered by

SUMNERS, JR., P.J.A.D.

In these appeals, calendared back-to-back and consolidated to issue a single opinion, we granted plaintiff Norma Davis leave to challenge two separate Law Division discovery orders arising from her lawsuit alleging that defendants Disability Rights New Jersey, Gwen Orlowski, and Ellen Catanese terminated her employment in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50. We stayed the orders pending resolution of these appeals.

In A-0269-22, the trial court order (cell phone record order) granted in part and denied in part plaintiff's motion to quash defendants' subpoena to her cellular provider seeking her cell phone records. Plaintiff used her cell phone to perform her work duties while allowed to work from home. The order required plaintiff: (1) to produce a redacted copy of her personal cell phone records indicating work-related calls and texts made and received during her

normal workday from January 1, 2018 to January 31, 2020; and (2) to submit to the court a copy of the redacted records provided to defendants, as well as a Vaughn[1] index of an unredacted copy of the records showing all calls and texts made and received during that period. National Employment Lawyers Association/New Jersey (NELA) filed an amicus brief in support of plaintiff.

In A-0270-22, the trial court order (social media posts order) granted in part and denied in part defendants' motion to compel plaintiff to provide copies of her private social media posts, profiles, and comments (collectively "social media posts" or "social media content") from January 1, 2020 to August 29, 2022, depicting an emotion, attaching a picture of herself, or mentioning: Disability Rights or her lawsuit's allegations; her vacations or celebrations; her being ill or worrying about being ill; and her work. NELA and New Jersey Association of Justice (NJAJ) filed amicus briefs in support of plaintiff.

We are unpersuaded by plaintiff's and amici's arguments that the trial judge abused his discretion in entering orders which abridged her privacy

[1] As pronounced in Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973). A Vaughn index is a privilege log "containing a 'relatively detailed' justification for the claim of privilege being asserted for each document. The judge analyzes the index to determine, on a document-by-document basis, whether each such claim of privilege should be accepted or rejected." Paff v. Div. of L., 412 N.J. Super. 140, 161 n.9 (App. Div. 2010) (citing Vaughn, 484 F.2d at 826-27).

interests. We conclude the judge appropriately considered plaintiff's privacy interests in her social media posts and cell phone bills and did not err in allowing defendants' discovery of limited private social media posts and cell phone bills to defend against her claims that her termination violated the LAD, causing her emotional distress. We, however, remand for the judge to add the requirement in the social media posts order — similar to the cell phone record order — that plaintiff submit a redacted copy of her private social media posts to defendants and the trial court as well as an unredacted copy of the posts with a Vaughn index to the trial court.

I.

In January 2020, Orlowski and Catanese terminated plaintiff's employment as a senior staff attorney with Disability Rights. Seeking redress, plaintiff filed a LAD complaint against defendants alleging she was terminated because she needed disability accommodations relating to her lupus condition and cancer diagnosis. Plaintiff claimed "defendants have caused [her] to suffer personal hardships, including economic loss, physical and emotional distress, anxiety, pain and suffering, humiliation, [and] career, family and social disruption[.]" In response to defendants' interrogatory questions, plaintiff asserted she suffers "ongoing" emotional distress due to defendants'

discrimination which has led to physical manifestations, including "terrible migraines, insomnia, worsening of her diabetes, [and] worsening blood pressure."

Defendants next demanded plaintiff produce copies of her private social media posts. After plaintiff refused, defendants moved to compel discovery of all her social media content "concerning any emotion, sentiment or feeling of [p]laintiff, as well as events that could reasonably be expected to evoke an emotion, sentiment, or feeling."[2] Plaintiff opposed, attesting she "never posted anything on her social media relating in any way to [Disability Rights], to defendants, or to the claims in this case."

Around the same time, defendants subpoenaed plaintiff's cell phone records from January 1, 2018 to January 31, 2020 from her provider. Plaintiff moved to quash the subpoena, arguing defendants failed to show a compelling need to obtain copies of her private cell phone records. Defendants asserted that, under our liberal discovery rules, the records, which were evidence of her work performance, were subject to subpoena. On three diverse dates over a two-

[2] The motion sought other information which we do not discuss because it is not relevant to this appeal.

month period, the trial judge heard plaintiff's motion and considered defendants' motion to compel the social media content.

On August 29, 2022, the trial judge entered two orders granting in part and denying in part the parties' respective motions. Regarding defendants' motion to compel plaintiff's social media posts, the judge narrowed the scope of defendants' request. The order required plaintiff to provide her private social media posts as follows:

> • Date range narrowed to posts from January 1, 2020 to the present.
>
> • Documents sufficient to demonstrate the social media sites, if any, on which [p]laintiff maintains or maintained a profile between January 1, 2020 and the present.
>
> • Postings, profiles or comments regarding any of the following:
>
> o [Disability Rights]
>
> o The allegations of this lawsuit
>
> o Posts that express an emotion, such as "I am happy that . . .", "It makes me angry when . . . ", or "I am worried about . . .”
>
> • Posts that say “Happy birthday” need not be produced

> • Posts that express opinions about politics, even if those opinions evoke emotion need not be produced
>
> o Posts that discuss or mention vacations, trips, parties, or celebrations
>
> o Posts that discuss or mention illness or worry about illness
>
> o Posts that mention work
>
> o All pictures of plaintiff
>
> • Pictures of trees, sunsets, landscapes or pets need not be produced
>
> • Pictures of people other than plaintiff need not be produced[.]

The order allowed plaintiff twenty-one days to fully comply and provided "plaintiff shall be made available for deposition on any topics that reasonably flow from the . . . discovery."

In his statement of reasons, the judge rejected plaintiff's argument that she had a legally protected privacy interest in her private social media accounts. The judge favored defendants' argument that, based upon the definitions of relevant and excludable evidence under N.J.R.E. 401 and 403, the private social media posts were discoverable because they may be a relevant indicator of her LAD emotional distress claim. The judge noted there was no binding precedent

addressing the issue but found persuasive reasoning in E.E.O.C. v. Simply Storage Mgmt., 270 F.R.D. 430, 432 (S.D. Ind. 2010) (quotations omitted), that social media accounts are not "shielded from discovery simply because [they] are locked or private."

In addition to finding plaintiff's private social media content can "demonstrate a manifestation of [p]laintiff's emotional distress," the judge held there would be no undue prejudice to her because "the primary purpose of the discovery request is relevant to the content sought." Finally, the judge determined the discovery would not create any improper or unfair treatment, nor irreparably harm plaintiff.

Regarding plaintiff's motion to quash the cell phone records, the judge narrowed the scope of the records to be provided to defendants. The judge ordered the cellular provider to produce "the requested documents to [p]laintiff[,]" who "shall redact all phone records for entries occurring outside of normal business hours and/or for non-work purposes" and "serve both a redacted copy of the phone records on [d]efendant[s] and an unredacted copy of the records, complete with an appropriate Vaughn [i]ndex and privilege log . . . within 14 days of this [o]rder."

In his statement of reasons, the judge rejected plaintiff's argument that defendants failed to show a compelling need for the cell phone records. The judge was satisfied the records were relevant under N.J.R.E. 401 because calls and texts made by plaintiff during normal business hours for work purposes are relevant to determine whether she was making enough calls or texts, a necessary component of her work duties. Recognizing there is a protected privacy interest in telephone billing records, see State v. Lunsford, 226 N.J. 129, 131 (2016), the judge found that "any phone calls made by [p]laintiff not occurring when she was using the phone for work[-]related calls must be redacted." Therefore, the judge required redaction of "personal calls not made during business hours" to prevent "undue prejudice, confusing of issues, or undue delay" as prescribed by N.J.R.E. 403. The judge further noted that plaintiff "entirely thwarted" her motion to quash when she subpoenaed the "same or substantially similar information" subpoenaed by defendants. Therefore, the judge maintained plaintiff conceded the cell phone records should be released and "assumed the burden of redacting such records in the manner [the court has ordered]."

II.

Social Media Posts Order

A.

Plaintiff argues she has a legal protected privacy interest in her private social media posts, which cannot be subjected to civil discovery without demonstrating a compelling need. In support, she cites state and federal statutes. The Social Media Privacy Law, N.J.S.A. 34:6B-5 to -10, prohibits employers from "requir[ing] or request[ing] a current or prospective employee to provide or disclose any user name or password, or in any way provide the employer access to" a personal social media account. N.J.S.A. 34:6B-6. An employee may waive this protection. N.J.S.A. 34:6B-7.

Under federal law, the Stored Communications Act, 18 U.S.C. §§ 2701-2713, states whoever:

> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
>
> (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided[.]
>
> [18 U.S.C. § 2701.]

Plaintiff relies on decisions by this court and other courts — In re State for Commc'n Data Warrants, 448 N.J. Super. 471, 484-85 (App. Div. 2017); Facebook, Inc. v. Superior Court (Hunter), 417 P.3d 725, 728 (Cal. 2018); In re

Facebook, Inc., 923 F. Supp. 2d 1204, 1206 (N.D. Cal. 2012); and Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965 (C.D. Cal. 2010) — which have held the Stored Communications Act recognizes a privacy interest in social media postings and private messaging.

Plaintiff asserts these legislative protections of an employee's social media accounts imply a reasonable expectation of privacy in those accounts. She further maintains these privacy backstops do not expire when the employment relationship ends, and her private social media content is not discoverable under the circumstances of her LAD claims.

Under common law, plaintiff cites to a District Court of New Jersey case, Ehling v. Monmouth-Ocean Hosp. Serv. Corp., which held the defendant employer improperly accessed the plaintiff employee's private Facebook posts. 872 F. Supp. 2d 369, 374 (D.N.J. 2012). The court explained the plaintiff "may have had a reasonable expectation that her [social media] posting would remain private, considering that she actively took steps to protect her [social media] page from public viewing." Ibid. Plaintiff also relies upon other federal court rulings that have found a reasonable expectation of privacy in the private social media accounts of plaintiffs. In United States v. Chavez, 423 F. Supp. 3d 194, 200, 205 (W.D.N.C. 2019), the court held the defendant had a reasonable

expectation of privacy under the Fourteenth Amendment in his private Facebook account although his posts could be viewed by his "[r]oughly three or four hundred" followers. In United States v. Irving, 347 F. Supp. 3d 615, 621 (D. Kan. 2018), the court ruled privacy settings give a social media user a reasonable expectation of privacy because the existence of separate public and private sections of the website creates a privacy interest in the private content.

Defendants do not dispute plaintiff's claim that she has a privacy interest in her private social media posts. Rather, they argue the trial judge must apply a balancing test — as he did — to determine the scope of discovery regarding the posts.

According to defendants, the state and federal statutes cited by plaintiff do not prevent discovery of her private social media posts. The Social Media Privacy Law and Stored Communications Act pertain only to unauthorized access to private social media posts and do not prevent court-ordered civil discovery. Defendants contend plaintiff's challenge to the social media posts order is incorrectly "based on an assumption that discovery should be limited whenever there is a statute protecting the privacy of particular information." In support, defendants cite the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d-1 to d-9, as an example of a statute which protects

against unauthorized access to medical records but permits their discovery when relevant.

We agree plaintiff has a privacy interest in her private social media posts. That said, there is no merit to plaintiff's assertion that her private social media posts are off limits from defendants' discovery requests based upon her LAD emotional distress claims.

Plaintiff mistakenly relies upon laws that do not bar discovery access to her private social media posts. The legislative intent of both the Social Media Privacy Law and Stored Communications Act is clear based on their plain language: they only protect a person's private social media posts from unauthorized access by employers and others, respectively. See McGovern v. Rutgers, 211 N.J. 94, 108 (2012) ("To determine [the meaning and legislative] intent, we look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen.") (quotations and citation omitted). Neither statute indicates nor implies that a person's private social media content is not subject to civil discovery. As one federal court held, "[t]he [Stored Communications Act] does not mention service of a civil subpoena duces tecum." Crispin, 717 F. Supp. 2d at 975.

To interpret either statute's plain language as a declaration that private media posts are not subject to discovery would, in essence, impose restrictions that are not expressed in either statute. This is not the role of our courts. See In re Diguglielmo, 252 N.J. 350, 360 (2022) ("A court may neither rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language.") (citation omitted). Likewise, the case law plaintiff relies upon to support her common law argument does not extend a blanket civil discovery bar to a litigant's private social media posts. In fact, civil discovery was not the focus of any of the cited case law.

As noted, our court rules permit discovery of all relevant, non-privileged information. R. 4:10-2(a). The rules do not extend a privilege to private social media account information. There are many types of privacy interests that must yield to discovery if the information sought is relevant, including those protecting personal financial information, Harmon v. Great Atl. & Pac. Tea Co., 273 N.J. Super. 552, 559 (App. Div. 1994) (credit cards and checkbook activity records), and medical records, Arena v. Saphier, 201 N.J. Super. 79, 89-90 (App. Div. 1985) (psychologist/patient communications in a LAD claim). Moreover,

some federal courts have recognized that a plaintiff's private social media content is discoverable. In Simply Storage, the court stated:

> Although privacy concerns may be germane to the question of whether requested discovery is burdensome or oppressive and whether it has been sought for a proper purpose in the litigation, a person's expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery.
>
> [270 F.R.D. at 434.]

In Tompkins v. Detroit Metro. Airport, 278 F.R.D. 387, 388 (E.D. Mich. 2012), the court ruled that a "private" social media post "is generally not privileged, nor is it protected by common law or civil law notions of privacy."

In sum, we conclude plaintiff's private social media posts are not privileged and is subject to discovery in conformity with our discovery rules.

B.

We now determine whether the social media posts order is consistent with our discovery rules. Plaintiff argues the social media posts order provides too broad an access to her social media. Finding no relevant New Jersey case law, she argues the trial judge should have looked to federal court rulings in Mailhoit v. Home Depot U.S.A., Inc., 285 F.R.D. 566, 570 (C.D. Cal. 2012), and Tompkins, as well as the Supreme Court of New York, Appellate Division, in

Tapp v. N.Y. State Urb. Dev. Corp., 958 N.Y.S.2d 392, 393 (N.Y. App. Div. 2013), where discovery of social media content was denied because it was not related to the plaintiffs' claims.

Plaintiff contends the social media posts order is vague and overbroad as was determined in Giacchetto v. Patchogue-Medford Union Free Sch. Dist., 293 F.R.D. 112 (E.D.N.Y. 2013).[3] There, the federal court recognized "[c]ourts have reached varying conclusions regarding the relevance of social networking postings in cases involving claims for emotional distress damages." Id. at 115. The federal court agreed with the approach that "[t]he fact that an individual may express some degree of joy, happiness, or sociability on certain occasions [on social media] sheds little light on the issue of whether he or she is actually suffering emotional distress." Ibid. In support, the court referenced a law review article[4] for the principle that social media posts are not an accurate assessment of the poster's actual emotional state. Id. at 116.

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[3] To support their arguments, plaintiff and defendants cite numerous unpublished decisions. Because unpublished decisions have no precedential value, R. 1:36-3, we do not discuss them.

[4] Brown, Kathryn R., The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs, 14 Vand. J. Ent. & Tech. L. 357, 365 (2012) ("Because social networking websites enable users to craft a desired image to

Plaintiff likens her social media posts to the financial records, specifically credit cards and checkbook activity, found undiscoverable in Harmon. There, we vacated a discovery order in a LAD complaint requiring the plaintiffs to produce personal financial records because "such broad and unfocused inquiry [of personal unrelated matters] is not necessary and that less intrusive inquiries directed to the particular aspects of diminished recreational activity which defendant wishes to explore would better serve the interest of justice." Harmon, 273 N.J. Super at 558. We expressed concern about "the chilling effect an order compelling discovery of plaintiffs' personal records might have on other employees considering filing meritorious discrimination suits." Id. at 559. In turn, we reasoned there were "less invasive" means of obtaining the necessary information considering the privacy interests at stake and such intrusive discovery would deter plaintiffs from bringing discrimination claims. Id. at 557-59.

Plaintiff claims there are less intrusive methods to acquire the relevant information and providing the social media posts defendants desire would result

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display to others, social scientists have posited that outside observers can misinterpret that impression.").

in a massive invasion of her privacy. According to plaintiff, defendants' discovery should be limited to her medical records and deposition testimony.

Defendants disagree with plaintiff's argument that, under Harmon, a plaintiff's privacy interest bars discovery of her private social media posts. Instead, they interpret Harmon as requiring a two-step balancing test that supports the social media posts order. See ibid.

First, defendants assert the court must assess the degree of the privacy interest. Defendants contend the privacy interest in personal financial information is highly valued, as evidenced by the fact many people keep that information confidential, including from family members. Yet, even personal financial information may be discoverable under certain circumstances. Id. at 559. Defendants assert there is a lesser privacy concern in private social media posts than personal financial information because posts are voluntarily generated and intentionally shared with people allowed to "follow" the poster's account. This is not the case for financial information.

Second, the court must consider the degree of intrusion into the privacy interest that would result from the discovery request. Defendants note their discovery demand was limited to social media posts related to plaintiff's emotional state or work at Disability Rights, unlike in Harmon, where all bank

records and credit card records were sought. See 273 N.J. Super. at 559. The degree of intrusion is minimized by the social media posts order because it does not allow unbridled access to plaintiff's private posts and affords plaintiff the ability to review her posts and redact non-relevant content. Finally, plaintiff's complaint placed her emotional state at issue, and the trial court properly exercised its discretion to limit discovery to that issue.

Defendants also contend the social media posts order is like the order upheld in Simply Storage, where the federal court allowed discovery of a broad range of private social media content revealing an emotion or mental state during the relevant time to examine emotional distress claims. See 270 F.R.D. at 434-37.

Defendants assert plaintiff's reliance on Mailhoit and Giacchetto to vacate the social media posts order is misplaced. The former allows discovery of private social media content unless it would be unnecessarily burdensome. Mailhoit, 285 F.R.D. at 571-72. The latter determined private social media content was discoverable to establish the plaintiff's emotional distress damages were related to stressors other than defendants' conduct and to assess the plaintiff's physical capacities. Giacchetto, 293 F.R.D. at 114-16. Defendants maintain the social media posts order allows them to ascertain evidence relating

to their defenses and is not burdensome. Consequently, plaintiff's concern in trying to distinguish which posts convey emotion should not restrict their discovery.

Amicus NJAJ joins plaintiff in arguing the social media posts order is contrary to Harmon and will prompt defendants to seek discovery from the people authorized to access plaintiff's private social media content. NJAJ predicts this will cause discrimination victims to cease bringing suits. NJAJ suggests the trial judge should not have allowed access to plaintiff's private social media posts because there was no reason to refute her certification that the posts are irrelevant to her lawsuit claims.

Amicus NELA argues that because plaintiff has a privacy interest at stake in private social media posts akin to personal tax records, the trial judge should have applied the heightened good cause Ullmann[5] test, recently reaffirmed in Parkinson v. Diamond Chem. Co., Inc., 469 N.J. Super. 396 (App. Div. 2021), to deny defendants' motion to compel. We held in Parkinson:

[5] Ullmann v. Hartford Fire Ins. Co., 87 N.J. Super. 409, 415-16 (App. Div. 1965).

> Boiled down to its essence, Ullmann requires a demonstration of three things by a requestor of an opponent's tax records in civil litigation: (1) the records are likely to contain information relevant to the claims or defenses in the case; (2) the requestor has a "compelling need" for the records to obtain information that cannot be obtained readily from other sources; and (3) disclosure of the records will serve a "substantial purpose."
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> [Id. at 408.]

NELA asserts the judge should not have followed Simply Storage, but rather applied Mailhoit because its reasoning is more like Harmon and Ullmann. NELA agrees with plaintiff that private social media accounts are entitled to heightened good cause review because they are accorded confidential status under the Social Media Privacy Law and Stored Communications Act. Lastly, NELA argues a request for social media posts that "express an emotion" or "mention vacations, trips, parties, or celebrations" is vague, and those posts do not accurately portray reality because they only show the best version of a person.

C.

We start with the understanding that appellate review generally defers to a trial judge's discovery order. State v. Brown, 236 N.J. 497, 521 (2019). Hence, our review of the order employs an abuse of discretion standard. Brugaletta v.

Garcia, 234 N.J. 225, 240 (2018). We only reverse an order "when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis," Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quotations and citation omitted), such as a "misunderstanding or misapplication of the law," Capital Health Sys. v. Horizon Healthcare Servs., 230 N.J. 73, 79-80 (2017). Yet, issues regarding questions of law are decided de novo. Barlyn v. Dow, 436 N.J. Super. 161, 170 (App. Div. 2014).

As we recently reiterated, our "discovery rules 'are to be construed liberally in favor of broad pretrial discovery.'" Trenton Renewable Power, LLC v. Denali Water Sols., LLC, 470 N.J. Super. 218, 226 (App. Div. 2022) (quoting Capital Health Sys., 230 N.J. at 80). The goal of discovery is to "accord[] the broadest possible latitude to ensure that the ultimate outcome of litigation will depend on the merits in light of the available facts." Serrano v. Underground Utils. Corp., 407 N.J. Super. 253, 268 (App. Div. 2009) (quoting Piniero v. N.J. Div. of State Police, 404 N.J. Super. 194, 204 (App. Div. 2008)).

In pertinent part, Rule 4:10-2(a) states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to

> the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of . . . documents, electronically stored information . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.
>
> [(Emphasis Added).]

Under this rule, relevancy "is congruent with relevancy pursuant to N.J.R.E. 401, namely, a tendency in reason to prove or disprove any fact of consequence to the determination of the action." R.L. v. Voytac, 402 N.J. Super. 392, 408 (App. Div. 2008) (citing Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997)). Yet, "discovery rights are not unlimited." Piniero, 404 N.J Super. at 204 (quotations omitted).

In accordance with Rule 4:18-1(a):

> any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on behalf of that party, to inspect, copy . . . any designated documents (including writings, . . . photographs, . . . images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, by the respondent into reasonably usable form), or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of R. 4:10-2 and that

> are in the possession, custody or control of the party on whom the request is served[.]

Through Rule 1:9-2, a party may subpoena documents or electronically stored information, which

> the court on motion made promptly may quash or modify the subpoena or notice if compliance would be unreasonable or oppressive and, in a civil action, may condition denial of the motion upon the advancement by the person in whose behalf the subpoena or notice is issued of the reasonable cost of producing the objects subpoenaed.

As the parties acknowledge, there is no New Jersey case law detailing the scope of discovery regarding a litigant's private social media posts. Nevertheless, considering the above principles and the persuasive reasoning in non-binding federal decisions, we conclude the trial judge did not abuse his discretion in entering the social media posts order. We, however, remand for the judge to put in place an in-camera review process to ensure plaintiff has recourse to allow the judge to assess posts that she believes are not discoverable.

Plaintiff's discoverable private social media posts are relevant to whether defendants' conduct caused her severe emotional distress. Discovery is limited to posts concerning comments or images depicting plaintiff's emotions, celebrations, vacations, employment, and health. Such limitations bar disclosure of non-relevant posts that have no bearing on plaintiff's action, e.g.,

comments concerning the welfare of members of her private groups. Defendants do not have unabated access to plaintiff's private social networking history simply because she pursues a claim for emotional distress damages.

Looking through the lens of our liberal civil discovery rules, we join the trial judge in embracing the federal court's pronouncement in Simply Storage that:

> It is reasonable to expect severe emotional or mental injury to manifest itself in some [social media] content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress. Further, information that evidences other stressors that could have produced the alleged emotional distress is also relevant.
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> [270 F.R.D. at 435.]

After determining that some private social media content is relevant,[6] the court limited discovery to the claimants' posts—comments, photographs, and videos––over a specific time period "that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state." Id. at 436. To avoid the disclosure of "private information that

[6] Federal Rule of Civil Procedure 26(b)(1) allows parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense[.]"

may embarrass" the claimants, the court cited the protective order "limit[ing] disclosure of certain discovery materials, and counsel should confer about whether that protection is appropriate here." Id. at 437.

We also agree with Giacchetto's reasoning, where the court acknowledged divergent rulings "regarding the relevance of social networking postings in cases involving claims for emotional distress damages," but took a more liberal approach towards discovery. 293 F.R.D. at 115. The Giacchetto court ordered the plaintiff to "produce any specific [social media] references to the emotional distress she claims she suffered or treatment she received in connection with the incidents underlying her [a]mended [c]omplaint" as well as "any postings on social networking websites that refer to an alternative potential stressor." Id. at 116.

We reject the arguments of plaintiff and amici that private social media posts have the same privacy interest as personal financial records, which under Ullmann face a heightened good cause test to be discoverable. See Parkinson, 469 N.J. Super. at 413 (reversing and remanding a discovery order granting the plaintiff in a wrongful discharge claim discovery of the individual and corporate tax filings of his former employers); Harmon, 273 N.J. Super. at 559 ("[O]n these facts the privacy interests presented [(seeking personal financial records)]

are of sufficient importance to be recognized and protected against such unlimited intrusion."). By their very nature, personal financial and tax records limit access to a financial institution or governmental tax authority, which cannot legally disclose the information without a person's consent or court order. In contrast, there is no confidentiality commitment or legal authority preventing an approved private recipient from sharing another's private posts, either verbally or by sending a screenshot to a non-private member. A member of a private social media group may have a moral obligation not to share posted content, but the content does not have the contractual and lawful protections afforded to personal financial and tax records. Persons who choose to post social media messages and photos necessarily assume the risk that intended recipients will share the information with others.

We further reject the arguments of plaintiff and amici that private social media posts are not discoverable because some social scientists have opined the posts are not relevant in disclosing a realistic portrayal of someone's life. Those opinions are not a consideration in determining discoverability of the posts. The ultimate reliability of accessing a person's emotional distress and the source(s) of any distress though her or his social media posts relates to the admissibility of the posts, which the judge decides at trial. See R. 4:10-2(a) ("It is not ground

for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence[.]"). And if the posts are admitted, the factfinder, depending on the trial judge's allowance of expert opinion, might consider a social scientist's belief regarding the import of private social media as evidence of a person's emotions. On the other hand, defendants could plausibly use the posts to attack plaintiff's credibility by arguing if private posts are not a true reflection of her thoughts, then why should a factfinder determine that her discovery responses and trial testimony are true. We reject the notion that plaintiff's private social media posts are not discoverable because readers might reach different conclusions as to whether and to what extent a particular post reveals her emotional state. Based on plaintiff's emotional distress claims, the social media posts order is reasonably calculated to lead to admissible evidence.

Given the rational relationship of the order to plaintiff's emotional distress claims, we see no merit to the contention that the order will have a chilling effect on LAD claims. Plaintiff has the right to seek damages to her emotional well-being caused by her termination in violation of the LAD. Defendants have the right to pursue rational discovery, as is the case here, to oppose plaintiff's allegations.

The social media posts order is not overbroad or burdensome. The order is limited to private posts made during a three-year timeframe and permits plaintiff to review the posts to determine which ones are responsive to the order without requiring her to provide unfettered access to her accounts. We appreciate plaintiff's counsel's contention at oral argument that plaintiff made daily private social media posts, thereby making the collection of her posts arduous. However, plaintiff's avid use of social media should not be a bar to defendants' legitimate discovery request given that her posts may be a window into her emotional state, which is in dispute.

Because it may be unclear whether some private social media posts "express an emotion," we remand and direct the trial judge to amend the order to require plaintiff to submit to defendants and the judge a redacted list of her discoverable posts and an unredacted list of her posts, with a Vaughn index, to the judge for in-camera review. The "Vaughn index must consist of one comprehensive document, adequately describe each withheld document or redaction, state the exemption claimed, and explain why each exemption applies." Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 765 (E.D. Pa. 2008).

III.

Cell Phone Records

Plaintiff argues that, given her privacy interest in her cell phone usage recognized in N. Jersey Newspaper Co. v. Passaic Cnty. Bd. of Chosen Freeholders, 127 N.J. 9, 18 (1992), the trial judge failed to apply the heightened good cause test of Ullmann in deciding her motion to quash defendants' subpoena of her cell phone records. Under that test, she asserts the motion should have been granted because defendants did not show the records were relevant to justify her firing, since they were unaware of her phone usage when they terminated her. Plaintiff contends she was never informed of any work performance deficiency related to her failure to make work-related phone calls. She further professes defendants offered no documentary evidence indicating she was not performing her job adequately based on her phone usage. Citing Serrano, 407 N.J. Super. at 281, plaintiff argues defendants did not provide specific evidence that the cell phone records would lead to admissible evidence and, as such, are engaging in a fishing expedition. For the most part, NELA reiterates plaintiff's arguments.

Defendants agree plaintiff has a privacy interest in her cell phone records but argue the trial judge properly balanced her privacy interest by imposing reasonable limitations on the subpoena so they could only obtain relevant

evidence. Specifically, the cell phone records order allows plaintiff to receive the records first and then redact all calls and texts transpiring outside of her work hours and for non-work purposes.[7] Thus, the order limits discovery to protect plaintiff's privacy interests. See Snyder v. Mekhjian, 244 N.J. Super. 281 (App. Div. 1990). Defendants assert that because an essential part of plaintiff's job duties was speaking to Disability Rights clients, her work calls are "essential and irreplaceable piece[s] of evidence about what [she] was doing on the days that she was being paid to work from home." According to the certification submitted in opposition to the motion to quash by Orlowski, Disability Rights' Executive Director, plaintiff failed to complete her job responsibilities by not communicating with her clients. Defendants argue the records will also bear on the credibility of plaintiff's claim that she was adequately performing her job. Defendants contend the Ullmann test, as applied in Harmon, should not have been applied by the trial judge because he did not order release of personal calls made during work or non-work hours. Defendants stress "there is no substitute for these records" because plaintiff does not remember whether she made the

[7] Apparently, after receipt of defendants' subpoena, plaintiff's counsel obtained a copy of her cell phone records.

appropriate phone calls, resulting in a particularized need for the cell phone records.

Considering the same liberal discovery rules applied to the social media posts order, we likewise conclude the judge did not abuse his discretion in entering the cell phone records order. We see no fault with the judge's assessment that records of plaintiff's work-related phone calls are relevant to defendants' claim that she was terminated because she was not performing her job duties by maintaining phone contact with her clients. The judge did not determine defendants' claim would succeed at trial but that the cell phone records could lead to admissible evidence concerning plaintiff's job performance. The order valued plaintiff's privacy rights by allowing her to redact the records of personal calls and texts made and received during workdays and non-workdays. Moreover, the order dictates that plaintiff provide a Vaughn index to justify her claim that certain redacted calls should not be disclosed to defendants.

As for plaintiff's contention that the trial judge should have applied the heightened good cause Ullmann test, we are not persuaded. We adopt the same reasoning we applied in rejecting plaintiff's argument in Section II, C above that discoverability of her private media posts is not subject to the Ullmann test.

Unlike in Ullmann and Harmon, where discovery of personal tax records and personal financial records, respectively, were sought, defendants are not being provided a record of plaintiff's personal cell phone calls. The cell phone records order only provides defendants with a record of plaintiff's work-related calls and texts. Thus, the judge was correct in not applying a heightened good cause Ullmann standard in issuing the cell phone order.

Affirmed in part and remanded in part to amend the social media order in accordance with this opinion.