2006 UCLA J.L. & Tech. 4

EMPLOYMENT TERMINATION FOR EMPLOYEE BLOGGING: NUMBER ONE TECH TREND FOR 2005♠ AND BEYOND, OR A RECIPE FOR GETTING DOOCED♠♠?

Stephen D. Lichtenstein[*] & Jonathan J. Darrow[**]

> *[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employes [sic] at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employe may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.*[1]

I. INTRODUCTION

[¶1] Blog is short for web log, which is a type of website upon which a blogger or author chronologically posts information, comments and opinions concerning a myriad of topics. Usually, others are allowed to post their comments on these sites and engage in interactive communication. The community that has developed from blogging has been referred to as the blogosphere.[2] Surveys indicate the blogosphere consists of over eight million bloggers (seven percent of the one hundred twenty million adults who use the internet), thirty-two million indicate they read blogs (twenty-seven percent of all internet users), and twelve percent of internet users have actually posted comments or other

---

♠ Fred Vogelstein, *10 Tech Trends to Watch in 2005*, FORTUNE, Jan. 10, 2005, at 43.

♠♠ Being fired for what is posted on one's web site (web log).

[*] Chair and Professor of Law, Department of Law, Taxation and Financial Planning, Bentley College (Waltham, MA).

[**] Assistant Professor of Business Law, Plymouth State University (Plymouth, NH); Research Associate, Department of Law, Taxation and Financial Planning, Bentley College (Waltham, MA).

[1] Payne v. W. & Atl. Railroad Co., 81 Tenn. 507, 518-19 (1884).

[2] *See, e.g.*, Ryan Walters, *Managing Global Mobility Free Trade in Services in the Age of Terror*, 6 U.C. DAVIS BUS. L.J. 92, 112 (2006) ("[T]he blogosphere erupted . . . ."); Michael W. Carroll, *The Role and Future of Intermediaries in the Information Age: Creative Commons and the New Intermediaries*, 2006 MICH. ST. L. REV. 45, 57 (2006) ("[T]he blogosphere includes not just separate blogs . . . .").

materials on blogs.[3] Moreover, recent data indicate that the size of the blogosphere is doubling every five months.[4]

[¶2] Although these statistics indicate the growing role blogs have in the cyberspace environment, sixty-two percent of all internet users do not know what a blog is.[5] This paper addresses the legal issues surrounding termination of employees who blog, commonly known as "doocing," with emphasis on the employment-at-will doctrine. The final part of the discussion describes the potential for employer liability based on information contained in an employee's blog and presents suggestions as to best blogging practices for both the employer and employee. The cyberlaw on this topic is unsettled since blogging is a relatively new phenomenon. Therefore, as was the case with earlier cyberlaw issues, the attempt here is to apply existing judicial precedent, as well as constitutional and statutory law to determine likely outcomes of these issues.

[¶3] In recent years, several employee terminations for information contained in the employee's blog have received national attention. In April 2004, Rachel Mosteller, an employee of the Herald Sun, penned a few humorously sarcastic comments regarding certain employee morale awards given at her employer's Durham, N.C. offices, and posted them on her blog.[6] Although the posting did not name the company, the company's location, or the author, company officials apparently became aware of it and fired Mosteller the next day.[7] A few months later, flight attendant Ellen Simonetti was

[3] Lee Rainie, *The State of Blogging*, Pew Internet & American Life Project, Jan. 2005, http://www.pewinternet.org/PPF/r/144/report_display.asp.
[4] Alan R. Nye, *Blog Wars: A Long Time Ago in an Internet Far, Far Away . . .*, 20 ME. B.J. 102, 103 (2005).
[5] Rainie, *supra* note 3.
[6] Amy Joyce, *When Blogging Gets Risky: Bad-mouthing Job Leads to Firings*, MSNBC, Feb. 10, 2005, http://www.msnbc.msn.com/id/6949377/.
[7] *Id.*

suspended indefinitely without pay (and later fired) after posting on her blog[8] images of herself in a Delta Airlines uniform.[9] The blog was a fictionalized account of her life as a flight attendant,[10] and did not specifically mention the airline by name.[11] The images were described by Delta as "inappropriate."[12] Michael Hanscom's only crime was posting a picture of MacIntosh computers on his blog. The problem? They were on a palate at Microsoft's Redmond, Washington campus, where Hanscom was working a temporary job.[13] He was asked never to return.[14]

[¶4] Given the rapid rise of blogging and the media coverage of cases such as those described above, one might think that employers would have quickly promulgated written policies addressing employee blogging. However, recent reports indicate that only eight to fifteen percent of employers have written policies regarding blogging.[15]

[¶5] Employee blogging policies should be added to existing employer computer usage and monitoring policies (of work-related matters), and should inform employees as to what blogs, if any, the employer would sanction. The policy should specifically address inappropriate blogs that could result in criminal or civil liability, especially those that pose potential risks to the protection of the employer's proprietary interests including intellectual property rights (trademarks, patents, copyrights), trade secrets and other

---

[8] Diary of a Flight Attendant, http://queenofsky.journalspace.com/ (2005).
[9] Jo Twist, *Blogger Grounded by Her Airline*, BBC NEWS, Oct. 27 2004, http://news.bbc.co.uk/1/hi/technology/3955913.stm. She was later fired. Jo Twist, *US Blogger Fired by Her Airline*, BBC NEWS, Nov. 3, 2004, http://news.bbc.co.uk/1/hi/technology/3974081.stm.
[10] John Oates, *Airborne Blogger Has Wings Clipped*, THE REGISTER, Oct. 27 2004, http://www.theregister.co.uk/2004/10/27/delta_blog_grounded/.
[11] Twist, *supra* note 9.
[12] *Id.*
[13] Joyce, *supra* note 6.
[14] *Id. See also* Charles Duhigg, *Can You Be Fired for Complaining About Your Boss Online???*, 2004-APR LEGAL AFF. 8 (2004).
[15] Amy Joyce, *Blogged Out of A Job*, WASHINGTON POST, Feb. 19, 2006, at F06; *see also* Charles Duhigg, *Can You Be Fired for Complaining About Your Boss Online???*, 2004-APR LEGAL AFF. 8 (2004) ("Very few companies have blogging policies").

information deemed confidential by the employer. Of further concern to the employer, is the potential liability, including vicarious liability, that could emanate from blogs that contain obscene, harassing, discriminatory or defamatory content. Although well-developed and disseminated blogging policies may reduce employer liability by clarifying that the employer does not encourage or condone the inappropriate content, they would not preclude liability for employees who disregard the policies.

II. THE AT-WILL DOCTRINE AND ITS EXCEPTIONS

[¶6] In the majority of cases where private employers have no written policy on blogging, the question is often whether non-unionized at-will employees dooced for information contained in their blogs have any legal recourse against their employers.[16]

A. The Eroding At-Will Doctrine

[¶7] The at-will doctrine has traditionally allowed the employer or employee to terminate the employment relationship at any time, with or without cause.[17] The United States is the only major industrialized nation in the world which adheres to the employment-at-will doctrine.[18] Moreover, even though the at-will doctrine was once

[16] Millions of United States employees are subject to the at-will rule. Benjamin B. Dunford, and Dennis J. Devine, *Employment At-Will and Employment Discharge: A Justice Perspective on Legal Action Following Termination*, PERSONNEL PSYCHOLOGY, Winter 1998, at 903 ("[A]n estimated 60 million U.S. employees are subject to employment at-will."); Donna E. Young, *Racial Releases, Involuntary Separations and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 356-57 (2001) ("In the United States, by far the most common employment arrangement is at-will . . . .").

[17] *See, e.g.*, Payne v. W. & Atl. Railroad Co., 81 Tenn. 507, 518-19 (1884).

[18] ANDREW D. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 9-10 (1987) (citing Daniel A. Mathews, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1447 n.54 (1975)); *See also* Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 355 (2001) ("[T]he United States stands virtually alone among Western industrialized nations in its failure to furnish its workers adequate job security."). Interestingly, Puerto Rico has enacted just-cause legislation. P.R. LAWS ANN. tit. 29, § 185a (2006) ("Every employee . . . contracted without a fixed term, who is discharged from his/her employment without good cause, shall be entitled to receive from his/her employer . . . the salary

entrenched in American jurisprudence, studies have shown that most blue and white-collar workers believe that employees should only be discharged for good reason.[19] Such a dramatic disconnect between society's prevailing beliefs and legal reality can create a great deal of tension and fuel litigation. It is perhaps not surprising then, that beginning in the 1970's, the United States witnessed an explosion of employment-at-will cases reaching the appellate level, a trend paralleling the judicial erosion of the employment-at-will doctrine.[20] Although the employment-at-will doctrine has been criticized for decades,[21] the erosion of the doctrine has recently reached new heights, with scholars calling for federal legislation limiting the rights of private employers to make adverse employment decisions based on off-duty conduct[22] and suggesting that the total demise of the doctrine may be on the horizon.[23]

---

corresponding to one month, as indemnity, if he/she is discharged within the first five (5) years of service; the salary corresponding to two (2) months if he/she is discharged after five years . . . .").

[19] ARCHIE B. CARROLL & ANN K. BUCHHOLTZ, BUSINESS & SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT 513 (6th ed. 2006).

[20] ANDREW D. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 9-10 (1987); Frank Vickory, *The Erosion of the Employment-At-Will Doctrine and the Statute of Frauds: Time to Amend the Statute*, 30 AM. BUS. L.J. 97, 108-11 (1992); Deborah A. Ballam, *Employment At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 654 (2000) (stating that exceptions to the at-will rule began developing in the 1960's). For a brief history of the employment-at-will doctrine in the United States, see Amy M. Carlson, *States Are Eroding the At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?* 42 DUQ. L. REV. 511, 512-14 (2004).

[21] *See, e.g.*, Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM L. REV. 1404 (1967).

[22] Ann L. Rives, *You're Not the Boss of Me: A Call for Federal Lifestyle Discrimination Legislation*, 74 GEO. WASH. L. REV. 553, 554 (2006). *See also* Mark D. Wagoner, Jr., *The Public Policy Exception to the Employment at Will Doctrine in Ohio: A Need for a Legislative Approach*, 57 OHIO ST. L.J. 1799, 1800 (1996) (suggesting that defining the respective termination rights of employers vis-à-vis their employees is more amenable to legislative than judicial resolution).

[23] Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 687 (2000). *See also* Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 517 & n.1 (2004) (noting that at least 200 scholarly articles have critiqued some aspect of the at-will employment rule since 1985).

B. Exceptions to the At-Will Rule

[¶8] Despite the decline of the at-will rule, the three major exceptions to it are narrow.[24] These include the implied contract of continued employment, the implied covenant of good faith and fair dealing, and the public policy exception.

1. Implied Contract of Continued Employment

[¶9] The implied contract exception, recognized by thirty-eight states,[25] usually involves oral or written statements by the employer that imply continued employment. Oral assurances of continued employment can be implied from statements made by the employer during the hiring stage. Written assurances generally take the form of statements found in employee manuals, handbooks, policies or in positive employee reviews or related rewards and recognitions. Such statements usually restrict the employer's right to discharge an employee who is considered to be fulfilling job requirements.[26]

[¶10] An employee who publishes a blog that does not compromise the proprietary rights of the employer or expose the employer to civil or criminal liabilities may prevail in a suit for wrongful discharge, provided that an implied contract is shown to exist.

---

[24] Amy M. Carlson, *States Are Eroding At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?*, 42 DUQ. L. REV. 511, 515 (2004) (Exceptions to the at-will rule "have been recognized in only the most limited of circumstances . . . .").

[25] David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales*, 33 AM. BUS. L. J. 645, 648 (1996).

[26] Toussaint v. Cross & Blue Shield of Michigan, 292 N.W.2d 880, 897 (Mich. 1980) ("An employer who agrees to discharge only for cause need not lower its standard of performance. It has promised employment only so long as the employee does the job required by the employment contract.").

2. Implied Covenant of Good Faith and Fair Dealing

[¶11] The implied covenant of good faith and fair dealing exception is recognized by only ten states.[27] Although difficult to define, it usually requires that termination of an at-will employee be based on just cause[28] and not motivated by malice, ill will or revenge constituting bad faith.[29] For example, firing an at-will employee to avoid paying him commissions would constitute evidence of bad faith under this exception and would likely result in a judgment for the dooced employee.[30]

3. Public Policy[31]

[¶12] The public policy exception perhaps offers the greatest hope for the dooced employee.[32] Four categories of public policy have been cited as providing a potential cause of action for wrongful discharge in an at-will employment relationship: (1) whistle-blowing (2) the exercise of a statutory or constitutional right or privilege, (3) the refusal

---

[27] Walsh & Schwartz, *supra* note 25, at 649.

[28] For a discussion of the varying interpretations of the term "just cause," see Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 518, 529 n.61 (2004).

[29] *See generally* Marvin Hill, Jr. & Emily Delacenseri, *Procrustean Beds and Draconian Choices: Lifestyle Regulations and Officious Intermeddlers – Bosses, Workers, Courts, and Labor Arbitrators*, 57 MO. L. REV. 51, 64 (1992).

[30] Maddaloni v. W. Mass. Bus Lines, Inc., 438 N.E.2d 351, 356 (Mass. 1982) ("An employer may not discharge an employee in order to avoid the payment of commissions . . . .").

[31] "To support a tort claim of wrongful discharge in violation of public policy, the policy in question 'must be: (1) delineated in either constitutional or statutory provisions; (2) "public" in the sense that it "inures to the benefit of the 'public'" rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental.'" Hartt v. Sony Elec. Broad. & Prof'l Co., 69 F.App'x 889, 890 (9th Cir. 2003) (no public policy against discharging an employee for moonlighting) (citing Stevenson v. Superior Court, 66 Cal. Rptr. 2d 888 (Cal. 1997)). *See also* MONT. CODE ANN. §§ 39-2-903(7) (2006) ("'Public policy' means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.").

[32] Paul S. Gutman, *Say What?: Blogging and Employment Law in Conflict*, 27 COLUM. J.L. & ARTS 145, 161 (2003).

to commit an illegal act, and (4) the performance of a statutory duty.[33] A fifth category, privacy, may be applicable as well.[34]

[¶13] In the cases of Ms. Mosteller, Ms. Simonetti, and Mr. Hanscom, whistleblowing, refusing to commit an illegal act, and the performance of a statutory duty were not implicated. In fact, the vast majority of discharges for blogging probably do not involve any of these public policy categories. Nevertheless, many feel a sense of injustice upon hearing that someone has been fired for authoring relatively innocuous statements or posting mildly provocative photos with a personal computer during off-work hours. This is especially true when the author has disguised the identity of the employer through the use of fictitious names. This sense of injustice is perhaps attributable to the strong tradition of protecting freedom of speech as well as the employee's right to privacy. *These two rights may provide at least a modicum of healthy ingredients to avoid the recipe for doocing.*

[¶14] Attempts by the (at-will) employee blogger to claim a violation of the employee's right to privacy by the employer accessing the blogs would probably fail, unless the right to privacy was deemed to exist in at-will employment relationships as a matter of public policy.[35] Again, this presupposes that the blog does not infringe upon or violate the aforementioned rights of the employer and are otherwise innocent or

[33] *Id.* at 161-64.

[34] Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 720-729 (1996) ("[R]ecognizing employee privacy rights as a public-policy exception to the at-will rule would serve the very interests the common law tort is intended to safeguard . . . ."); Ann L. Rives, *You're Not the Boss of Me: A Call for Federal Lifestyle Discrimination Legislation*, 74 GEO. WASH. L. REV. 553, 555 (2006) ("[S]ome courts have begun to consider extending a public policy exception to cover an employee's right to privacy.").

[35] *See* Kim, *supra* note 34, at 675-76 ("[W]hen the employer gives notice in advance that it intends to engage in . . . intrusive practices, the protection offered by the common law tort is problematic.").

innocuous. This could be true when the blog is critical of the employer, the company, its industry or is somehow job-related.

III. THE PUBLIC POLICY EXCEPTION: RIGHT TO PRIVACY

[¶15] Would Ms. Mosteller, Ms. Simonetti, Mr. Hanscom be successful in establishing that their employer's actions constituted an invasion of their right to privacy and as such should satisfy the requirements of the public policy exception?

[¶16] The extent to which this right applies to employees has been the subject of much discussion.[36] At the federal level, the United States Supreme Court has ruled that the First, Fourth, Fifth, Ninth and Fourteenth Amendments have created a penumbral or implied right to privacy at least as they relate to public employees.[37]

A. Statutory Privacy: The Electronic Communications Privacy Act

[¶17] In 1986, Congress passed the Electronic Communications Privacy Act (ECPA),[38] one of the most significant federal statutes addressing privacy rights in cyberspace. Congress passed the ECPA to amend existing federal anti-wiretapping statutes[39] thereby expanding protection to new modes of communication including radio pagers, cell phones, private communication carriers, and electronic communications such

---

[36] A search on Westlaw for articles whose titles contain the words "employee" or "worker" and "privacy" turned up over 100 articles. Furthermore, the discussion is by no means limited to legal journals. *See, e.g.*, Thomas A. Shumaker, *Employee Privacy Versus Employer Rights*, NURSING HOMES MAGAZINE, Nov. 2003, at 60; Kenneth A. Kovach et al., *The Balance Between Employee Privacy and Employer Interests*, 105 BUSINESS AND SOCIETY REVIEW 289 (2000); A. Scott, *No Privacy in the Workplace*, INTERNAL AUDITOR, June 2001, at 15.

[37] Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Roe v. Wade, 410 U.S. 113 (1973).

[38] 18 U.S.C. §§ 2510-2520.

[39] Existing statutes included Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Note that this Act covered telephone wiretaps and oral communications and is now Title III of the ECPA, 18 U.S.C. §§ 3121-3127, known as The Pen Register Act. It applies to wiretaps, pen registers (device that allows the recording of phone numbers dialed from another source) and trap and trace devices (which record the origin of incoming calls). Consequently, there appears to be no relevance of this Title to blogging.

as e-mail (the ECPA would also apply to newer devices such as iPods, Blackberries and others). Doocing resulting from employer access of employee blogs may be subject to the privacy protection provisions of the ECPA.

[¶18] Title I of the ECPA, provides that "any person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . shall be punished . . . or shall be subject to suit . . . ."[40] Title II, known as the Stored Communications Act (SCA), addresses communications in storage (e-mail inbox, blog, electronic bulletin or message board) and provides that "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 . . . ."[41] Furthermore, a person or entity providing an electronic communication service to the public "shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service."[42]

[¶19] Two cases illustrate the impact the ECPA may have on law suits brought by a dooced employee against an employer. In *Konop v. Hawaiian Airlines, Inc.*,[43] the plaintiff was a pilot for the defendant. During union negotiations with the Airline Pilots

[40] 18 U.S.C. § 2511(1)(a) (2006).
[41] 18 U.S.C. § 2701(a) (2006).
[42] 18 U.S.C. § 2702(a)(1) (2006). See Andersen Consulting v. UOP, 991 F. Supp. 1041 (N.D. Ill. 1998), in which the defendant operated and maintained an internal e-mail system and allowed the plaintiff to use it in connection with a project for which it had been hired. After terminating the plaintiff's services, the defendant disclosed some of the plaintiff's e-mails stored in its e-mail system to the Wall Street Journal. The court dismissed the suit, holding that the phrase "to the public" contained in Title II of the ECPA was intended to mean the "community at large" and such was not the intent of the defendant's internal e-mail system.
[43] 302 F.3d 868 (9th Cir. 2002).

Association (ALPA), he created a web site (similar to a blog) where he posted messages critical of the defendant's president and urged employees to seek another union to represent them.[44] Access to the site was possible only by obtaining a user name and password issued by the plaintiff (he would also keep a list of the authorized users) intended not to be disclosed to others. The defendant's vice-president became aware of the plaintiff's comments and wanted to access them in order to determine if they were truthful. To do so, he obtained the passwords from two other pilots and, with their permission, proceeded to impersonate the pilots and access the site many times. The messages were disclosed to the defendant's president, other officers of the company and the ALPA.

[¶20] The plaintiff was suspended and brought suit in federal district court alleging his right to privacy was violated under Title I and II of the ECPA.[45] He also alleged that his suspension was in retaliation for his opposition to the proposed labor concessions in violation of the Railway Labor Act (RLA). As to the Title I claims, the district court held that there was no interception of the message as the interceptions and access by the vice-president occurred when the messages were "in storage" (the e-mail in-box) and not "in transmission" as is required by Title I. On the Title II claim, the court decided that the access was covered by one of the four exceptions[46] provided by the

[44] *Id.* at 872.
[45] *Id.* at 873.
[46] The four exceptions are:
1)18 U.S.C. § 2702(b)(5). Internet Service Provider Exception. An ISP (*e.g.*, AOL, Prodigy, CompuServe) can, in the normal course of their employment, intercept, disclose, or use an electronic communication which is necessary in providing their service or to protect the rights or property of the ISP. Random monitoring is only allowed if the purpose is to check mechanical operation or to insure quality control of the service. *See* United States v. Mullins, 992 F.2d 1472 (9th Cir. 1993).
2) 18 U.S.C. § 2702(b)(2). Business Extension Rule or Ordinary Course of Business Exception. This exception allows an employer to monitor and intercept e-mail or phone calls (could apply to a blog) on its system if the employer had a monitoring policy that was disseminated to employees before an

ECPA which allows a person to authorize a third party's access to an electronic communication if the person is a user (the plaintiff would qualify as a user) of the communication service provider (the defendant employer) with respect to a communication of or intended for that user.[47] The district court agreed with the plaintiff's claim his suspension was retaliatory and therefore in violation of the RLA.

[¶21] In his first appeal of that decision, the court reversed the decision of the district court deciding that both Title I and II were violated by the defendant.[48] It affirmed the decision regarding the RLA violation.[49] In the second appeal,[50] the court affirmed the district court's decision granting summary judgment to the defendant regarding the plaintiff's Title I claim, concluding that for an interception of a website such as the plaintiff's to meet the requirements of the wiretap provisions of Title I, the electronic communications (in this case, the messages) would have to have been acquired

---

interception occurred and the purpose of the interception was both business related and intended to protect the employer's business interests. Under this exception, the interception of an electronic communication must be accomplished by the use of equipment furnished to the employer by a provider of communication service and carried out in the ordinary course of business. 18 U.S.C. § 2510(5)(a) (2006). This exception is not without limit. *See, e.g.*, Sanders v. Robert Bosch Corp., 38 F.3d 736, 741 (4th Cir. 1994) (finding employer monitoring twenty-four hours a day seven days a week to be a "drastic measure" not in the ordinary course of business). *See also* Deal v. Spears, 980 F.2d 1153, 1158 (1992) (noting that once the employer determines that intercepted calls are personal, the interception should cease).

3) 18 U.S.C. § 2511(1)(c) (interception under Title I) and § 2702(b)(3) (accession under Title II). Prior Consent. Here one of the parties to the communication has given prior permission for the interception. The interception must be commensurate with the permission given. *See* Watkins v. L.M. Berry & Co., 704 F.2d 577, 582 (11th Cir. 1983) (where consent is given for business calls only and the employer intercepts personal calls, interception should cease once the personal nature of the calls is indicated).

4) 18 U.S.C. § 2702(7)(d). Government and Law Enforcement Agencies. A service provider that accidentally intercepts a communication containing evidence of an illegal act may disclose it to the proper authorities. Law enforcement officials must obtain a search warrant, court order, or subpoena to access unless the communication poses an imminent threat to national security or is associated with organized crime.

[47] 18 U.S.C. § 2701(c)(2) (2006).

[48] Konop v. Hawaiian Air Lines, Inc., 236 F.3d 1035, 1046 (9th Cir. 2001), *opinion superseded by* Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002).

[49] *Id.* at 1053.

[50] Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002).

during their transmission and not when they were in storage.[51] As to the plaintiff's claim of a violation of the stored communications provisions of Title II of the ECPA, the court reversed the district court's decision. It held that since the pilots who provided their login credentials to the defendant's vice president had never accessed the website themselves, they did not qualify as "users" of the communication service as required under the provisions of Title II.[52] Consequently, they could not have authorized the vice president's access to the website.

[¶22] A more recent case, *Snow v. DirecTV, Inc.*,[53] could serve to predict what fate the blogger might face even in cases where strong measures were employed to protect unauthorized access and keep the site private. Snow hosted a website entitled Stop Corporate Extortion[54] as a private electronic message board where individuals being sued by corporations could share messages. The website homepage expressly forbade access to DirecTV or any of its agents.[55] To access the website, a member had to register, create a password and agree that they were not associated with DirecTV.

[¶23] DirecTV had been involved in thousands of anti-piracy actions to stop individuals from intercepting the defendant's transmissions without paying. Snow sued alleging that DirecTV's employees and its law firm accessed his website without authority and thereby violated the stored communications provisions (SCA) of Title II.[56] The district court held that the electronic messages on Snow's electronic bulletin board did not meet the "in storage" requirements required by Title II and granted DirecTV's

[51] *Id.* at 878.
[52] 18 U.S.C. § 2701(c)(2) (2006) (A person may authorize a third party's access to electronic communications if the person is (1) "a user of [the] service" and (2) the communication is "of or intended for that user.").
[53] Snow v. DirecTV, Inc., 450 F.3d 1314 (11th Cir. 2006).
[54] Stop Corporate Extortion, http://www.stop-corporate-extortion.com.
[55] Snow v. DirecTV, 450 F.3d 1314, 1316 (11th Cir. 2006).
[56] *Id.*

motion to dismiss the suit.[57] The decision was affirmed on appeal with the court ruling that irrespective of Snow's efforts at keeping the site private, he did not succeed and the site was therefore readily and easily accessible by the general public.[58] The court apparently was not deterred in its decision by the dishonest or even fraudulent actions of DirecTV but rather implied that more efforts in restricting website access would have to have been exerted to garner the protection of Title II.

[¶24] As far as reconciling *Snow* with *Konop*, in both cases: the communications were in storage; access to the web sites required user names and passwords; an agreement to expressed terms; certain individuals were not eligible to access; and in both cases the defendants were alleged to have accessed the stored communications in violation of those terms. The court in *Konop* held that the defendants violated Title I and the court in *Snow* held that the defendants did not. It appears that the major factor yielding the different results was the fact that in *Konop*, in order to gain access, one had to be an eligible employee thereby limiting access to the public. Such was not the case in *Snow*.

[¶25] In summary, establishing a claim of invasion of privacy under the ECPA would require the dooced blogger, at-will or otherwise, to first establish that the employee either owned the blog or maintained it. Proof would then have to be presented that the blogger intended that access to the site be private and not open to the public at large. The employee would also have to prove that interception and access to the blog(s) occurred while in transit and not when in storage, unless subject to one of the four exceptions to the ECPA.[59]

---

[57] *Id.*
[58] *Id.* at 1322.
[59] *See* Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107 (3rd Cir. 2004). In *Fraser*, the plaintiff, an at-will insurance agent for the defendant, filed complaints with the state against the defendant alleging that it

B. Common Law Privacy

[¶26] The state constitutions of Alaska, Arizona, California, Florida, Hawaii, Louisiana, Montana, South Carolina, Texas and Washington also recognize a right to privacy for their public employees. California is the only state that recognizes this right constitutionally for private employees.[60] Massachusetts[61] and Connecticut[62] have passed statutes recognizing the right to privacy applies to the private workplace.

---

discriminated in refusing to offer auto insurance to unmarried individuals and new drivers. The defendant learned about letters the plaintiff had drafted but not sent to its competitors and was also concerned that the plaintiff was revealing company secrets to competitors. To assuage or confirm their concerns, the defendant accessed the plaintiff's e-mails while stored on the defendant's main file server and discovered evidence the plaintiff was disloyal. As a result plaintiff was fired, whereupon he filed suit claiming wrongful termination based on privacy violations of Title I and alleging that the access was made while the e-mails were in transit. He also alleged under Title II that the defendant wrongfully searched his e-mail when it was in storage. On the Title I claim, the court ruled against the plaintiff deciding that there was no interception contemporaneous with their transmission. The court also ruled against the plaintiff on his Title II claim, deciding that although the e-mail was in storage, it was subject to an exception provided by ECPA § 2701(c), which allows access to stored communications by the entity that provides the service. *Id.* at .115. *Compare* Apple Computer, Inc. v. Doe I, 2005 WL 578641 (Cal. Super. Ct. Mar. 11, 2005) and the related case O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72 (Ct. App. 2006). In *Apple*, certain unnamed individuals (Does 1-25) published trade secret and confidential information regarding a new Apple device that would facilitate the creation of digital live sound recordings on Apple computers. This information was published in the form of blogs on web sites including PowerPage which was owned by Jason O'Grady and for which Nfox was the e-mail service provider. Apple sought a subpoena against PowerPage and Nfox seeking discovery of the identity of the individuals who had published the blogs. PowerPage and Nfox argued that as journalists, their anonymity and the sources of the information posted on their blog were protected and moved that any discovery or subpoena should not be allowed. *Apple* at *.2.. The court denied the motion on the grounds that the publishers had misappropriated trade secrets in violation of the Uniform Trade Secrets Act, CAL. CIV. CODE § 3426 (2006), adopted by California in 1985. The actions of the defendants also constituted a theft of trade secrets under California Penal Code § 499c. *Id*. at *.7.. O'Grady petitioned for a writ to block discovery (*O'Grady v. Superior Court*), arguing that as a publisher and reporter, he was entitled to protection under California's shield law and could not be required to identify confidential sources. The court held that since the contents of the blogs were in "electronic storage," Apple's discovery subpoena was prohibited by the federal Stored Communications Act, 18 U.S.C. § 2702(a)(1) (part of the Electronic Communications Privacy Act of 1986). While the court noted that there were specific exceptions set forth in the ECPA, the court held that they did not include the "implied" exception for civil discovery sought by Apple and granted a writ blocking discovery. *O'Grady* at 89.

[60] *See* Hill v. Nat'l Collegiate Athletic Assoc., 865 P.2d 633 (Cal. 1994).

[61] MASS. GEN. LAWS ch. 214, § 1B (2006) ("A person shall have a right against unreasonable, substantial or serious interference with his privacy.").

[62] CONN. GEN. STAT. § 31-51q (2006).

[¶27] Additionally, the Restatement (Second) of Torts recognizes four common law torts for invasion of privacy that include intrusion upon seclusion,[63] public disclosure of private facts causing injury to one's reputation,[64] publicly placing an individual in a false light,[65] and appropriation of another's name or likeness for one's own use or benefit.[66]

[¶28] Of these four torts, intrusion upon seclusion probably is the most apt for the employee whose blog was accessed by the employer resulting in the doocing. That being the case, the employee would nevertheless have to overcome at least two obstacles that could impede or prevent a successful challenge to the doocing. First, the employee would have to establish there was a reasonable expectation of privacy in the blog. Recall that the purpose for creating a blog in the first place was to provide an open forum for discussion and opinion on a myriad of topics. Given and the worldwide ability for anyone to access the blog's site, unless the employee took steps to prevent unauthorized access to the site and also to insure its privacy (use of encryption with the key given only to authorized individuals), it seems unlikely that the employee would be able to establish that there existed a reasonable expectation of privacy sufficient to qualify as one of the elements required to prove an invasion of privacy.[67] Second, succeeding in a privacy

[63] RESTATEMENT (SECOND) OF TORTS § 652B.
[64] RESTATEMENT (SECOND) OF TORTS § 652D.
[65] RESTATEMENT (SECOND) OF TORTS § 652E.
[66] RESTATEMENT (SECOND) OF TORTS § 652C.
[67] See, for example, *O'Connor v. Ortega*, 480 U.S. 709 (1987), where officials of a California State Hospital procured a warrant to search the desk and files in the office of the defendant-physician who was being accused of mismanagement and sexual harassment. The Court held that search and seizure and privacy rights under the Fourth Amendment were not violated since the search of a public office, desk and files, under the circumstances of this case, was reasonable. Furthermore, the Court decided that Ortega had no reasonable expectation of privacy in the office and its contents. *Id.* at 733. *See also* Muick v. Glenayre Elec., 280 F.3d 741 (7th Cir. 2002); USA v. Angevine, 281 F.3d 1130 (10th Cir. 2002). Even if employees were to have a reasonable expectation of privacy in their blogs, an employer would very likely be able to negate this expectation, at least as to blogs posted while at work or from employer computers, by notifying employees that internet activity will be monitored. *See* Donald P. Harris, Daniel B. Garrie & Matthew J. Armstrong, *Sexual Harassment: Limiting the Affirmative Defense in the Digital Workplace*, 39 U. Mich. J.L. Reform 73 , 83 (2005) ("[C]ourts have consistently

claim requires a showing that the invasion be "substantial" and "highly offensive to a reasonable person." Blogging is unlikely to meet these requirements.

[¶29] *Smyth v. Pillsbury*[68] provides a good barometer of that unlikely result. In *Smyth*, the defendant had informed its employees that their e-mail was to be confidential and not to be used as a basis for employment termination. Smyth, an at-will employee, exchanged certain e-mail communications with his supervisor over defendant's e-mail system on his computer at home. The e-mails referred to the defendant's sales management team and contained threats to "kill the backstabbing bastards" and also referred to the planned holiday party as the "Jim Jones Kool-aid affair."[69] Smyth claimed that the defendant's assurances created a reasonable expectation of privacy in his e-mails and that the invasion of that privacy satisfied the elements for the tort of intrusion upon seclusion. He also claimed that termination was in violation of the public policy exception to the at-will doctrine under (Pennsylvania) state law.[70]

[¶30] The court disagreed, deciding that since the e-mails were communicated over the defendant's company system, no reasonable expectation of privacy existed and, therefore, there could be no intrusion upon exclusion.[71] The court ruled that liability for this tort only attaches when the "intrusion is substantial and would be highly offensive to the 'ordinary reasonable person,'"[72] which was not the case here.[73] Furthermore, the court stated that even if a privacy interest had existed in the e-mail communications, this

---

found that employees do not have an objectively reasonable expectation of privacy when employers have e-mail policies that notify employees that the employer may monitor their e-mail or Internet use.").

[68] Smyth v. Pillsbury, 914 F. Supp. 97 (E.D. Pa. 1996).

[69] *Id*. at 99 n.1.

[70] *Id.* at 100.

[71] *Id.* at 101.

[72] *Id.* at 100 (citing Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 621 (3d Cir. 1992)).

[73] *Id.* at 101.

interest would have been outweighed by the employer's interest in preventing inappropriate, unprofessional comments or illegal activity by its employees.[74]

[¶31] Seemingly, *Smyth* could be applied to a case with similar facts but involving a blog. It is to be noted that in cases where the contents of an e-mail (or blog) contained purely personal or private content, the interception would more likely be deemed substantial and highly offensive to a reasonable person thereby satisfying one of the elements for proving the tort of intrusion upon seclusion.[75] However, unless the blog was password-protected or otherwise restricted from public view, it would be nearly impossible for the blogger to establish a reasonable expectation of privacy in the first instance.

[¶32] Blogging by the at-will employee may also occur during non-working hours (off-the-job) outside the employer's premises and not involve the use of the company computer or involve activities that directly oppose the requests of the employer. As discussed above, here the interests of the employer extend to insuring that the employee is not posting blogs that violate the rights and interests of the employer or others. Of course, the employee blogging on his or her own time (off-the-job) would have a greater expectation of privacy than when on the employer's time whether in or out of the workplace. Certainly, a court would have to determine the effect of the blog on the

[74] Smyth v. Pillsbury, 914 F.Supp. 97, 101 (E.D. Pa. 1996).

[75] RESTATEMENT (SECOND) OF TORTS § 652B ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."). *See also* McLaren v. Microsoft, 1999 WL 339015 (Tex. App. May 28, 1999), where the court held that no reasonable expectation of privacy existed where an employer, pursuant to an investigation of allegations of sexual harassment by the employee, broke into, accessed and released to third parties, the employee's e-mails stored in his personal folders on his office computer and accessible by a password known only to the employee. The court reasoned that since the employee's e-mails first traveled through various points in the defendant's e-mail system before reaching the folder, they were accessible by the employer at any point before such time.

employee's ability to fulfill the requirements of the job. Examples of blogs that an employer would certainly be interested in accessing would be those in which the employee posts comments that constitute harassment or discrimination against fellow employees, posts obscene or defamatory material, is planning or actively engaging in competition with the employer,[76] or reveals a substance abuse problem that might create a safety hazard at the place of employment. It is hoped that in cases where the blog indicates substance abuse that the employer would be motivated from a humanitarian perspective to find help for the employee.

III. THE PUBLIC POLICY EXCEPTION: FREEDOM OF SPEECH

[¶33] Not only is protection of freedom of speech expressed in the United States Constitution (and those of many states), it is the *First* Amendment. Yet, as scholars and courts are quick to point out, the First Amendment only protects individual freedom of speech from government action, not from the acts of private employers. This, therefore, begs the question as to whether First Amendment ideals of freedom of expression can find a voice in the public policy exception to the at-will employment doctrine, or whether any other Constitutional or statutory right may be similarly helpful to the dooced private employee.[77]

[76] Stokes v. Dole Nut Co., 41 Cal. App. 4th 285, 296 (1995) (holding that employer breached neither the employment contract nor the implied covenant of good faith and fair dealing when it fired an employee who had made preparations for a competing venture).

[77] *See* Lisa Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 350-51 (1994) ("Very few courts have indicated willingness to recognize a retaliatory discharge tort relying on the Constitution for a statement of public policy.").

[¶34] Legal scholars have so far concluded that as to the First Amendment, the answer is no,[78] a conclusion that has so far been supported by the case law.[79] For example, in *Drake v. Cheyenne Newspapers, Inc.*, the employer opposed efforts of its editorial division to unionize and required its managerial staff to wear buttons urging a "no" vote on the union.[80] The employees refused to wear the buttons, and were fired. Despite a freedom of speech clause in the Wyoming State Constitution that did not specifically require state action, the court held that the employee failed to state a claim upon which relief could be granted.[81] "Terminating an at-will employee for exercising

[78] *See, e.g.*, Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to Speak Out*, 55 S.C. L. REV. 253, 267 (2003) ("[T]he prevailing view is that free speech provisions in state or federal constitutions provide a public policy exception to the employment-at-will doctrine only if there is state action."); Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101 (1995) (arguing that in light of the employment-at-will relationship and the lack of due process in the workplace, employees possess little freedom of speech, and advocating a universal just-cause requirement); Matthew W. Finkin, *Second Thoughts on a Restatement of Employment Law*, 7 U. PA. J. LAB. & EMP. L. 279, 296-97 (2005) ("[O]ught employers be permitted to regulate an employee's private life, or any other aspect of his or her membership in civil society, that may have no supervening connection to the workplace or to the employment relationship? This is an authentic question of public policy, but the [American Law Institute] draft [of the Restatement of Employment Law] assumes the answer to it. Under the draft's formulation, there could be no constraint on an employer's ability to tell an employee to desist from, or to engage in, political activity."); Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL'Y J. 321, 336 (1999) ("[T]he law in the U.S. affords no protection for speech that is critical of one's employer . . . .").

[79] *See, e.g.*, Edmonson v. Shearer Lumber Products, 75 P.3d 733, 738 (Idaho 2003) ("The prevailing view . . . [regarding the discharge of an employee] in the private sector is that state or federal constitutional free speech cannot, in the absence of state action, be the basis of a public policy exception in wrongful discharge claims.") (citing Tiernan v. Charleston Area Medical Ctr., Inc., 506 S.E.2d 578, 589-90 (W. Va. 1998)); Johnson v. Mayo Yarns, Inc., 484 S.E.2d 840 (N.C. App. 1997) (no violation of public policy where employee discharged for refusing to remove a Confederate flag decal from his toolbox.); Albertson's, Inc. v. Ortiz, 856 S.W.2d 836, 840 (Tex. App. 1993) ("We likewise decline to recognize a compensatory cause of action to redress a wholly private entity's infringement of free-speech rights guaranteed by the state constitution."); Martin v. Capital Cities Media, Inc., 511 A.2d 830, 831-32 (Pa. Super. 1986) (finding no public policy that would prevent the discharge of a newspaper employee for placing commercial advertisement in competing newspaper under a pseudonym: "Even when the Constitution allows one to speak freely, it does not forbid an employer from exercising his judgment to discharge an employee whose speech in some way offends him."); Ball v. United Parcel Service, Inc., 602 A.2d 1176 (Md. App.1992) (no violation of public policy where employee discharged for refusing to contribute to United Way Fund).

[80] Drake v. Cheyenne Newspapers, Inc., 891 P.2d 80, 81 (Wyo. 1995).

[81] *Id.* at 83.

his right to free speech by refusing to follow a legal directive of an employer on the employer's premises during working hours does not violate public policy."[82]

A. Selected State Public Policy Statutes

[¶35] Favoring the blogger is the fact that, consistent with the trend toward judicial erosion of the at-will doctrine, several states have enacted legislation ostensibly limiting an employer's ability to discharge at-will employees.[83] In keeping with the statement above regarding the unsettled nature of the law on this topic, while there have not yet been any published decisions addressing the wrongful discharge of an employee-blogger under these statutes, such legislation may provide the strongest basis for such an action. The statutes and resulting case law in five states – North Dakota, Colorado, Connecticut, New York, and California – are discussed below.

1. North Dakota.

[¶36] Common-law public policy exceptions to the at-will employment rule recognized in North Dakota are limited.[84] Adding to the bloggers woes is the fact that North Dakota has never decided whether a tort action for invasion of privacy even exists,[85] let alone whether it might be applied favorably to a dooced blogger.

---

[82] *Id.* at 82.

[83] Importantly, these statutes may in some cases preclude the maintenance of a suit based on common law public policy grounds. Sturm v. Rocky Hill Bd. of Educ., 2005 WL 733778 (D. Conn. Mar. 29, 2005) ("The statutory remedy under CONN. GEN. STAT. § 31-51q, invoked by the plaintiff here in the second count of the complaint, precludes her from bringing a common-law wrongful discharge action based on the policy articulated by that statute.").

[84] *See, e.g.*, Ressler v. Humane Soc'y of Grand Forks, 480 N.W.2d 429, 432 (N.D. 1992) (public policy prohibits employment termination in retaliation for honoring a subpoena and testifying truthfully); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 795 (N.D. 1987) (public policy prohibits discharge in retaliation for seeking worker's compensation benefits); Jose v. Norwest Bank N.D., 599 N.W.2d 293, 298 (N.D. 1999) (N.D. CENT. CODE § 14-02.4-03 does not create clear public policy against discharging employees in retaliation for participating in an internal investigation of other employees' job performances).

[85] Hougum v. Valley Mem'l Homes, 574 N.W.2d 812, 816 (N.D. 1998).

[¶37] However, since 1991 North Dakota has statutorily proscribed discrimination by employers against employees for their "participation in lawful activity off the employer's premises during nonworking hours."[86] The breadth of this otherwise sweeping statement is sensibly limited and does not apply where participation in the activity "is contrary to a bona fide occupational qualification that reasonably and rationally relates to employment activities and the responsibilities of a particular employee or group of employees, rather than to all employees of that employer."[87] The scope of the statute was further limited in 1993 when it was amended to permit discrimination against employees whose conduct is in direct "conflict with the essential business-related interests of the employer."[88] These limitations prevent an employee from claiming that the statute insulates her from adverse employment action as a result of, for example, her operation of a competing business or her maintenance of a lawsuit against the employer's clients.

[¶38] As suggested above, blogging can meet the statutory requisites of being carried out in a lawful manner off the employer's premises during non-working hours. Even where this is the case, however, it is far from certain that the blogger would be protected. Do non-defamatory comments critical of the employer "directly conflict with the essential business-related interests of the employer"? Is there a bona fide

[86] N.D. CENT. CODE § 14-02.4-01 (2006) ("It is the policy of this state to prohibit discrimination on the basis of . . . participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer."); *see also* N.D. CENT. CODE § 14-02.4-03 (2006) ("It is a discriminatory practice for an employer to fail . . . to hire a person; to discharge an employee; or to accord adverse . . . treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of . . . participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.").

[87] N.D. CENT. CODE § 14-02.4-08 (2006).

[88] Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 227 n.1 (N.D. 1993).

occupational qualification, specific to the particular blogger rather than applicable to all employees, that would prevent him from posting on his blog, photographs that are embarrassing to his employer?

[¶39] Unfortunately, few cases have squarely addressed the extent of the protection created by these sections. In *Fatland v. Quaker State Corporation*, an employee was discharged after refusing to divest himself of an ownership interest in an after-hours business.[89] Finding that the after-hours business might result in a loss of business and goodwill to the employer, the court held that "prohibiting employees . . . from operating off-hours businesses that would . . . result[] in . . . termination of business with the employer is a bona fide occupational qualification . . . within the meaning of section 14-02.4-08."[90]

[¶40] As is frequently true with laws that protect individual freedoms, the North Dakota statute at issue in this case attempts to balance the interests of the employer with those of the employee. On the one hand, the employer may not discharge at its whim where an important employee freedom is at stake. At the same time, an employee cannot participate in off-duty activities with reckless disregard for the consequences of those activities on his employer, and then rely on the law to shield him from discharge. *Fatland* suggests a sensible rule when balancing these interests: Where an otherwise protected off-duty activity of the employee has a deleterious effect on the employer's business, the employer should have greater freedom to discharge the employee. Therefore, while neither employers nor employees are absolutely free to discharge or blog, respectively, *Fatland* suggests that where the contents of a blog can be shown to

[89] 62 F.3d 1070, 1072 (8th Cir. 1995).
[90] *Id.* at 1073.

result in decreased business to or the tarnishing of goodwill of the employer, the employer may be more likely to prevail.

[¶41] In *Hougum v. Valley Memorial Homes*, it was less clear whether the employee's off-the-job conduct was in direct conflict with the employer's essential business-related interests.[91] The *Hougum* court declined to decide as a matter of law whether masturbation in a Sears bathroom at a shopping mall constituted protected activity for purposes of section 14-02.4-03. In denying the employer's summary judgment motion, the court noted that a factual dispute existed as to whether the plaintiff's conduct was lawful.[92] More importantly to the issue of blogging, defendant Valley Memorial Homes had terminated plaintiff from his position as staff chaplain, alleging that his conduct had "undermined his effectiveness as a chaplain."[93] The court therefore held that an issue of fact also remained as to whether his conduct was "in direct conflict with its essential business-related interests."[94]

[¶42] Blogging that is critical of co-workers, supervisors, or the employer could potentially undermine an employee's effectiveness. Take, for example, the dooced Harvard employee who had referred on her blog to her supervisor's "anal retentive control freakishness."[95] Even if the phrase is considered a non-defamatory opinion, it is not difficult to imagine how this might create tension and undermine the efficient workings of an office environment. Consider also the case of Nadine Haobsh, an associate beauty editor for Ladies' Home Journal, who published a blog called Jolie in

[91] 574 N.W.2d 812, 822 (N.D. 1998).
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] Leon Neyfakh, *Online Weblog Leads To Firing*, HARVARD CRIMSON ONLINE EDITION, May 26, 2004, http://www.thecrimson.com/article.aspx?ref=502702 (describing Amy Norah Burch, an undergraduate coordinator for Harvard University's Committee on Degrees in Social Studies, who was fired after her supervisor discovered this and other pointed comments on her blog).

NYC[96] upon which she published allegedly secret information about the beauty industry including the practice of beauty product companies giving expensive gifts and other gratuities to executives, editors and authors of beauty related publications. On the day she was to give two weeks notice to her employer in order to accept an offer of employment from Seventeen Magazine, her employer informed her that he knew she was the source of the blog and considered her to be disloyal and unprofessional.[97] Believing she had the new job, she resigned and gave two weeks notice. Her employer dooced her immediately. To add insult to injury, Seventeen revoked their offer of employment. Legal issues aside, this appears to be a case of an existing employer and a prospective employer simply disapproving of information about the practices of an industry that was common knowledge to all in that industry. For Haobsch, it was a recipe for doocing.[98]

2. Colorado

[¶43] A very similar statute was enacted in Colorado in 1990,[99] which provides:

> (1) It shall be discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction: (a) relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or (b) is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.[100]

---

[96] http://www.jolienyc.com.
[97] Myrna Blyth, *Blogging Bizness*, NAT'L REV. ONLINE, July 28, 2005, http://www.nationalreview.com/blyth/blyth200507280758.asp.
[98] Subsequent to her employment termination, Haobsh was interviewed on MSNBC (July 25, 2005) and CNN (July 22, 2005), and featured in several other publications and media outlets. She continues to blog.
[99] Galvan v. Spanish Peaks Reg'l Health Ctr., 98 P.3d 949, 951 (Colo. Ct. App. 2004).
[100] COLO. REV. STAT. ANN. § 24-34-402.5 (West 2006).

[¶44] The scope of this statute was soon tested in *Marsh v. Delta Air Lines*, where a baggage handler and twenty-six year veteran of Delta Air Lines was discharged after writing a letter to the editor of the Denver Post.[101] The letter criticized Delta's decision to replace full-time employees with hourly workers, stating that Delta was "betraying the trust and loyalty of more than 60,000 dedicated employees" and suggesting that it was foolhardy to believe that "traditional high levels of customer service could be maintained with $6 an hour help."[102]

[¶45] The court noted that the statute was intended to protect employees in their "off-the-job-privacy" and to "provide a shield to employees who engage in activities that are personally distasteful to their employer, but which activities are legal and unrelated to an employee's job duties."[103] The parties did not dispute that the employee had "engaged in a lawful activity,"[104] and the court easily held that the employee's activity had taken place "off the premises of the employer during nonworking hours."[105]

[¶46] Addressing the exception in subsection (b) of the statute, the court held that the employee's act of writing a letter to the Post did not constitute a conflict of interest because the employee was not "disregarding his duties in favor of personal gain."[106] Delta also argued that the plaintiff breached his duty to promote a positive Delta image, thereby allowing Delta to fire him under subsection (a), which provides an exception where the employer's restriction is "reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees,

---

[101] Marsh v. Delta Air Lines, Inc., 952 F. Supp. 1458 (D. Colo. 1997).
[102] *Id.* at 1460.
[103] *Id.* at 1462.
[104] *Id.* at 1461.
[105] *Id.* at 1464. The court observed that the "[p]laintiff's de minimis act of photocopying the letter on Delta property does not, by itself, vitiate the applicability of the statute."
[106] *Id.* at 1464.

rather than to all employees of the employer." However, the court held this exception inapplicable, stating that the Delta could not "seriously contend that it is the unique function of a baggage handler to portray a positive image for Delta while other employees are not charged with that same responsibility."[107]

[¶47] Analyzing only these sections of *Marsh*, a blogger might conclude that her activities should in most cases be protected under the Colorado statute. Just like the employee's actions in *Marsh*, bloggers' on-line activities can certainly be legal and can be conducted off the premises of the employer during non-working hours. Bloggers are rarely seeking financial or other tangible personal gain, but merely use blogs as a way to "let off steam,"[108] "keep in touch with friends and family,"[109] or even simply to amuse friends,[110] all of which – at least under the narrow "personal gain" standard of *Marsh* – would not likely give rise to a conflict of interest.

[¶48] Unfortunately for the blogger, the *Marsh* court held that subsection (a) contains not one, but two exceptions to the protections afforded employees for their off-duty activities.[111] The "bona fide occupational requirement" of subsection (a), the court held, is a separate exception that includes an implied duty of loyalty.[112] This duty of loyalty was breached by the employee in writing his harshly critical letter.[113] In reaching this conclusion, the court emphasized that the employee was not attempting to inform the

---

[107] *Id.* at 1463.
[108] Leon Neyfakh, *Online Weblog Leads To Firing*, HARVARD CRIMSON ONLINE EDITION, May 26, 2004, http://www.thecrimson.com/article.aspx?ref=502702.
[109] Jason Koulouras, *Private Blog Wasn't: Man Fired for Blasting Boss*, BLOGCRITICS MAG., Sept. 4, 2004, http://blogcritics.org/archives/2004/09/04/141004.php (discussing blogger Matthew Brown, fired from Starbucks for "profanity-laced" remarks about his boss).
[110] April Witt, *Blog Interrupted*, WASH. POST, Aug. 15, 2004, at W12 (discussing Jessica "Washingtonienne" Cutler, a staff-assistant on Capitol Hill fired for her blog).
[111] *Marsh*, 952 F. Supp. at 1462 n.2.
[112] *Id.* at 1463.
[113] *Id.*

public of a safety concern (which might render his action analogous to whistleblowing), nor did he voice his concerns by utilizing Delta's internal grievance procedure.[114, 115]

[¶49] Under *Marsh*, therefore, employees would be best advised not to criticize their employers on their blogs, lest they be found to have breached the implied duty of loyalty. They should also be cautious not to use the blog for personal gain, such as by selling advertising space on the blog, so as not to run afoul of the conflict of interest exception. Finally, bloggers may be better off if they limit their online-comments to non-work-related matters. The *Marsh* court found it important that the employees' off-the-job activities were work-related.[116]

3. Connecticut

[¶50] Connecticut has enacted a free-speech statute prohibiting:

> any employer . . . [from] subject[ing] any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution [or certain state constitutional provisions] provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer.[117]

---

[114] *Id.*

[115] *Cf.* Gwin v. Chesrown Chevrolet, Inc., 931 P.2d 466, 471 (Colo. Ct. App. 1996) (where employee was fired after attending an optional offsite sales seminar, at least partly because he had demanded a refund of the seminar fees, the court found that this off-the-job activity fell under the protection of § 24-34-402).

[116] *Id.* at 1462-63.

[117] CONN. GEN. STAT. ANN. § 31-51q (West 2006). *See also* Thiebeault v. Scap Motors, Inc., No. 304CV1936(JCH), 2005 WL 2041968, at *2 (D. Conn. Aug. 23, 2005) (explaining that, in order to state a claim under § 31-51q, a plaintiff must allege that "(1) he was exercising rights protected by the first amendment to the United States Constitution (or an equivalent provision of the Connecticut Constitution); (2) he was fired on account of his exercise of such rights; and (3) his exercise of his first amendment . . . rights . . .did not substantially or materially interfere with his bona fide job performance or with his working relationship with his employer." (citing Lowe v. Amerigas, Inc., 52 F. Supp. 2d. 349, 359 (D.Conn. 1999))).

[¶51] This statute applies, at least in some cases, even if the speech in question takes place on work premises and is addressed to another employee or supervisor of the employee.[118]

[¶52] Unlike the employee protection statutes in North Dakota, Colorado, New York, and California, the Connecticut statute specifically provides protection against adverse employment action in retaliation for the exercise of First Amendment rights. While this might initially appear to be just the magic shield bloggers are seeking, its protection is in fact quite limited. As the Supreme Court of Connecticut cautioned in *Daley v. Aetna Life and Casualty Company*, the First Amendment "safeguard[s] statements made by an employee that address a matter of public concern, but provide[s] no security with respect to statements that address wholly personal matters."[119] It is possible of course that a blogger's online comments address matters of public concern and therefore fall under the protection of the statute. However, in those cases where the

[118] Cotto v. United Techs. Corp., 738 A.2d 623, 626 (Conn. 1999); Calderon v. Dinan & Dinan PC, No. 3:05CV1341(JBA), 2006 WL 1646157, at *5 (D. Conn. June 13, 2006).

[119] 734 A.2d 112, 121 (1999) (citing Connick v. Myers, 461 U.S. 138, 147-49 (1983)). *Connick*, the case cited by the *Daley* court, addressed first amendment rights in the context of public employment. Without doing so explicitly, the *Daley* court seems to have extended the requirement that protected employee speech address a "matter of public concern" to employees in the private sector. *See, e.g.*, Young v. Trinity Hill Care Ctr., 41 Conn. L. Rptr. 311 (Super. Ct. 2006) (applying the *Daley* "public concern" requirement in the context of a private defendant-employer's dismissal of an employee). This is a sensible development; were private sector employees not required to demonstrate that their speech addresses a matter of public concern, these employees would have greater free speech rights than public sector employees - a perverse result. Note that in the absence of an employee protection statute such as CONN. GEN. STAT. ANN. § 31-51q, a private sector employee discharged for exercising free speech rights might have no cause of action at all. *See, e.g.*, Tiernan v. Charleston Area Med. Ctr., Inc., 506 S.E.2d 578, 591 (W. Va. 1998) (holding the free speech clause of the state constitution inapplicable to a private sector employer, and describing the CONN. GEN. STAT. ANN. § 31-51q as "the only legislative effort in the nation to extend the full gamut of constitutional principles to private employers"); Cotto v. United Techs. Corp., 738 A.2d 623, 627 (Conn. 1999); *Calderon*, 2006 WL 1646157, at *5 ("Connecticut law . . . extends the protection of the First Amendment to employees of private employers.").

blogger is merely letting off steam, criticizing office operations, or posting provocative photos, it is unlikely that these topics would constitute matters of public concern.[120]

[¶53] Moreover, online comments will not be protected if they "substantially or materially interfere with the . . . working relationship between the employee and the employer."[121] Although the Connecticut Supreme Court in *Daley* did not interpret this section of the statute, bloggers would be wise to avoid discussing work matters online so as to avoid falling outside the statute's scope of protection.[122]

[¶54] How much First Amendment protection do employees enjoy under section 31-51q? Although the statute protects some free speech against adverse actions by private employers, it does not protect all speech.[123] Specifically, the protection extends "only to expressions regarding public concerns that are motivated by an employee's desire to speak out as a citizen."[124] "[S]peech on a purely private matter, such as an employee's dissatisfaction with the conditions of his employment, does not pertain to a

[120] *See, e.g.*, Luck v. Mazzone, 52 F.3d 475 (2d Cir. 1995) (public employee's speech criticizing the inadequacy of building air conditioning is not a matter of public concern); Clouston v. On Target Locating Servs., No. 3:01-CV-2404-DJS, 2005 WL 2338883, at*10 (D. Conn. Aug. 19, 2005) (plaintiff-employees' concerns regarding their supervisor's use of profanity and his directions to pay employees for time they did not actually work, which directions violated company policy "could not be construed to concern anything other than workplace personnel matters" and is therefore not protected speech for purposes of § 31-51q); Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 381-82 (1994) (speculating "that courts would consider discussions about raises, salary cuts, parking privileges, benefits, transfers from one position or plant to another, promotions, and demotions, as ordinary day-to-day personnel actions and representing speech on matters of purely private concern.").

[121] CONN. GEN. STAT. ANN. § 31-51q (West 2006).

[122] *See* Jaszcolt v. KIP, Inc., 39 Conn. L. Rptr. 657 (Super. Ct. 2005) (discharging employee for bringing small claims suit against employer over minor employment-related matter not barred by section 31-51q). *See also* Orr v. Crowder, 315 S.E.2d 593, 602 (W. Va. 1984) ("statements made about persons with whom there are close personal contacts which would disrupt 'discipline . . . or harmony among coworkers' or destroy 'personal loyalty and confidence' may not be protected." (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 570 (1968))).

[123] Campbell v. Windham Cmty. Mem'l Hosp., 389 F. Supp. 2d 370, 382 (D. Conn. 2005).

[124] *Id.* at 382 (citing Cotto v. United Techs. Corp., 738 A.2d 623, 632 (Conn. 1999)). *See also Calderon*, 2006 WL 1646157, at *5; *Thibeault*, 2005 WL 2041968, at *2.

matter of public concern."[125] Whether a private entity is acting criminally is a matter of public concern.[126] More generally, speech addresses a matter of public concern if it can "be fairly considered as relating to any matter of political, social, or other concern to the community."[127] However, determining when speech is a matter of public concern is not always a simple task, as the following cases illustrate.

[¶55] In *Daley,* the employee was discharged after sending an interoffice memorandum to the Aetna chairperson expressing her dissatisfaction with Aetna's lack of adherence to its own "family flexible" policies.[128] The court held that whether such a memorandum constituted protected speech was a mixed question of law and fact[129] and that the employee's motivation is decisive as to whether the expression is a matter of public concern,[130] and affirmed the judgment of the trial court in favor of Aetna.

[¶56] In *Campbell v. Windham Community Memorial Hospital*,[131] the plaintiff, who was hired as Staff Chaplain at Windham, was asked to resign after proposing changes to Windham's pastoral care policies.[132] The plaintiff was concerned that Windham's practice of providing local clergy with copies of patient lists (including

---

[125] Lewis v. Cohen, 165 F.3d 154, 164 (2d Cir. 1999).
[126] *Thibeault*, 2005 WL 2041968, at *2.
[127] Connick v. Myers, 461 U.S. 138, 146 (1983).
[128] Daley v. Aetna Life & Cas. Co., 734 A.2d 112, 118 (Conn. 1999).
[129] *Id.* at 119. More generally, "[r]estrictions on employee-employer speech are more justified than restrictions on the speech of the public at large." Cotto v. United Techs. Corp., 711 A.2d 1180, 1186 (Conn. App. Ct. 1998), *aff'd*, 738 A.2d 623 (Conn. 1999). In support of this proposition, *Cotto* cites Waters v. Churchill, 511 U.S. 661 (1994), which states that government, in its role as employer, has a "freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large." *Id.* at 671. Given that the first amendment protects freedom of speech vis-à-vis the government, and that statutes such as CONN. GEN. STAT. ANN. § 31-51q extend this protection to all employers, it would seem that private employers should have at least as much latitude in regulating employee speech as do government employers. *See id.* at 628 ("The legislature's manifest concern for the special needs of the workplace is at least as relevant in the private workplace as it is in the public workplace.").
[130] *Daley*, 734 A.2d at 124; *see also* Cotto v. United Techs. Corp., 738 A.2d 623, 648 (Conn. 1999) (Katz, J., concurring in part and dissenting in part).
[131] Campbell v. Windham Cmty. Mem'l Hosp., 389 F. Supp. 2d 370 (D. Conn. 2005).
[132] *Id.* at 375-76.

patients' names, room numbers, and religious affiliations) might violate federal law.[133] Noting that the plaintiff's speech addressed in part her employer's potentially illegal practices with respect to private third parties, the court concluded that the speech touched on a matter of public concern and denied the defendant's summary judgment motion.[134]

[¶57] Similarly, in *Sturm v. Rocky Hill Board of Education*, the court denied the defendant's motion to dismiss a section 31-51q claim.[135] The plaintiff, a special education teacher, had recommended that several of her students be placed in a special behavior-improvement program implemented by the school, that another student be mainstreamed, and asked for the separation of four troublesome students.[136] The employer later refused to renew her contract of employment. The court held that the plaintiff's allegations "potentially could demonstrate that the form, context and content of her statements sufficiently concerned a matter of public interest," and that the plaintiff should therefore be allowed to offer evidence to support her § 31-51 claim.

[¶58] In *DiMartino v. Richens*, the Supreme Court of Connecticut affirmed the lower court ruling in favor of the plaintiff under section 31-51q.[137] Plaintiff, an employee of Bradley International Airport had reported to the state police that the door to his office may have been pried open.[138] The office contained a key bank containing dozens of duplicate keys which would provide access to secure areas of the airport. In what was

---

[133] *Id.* at 375.
[134] *Id.* at 382. The court in *Campbell* recognized that under Connecticut law, public policy considerations impose "limits on the unbridled discretion to terminate the employment of someone hired at will." *Id.* at 380 (citing Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980)).
[135] No. 3:03CV00666, 2005 WL 733778 (D. Conn. Mar. 29, 2005).
[136] *Id.* at *2.
[137] 822 A.2d 205 (Conn. 2003).
[138] *Id.* at 213.

perhaps the most clear cut case of what constitutes a matter of public concern, the court was easily persuaded that plaintiff's speech met this condition.[139]

[¶59] These cases make it clear that bloggers cannot blog indiscriminately with the expectation that Connecticut's free speech statute will prevent discharge. Only information that addresses a matter of public concern is protected. Even then, protection will only be available if the posting "does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer."[140] Comments that are critical of the employer or other employees may frequently not meet this requirement.

4. New York

[¶60] New York broadly prohibits employers from discharging employees for the employees' "legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property"[141] where recreational activities are defined as "any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material."[142] An exception is created for activities which create "a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest."[143]

---

[139] *Id.* at 224. Note that the defendants in *DiMartino* were agents of a state government, diminishing the importance of section 31-51q to the claims.
[140] CONN. GEN. STAT. ANN. § 31-51q (West 2006).
[141] N.Y. LAB. LAW § 201-d(2)(c) (McKinney 2006).
[142] N.Y. LAB. LAW § 201-d(1)(b) (McKinney 2006).
[143] N.Y. LAB. LAW § 201-d(3)(a) (McKinney 2006).

[¶61] Few decisions have addressed this section of New York law, and those that have shed little light on the scope of protection. What is clear is that dating is not a recreational activity for the purposes of the statute.[144] On the other hand, New York's statute itself in some respects provides more guidance as to what might constitute a recreational activity than do other states statutes, as several non-exhaustive examples are listed.

[¶62] In *State v. Wal-Mart Stores, Inc.*, the court applied the doctrine of *noscitur a sociis* to these examples to conclude that "personal relationships fall outside the scope of legislative intent," and thus are not recreational activities for purposes of the statute.[145] This doctrine holds that "the meaning of an unclear word or phrase should be determined by the words immediately surrounding it."[146] Just as dating may fall outside the statutory definition of recreational activities because it does not fit with "sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material," blogging may fall within this definition. "Hobbies," for example, could easily include blogging.

[¶63] On the other hand, although "reading" and "viewing" are present in the listed examples, curiously absent from the list is any reference to writing or speaking. Given the frequency with which "reading" and "writing" are found as a pair, the legislative omission of the latter could be interpreted by the courts to have been an

---

[144] McCavitt v. Swiss Reinsurance Am. Corp., 237 F.3d 166, 168 (2d Cir. 2001) (romantic dating is not a "recreational activity"); State v. Wal-Mart Stores, Inc., 207 A.D.2d 150, 152 (N.Y. App. Div. 1995) ("'[D]ating' is entirely distinct from and, in fact, bears little resemblance to 'recreational activity.'"); Hudson v. Goldman Sachs & Co., 283 A.D.2d 246, 246 (N.Y. App. Div. 2001) ("[R]omantic relationships are not protected 'recreational activities' within the meaning of" section 201-d(2)(c)); Bilquin v. Roman Catholic Church, 286 A.D.2d 409, 409 (N.Y. App. Div. 2001) (cohabiting with a man who is married to another woman does not constitute a "recreational activity"). *See also* Cheng v. New York Tel. Co., 64 F. Supp.2d 280, 285 n.2 (S.D.N.Y. 1999) (telephone company employee's installation of telephone equipment for personal profit "obviously was not a 'recreational activit[y]'" for purposes of Section 201-d).

[145] *Wal-Mart Stores, Inc.*, 207 A.D.2d at 152.

[146] McCavitt v. Swiss Reinsurance Am. Corp., 237 F.3d 166, 168 n.2 (2d Cir. 2001) (citing BLACK'S LAW DICTIONARY 1084 (7th ed.1999)).

intentional exclusion of free speech protections from the scope of the statute.[147] Moreover, the fact that New York statutes "in derogation of the common law right of an employer to terminate an employee for no reason, or for a bad reason, have been strictly construed"[148] would not favor the blogger.

5. California

[¶64] California enacted legislation effective January 1, 2000, that allows for the assignment to the Labor Commissioner of "[c]laims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises."[149] However, the usefulness of this statute to dooced bloggers was all but eviscerated in 2003, when the California Court of Appeal in *Barbee v. Household Automotive Finance Corp.* concluded that this provision does "not set forth an independent public policy that provides employees with any substantive rights, but rather, merely establishes a procedure by which the Labor Commissioner may assert, on behalf of employees, recognized

---

[147] The *Wal-Mart* court described the legislative history of section 201-d as "evinc[ing] an obvious intent to limit the statutory protection to certain clearly defined categories of leisure-time activities." *Wal-Mart Stores, Inc.*, 207 A.D.2d at 152. This is a perplexing statement, given the unambiguous statutory language that "recreational activities" includes, *but is "not limited to*," the listed examples of sports, games, etc. N.Y. LAB. LAW § 201-d(1)(b) (McKinney 2006) (emphasis added). *See generally Wal-Mart Stores, Inc.*, 207 A.D.2d at 153 (Yesawich, J., dissenting) (arguing for an expansive interpretation of the statute, and stating that the legislature's primary intent in enacting the statute "was to curtail employers' ability to discriminate on the basis of activities that are pursued outside of work hours, and that have no bearing on one's ability to perform one's job, and concomitantly to guarantee employees a certain degree of freedom to conduct their lives as they please during nonworking hours"). Moreover, protecting smokers was apparently one of the primary motivations in enacting the statute. *See* McCavitt v. Swiss Reinsurance Am. Corp., 89 F. Supp.2d 495, 498 (S.D.N.Y. 2000), *aff'd*, 237 F.3d 166 (2d Cir. 2001). It would seem that in light of the examples provided in the statute ("sports, games, hobbies, exercise, reading and the viewing of television, movies"), the doctrine of *noscitur a sociis* would countenance the inclusion of writing or blogging (either as a hobby or as a corollary to reading) far more easily than the inclusion of smoking (which, at best, strains to fit within the category of "hobby").

[148] McCavitt v. Swiss Reinsurance Am. Corp., 89 F. Supp. 2d 495, 498 (S.D.N.Y. 2000), *aff'd*, 237 F.3d 166 (2d Cir. 2001).

[149] CAL. LAB. CODE § 96(k) (West 2000).

constitutional rights."[150] On the other hand, the court noted that the plaintiff had failed to assert the provisions of California Labor Code section 98.6, as amended in 2001, which states that "[n]o person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96 . . . ."[151] The court therefore left open the possibility that future plaintiffs might find more success in arguing that section 96(k) has, via section 98.6, created substantive rights that offer greater protection to employee's lawful off-the-job activities such as blogging.

[¶65] The potential benefit of section 98.6 was quickly extinguished however, in *Grinzi v. San Diego Hospice Corp.*, in which the plaintiff was fired for her membership in an investment group that the employer believed to be an illegal pyramid scheme.[152] The court first noted the "'Legislature's goal to give law-abiding employers broad discretion in making managerial decisions'"[153] and the desirability of "employers hav[ing] adequate notice of the conduct that will subject them to tort liability to the employees they discharge."[154] The court then stated that since section 98.6 depended on section 96(k), the rights arising under section 98.6 could be no broader than the underlying statute. *Barbee* had held that the scope of 96(k) was "limited to lawful conduct occurring during nonworking hours away from the employer's premises asserting

[150] 6 Cal. Rptr. 3d 406, 412 (Ct. App. 2003); *see also* Agabao v. Delta Design, Inc., No. D039642, 2003 WL 194950, at *3 (Cal. Ct. App. Jan. 30, 2003) (observing that the statute does not "embody a 'substantial and fundamental' public policy for purposes of determining tort liability," and noting that "for legitimate business reasons, an employer may require an employee to relinquish the exercise of certain rights").
[151] *Id.* at 413 n.3.
[152] 14 Cal. Rptr. 3d 893 (Ct. App. 2004).
[153] *Id.* at 897 (citing Green v. Ralee Eng'g Co., 78 Cal. Rptr. 2d 16, 24 (Cal. 1997)).
[154] *Id.* at 897 (citing Stevenson v. Superior Court, 66 Cal. Rptr. 2d 888, 892-893 (Cal. 1997)).

recognized constitutional rights."[155] The free speech protections of the first amendment, however, protect only against government interference; therefore, free speech vis-à-vis an employer is not, the *Grinzi* court held, a recognized constitutional right for the purpose of sections 96(k) or 98.6.[156]

[¶66] Thus, while the language of the statutes in these five states themselves suggests broad protection for legal off-the-job activities during non-working hours, judicial interpretation of the statutes has so far been very narrow. This judicial restraint in the face of the steadily eroding at-will employment doctrine is probably attributable to concern that too much erosion too quickly may upset employer-employee relations, create uncertainty, and deter even legitimate employment terminations for fear of litigation.

V. EMPLOYER LIABILITY FOR EMPLOYEE BLOGS

[¶67] It is certainly not mere employer whim that the at-will rule is intended to protect. Employers have an interest in maintaining the flexibility to hire and fire employees with the ebb and flow of market cycles.[157] They have an interest in promoting a harmonious work environment by leveraging the possibility of at-will discharge to

[155] *Id.* at 903 (internal quotes and emphasis omitted).

[156] *Id.*. *See also* Belcher v. Tribune Co., No. B163640, 2003 WL 21760026, at *7 (Cal. Ct. App. July 31, 2003) (employee's off-duty threats to defame police officer are not protected speech). Section 96(k) does allow the California labor commissioner to enforce privacy rights, though such privacy rights must likewise be pre-existing rights conferred by laws other than section 96(k). Paloma v. City of Newark, No. A098022, 2003 WL 122790, at *12 (Cal. Ct. App. Jan. 10, 2003) (no violation of privacy rights where police officer disciplined for officer's off-duty sexual relations that tend to impair public trust in the police department); Tavani v. Levi Strauss & Co., No. 095770, 2002 WL 31623684, at *15 (Cal. Ct. App. Nov. 21, 2002) (employee's sexual relationship with subordinate, though occurring outside employer's premises, diminished employee's credibility and effectiveness as a manager, and employer's subsequent termination of employment did not constitute invasion of privacy).

[157] The flexibility of the United States labor market is sometimes credited for contributing to economic productivity. *See, e.g.*, *A Productivity Primer*, ECONOMIST, Nov. 4, 2004, at 80 ("European economies, in contrast [to the United States economy], are thought to be much less productive, thanks to their rigid labour markets . . . .").

dissuade disruptive employee behavior, even where the employee behavior might not be sufficient to lead to "just-cause" termination. Perhaps less obvious but of substantial importance, employers have a legitimate interest in discouraging employee behavior (including blogs and other electronic communications) that may result in substantial liability for the employer.

[¶68] Such vicarious liability may arise either when the employee herself creates a blog or when a third party posts content on an employee's blog. Of course, the threat of discharge should only be a last resort when attempting to reduce exposure to this type of liability. The better approach is for the employer to create policies regarding blogging and clearly communicate these policies to employees. Failure to implement such computer usage and monitoring policies can result in enormous liability exposure for the employer, as the following case illustrates.

A. Blogging by Employees

[¶69] In *Blakey v. Continental Airlines*,[158] Continental contracted with CompuServe (an internet service provider) to sponsor an online bulletin board called the "Crew Members Forum" (Forum) that was intended to have no physical presence in the workplace. Continental's pilots and crew members were required to access the Forum in order to determine flight related information. The bulletin board also provided a venue for posting personal comments. Continental had no computer usage or monitoring policy that addressed the bulletin board. Captain Tammy Blakey, Continental's first female captain to fly an Airbus or A300 aircraft,[159] had complained to management that several male Continental employees including some of her co-pilots had engaged in harassing

[158] 751 A.2d 538 (N.J. 2000).
[159] *Id*. at 543.

conduct that created a hostile work environment. The conduct included placing pornographic pictures and derogatory gender-based comments about her in the cockpit and other work areas.[160] Pending the federal litigation resulting from her complaint, additional derogatory and insulting remarks about Blakey were posted on the Forum. Although Blakey informed Continental about the remarks, it did nothing to remove the comments or reprimand the pilots believing that since the bulletin board had no physical presence in the workplace, it had no duty to monitor it and therefore no responsibility for what was posted.[161]

[¶70] The court disagreed, awarding Blakey 1.7 million dollars in damages and stating that in and of itself, the fact that the electronic bulletin board was located outside the workplace (although not as closely affiliated with the workplace as was the cockpit in which similar harassing conduct occurred), did not eliminate Continental's legal obligation to correct the off-site harassment by co-employees.[162] Accordingly, *Blakey* appears to provide a viable precedent whereby a court could impose vicarious liability on an employer who is aware of the contents of a potentially harmful employee blog but does nothing to prevent its publication.

B. Blogging by Third Party on Employee's Blog

[¶71] Another potential major area of concern for the employer is where third parties post comments on the employee's blog that contain defamatory, obscene or pornographic material, violate the employer's legal rights or interests, or constitute an invasion of the employer's privacy. The major issue here is one of assigning liability for content beyond the author of the blog. Generally in cyberspace cases involving

[160] *Id*. at 543.
[161] *Id*. at 540.
[162] *Id.* at 549.

electronic message boards and the like, the online service provider (OSP) or internet service provider (ISP) was usually the subject of cases involving responsibility for content posted by users on sites they host. The relevant federal statute that addresses the liability of the service provider (and potentially that of the employee who owns the blog) for third party content is the Communications Decency Act (CDA) of 1996[163] and, in particular, section 230 of the CDA[164] and two of its three relevant provisions:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.[165]

> No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable whether or not such material is constitutionally protected . . . .[166]

[¶72] One of the key issues litigated in the cases has been the degree to which the service provider has control over the content and under what circumstances they can claim immunity from liability under § 230. This usually depends on whether the service provider is a publisher or distributor of the content. Two inconsistent decisions on the issue of control over content were probably the genesis for Congress passing the CDA. In *Cubby, Inc. v. CompuServe, Inc.*,[167] the defendant was the provider of an electronic library service where subscribers could access daily newspapers. The defendant exercised no control of the content posted. The plaintiff sued the defendant for defamatory statements published about him in one of the newspapers, Rumorville, posted

[163] 47 U.S.C. § 223 (2006).
[164] 47 U.S.C. § 230 (2006).
[165] 47 U.S.C. § 230(c)(1) (2006).
[166] 47 U.S.C. § 230(c)(2) (2006). Sections 230(c)(1) and 230(c)(2) are together referred to as the "good samaritan" provision.
[167] 776 F. Supp. 135 (S.D.N.Y. 1991).

on the service. The court decided that since the plaintiff provided no evidence to the contrary, the defendant neither had control nor knowledge of the defamatory material.

[¶73] Therefore, it concluded that it was not a publisher but a distributor and had no liability for the defamation.[168] The court in *Stratton Oakmont v. Prodigy Services Company*[169] reached a different conclusion. In *Stratton Oakmont*, the plaintiff brought suit against Prodigy and the unidentified individual who posted defamatory statements about him that were posted on Money Talk, a financial bulletin board owned and operated by Prodigy. Evidence presented indicated that Prodigy (unlike CompuServe) had posted a set of "content guidelines" that advised its members not to post insulting or harassing comments. A monitoring procedure for insuring compliance was also employed. The court decided that the degree of control Prodigy had over content qualified it as a publisher and not a distributor. Consequently, Prodigy was liable for the defamatory statements posted.[170]

[¶74] As indicated above, Congress passed the CDA to eliminate the distinction between distributor and publisher. It effectively overruled the decision in *Stratton*. Since its passage, there have been a plethora of cases dealing with the issue of when a service provider would be liable for content on hosted sites.[171] As far as the applicability of the

---

[168] *Id.* at 143.
[169] 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
[170] *Id.* at *7.
[171] *See* Zeran v. Am. Online, Inc., 958 F. Supp. 1124 (E.D. Va. 1997), *aff'd*, 129 F.3d 327 (4th Cir. 1997) (in which the court granted immunity to an ISP, holding it to be a distributor and not a co-author of anonymously posted defamatory material on one of its bulletin boards); *see also* DiMeo v. Max, 433 F. Supp.2d 523 (E.D. Pa. 2006) (in which the operator of a message board was held to be immune under § 230 from liability for offensive statements posted about the plaintiff by a third party). For a more recent case that provides a different conclusion than *Zeran*, see *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142 (Ct. App. 2004), *cert. granted*, 87 P.3d 797 (2004), where the court held that § 230 does not immunize a user of an interactive computer service from a claim of defamation where the user republished third party statements where the user knew or had been placed on notice that the statements were false. *Id.* at 150. *Barret* seems to impose a duty on the user to exercise reasonable care when it has such notice that a communication is defamatory. However, the *Barrett* court left open what would constitute reasonable

immunity provided by § 230, it would appear that the at-will employee would not be liable for the content of blogs posted by third parties unless there was evidence indicating sufficient control over the content posted or where the employee had notice of or knowledge of the tortious or criminal nature of the blog and did not exercise reasonable care in preventing it from being posted or in removing it.[172] However, the courts would have to recognize that the doocing for the content of the blogs posted by third parties not only violates the immunity granted by the CDA but also qualifies as a public policy exception to the at-will doctrine.

[¶75] A related issue involves cases where an anonymous blogger has posted on an employee's blog, tortious or criminal comments deemed objectionable by the employer. As a result, the employer would seek to discover the identity of the owner of the blog. The issue here is whether an employer can, via discovery (subpoena, court order), require an OSP or ISP to disclose the blogger's identity.

[¶76] Courts protect the right to speak anonymously[173] although this right, like others, is not absolute. In the past, courts faced with cases involving non-blog related anonymous speech have attempted to strike a balance between the right to speak anonymously with the right of an individual to be protected from defamatory or other harmful or objectionable speech. In determining whether to grant the plaintiff a subpoena

---

care. See also *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998), where the defendant, Drudge, published (in his online publication, The Drudge Report) defamatory statements about Blumenthal on co-defendant AOL's electronic bulletin board. The court in *Blumenthal* held that AOL was immune under § 230 despite the fact it contractually had a right to control what Drudge was allowed to publish on AOL. *Id.* at 49 (citing 47 U.S.C. §230(b)(1)-(2)). The court believed that the decision it reached would help "preserve the vibrant nature and competitive free market" for services such as those offered by AOL. A similar decision was reached in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), where an operator of a web site and listserv was held to be immune under § 230 for content provided by a third party.

[172] Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142 (Ct. App. 2004), *cert. granted*, 87 P.3d 797 (2004).

[173] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

or court order to force disclosure of identity, the court in *Dendrite International, Inc. v. John Doe*[174] set the standards high by requiring:

> (1) that the plaintiff demonstrate that efforts have been undertaken to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board;
>
> (2) that the plaintiff identify for the court the exact statements made by the anonymous posters;
>
> (3) that the plaintiff establish that there exists a prima facie cause of action for defamation against the fictitiously-named anonymous defendants; and
>
> (4) that the court (assuming the court concludes that the plaintiff has presented a prima facie cause of action) balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.[175]

[¶77] *Immunomedics, Inc. v. Doe*,[176] decided the same month by the same court, involved an employee who had signed a confidentiality agreement and allegedly breached it when she posted information about the plaintiff on a website provided by Yahoo!. The plaintiff sought a subpoena against Yahoo! to determine the defendant's identity. The court found that the plaintiff had satisfied the four requirements set forth in *Dendrite* and granted the request stating, in part:

---

[174] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). The plaintiff in *Dendrite International* sought a subpoena against Yahoo!, an ISP, seeking the identity of an anonymous user who had posted defamatory statements about its financial and accounting practices the results of which allegedly lowered the value of the plaintiff's stock. The value of the stock actually rose after the postings leading the court to decide that no harm had resulted from the statements. Consequently, it denied the request for the subpoena. *Id.* at 757.

[175] *Id.* at 760.

[176] 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001).

> [A]lthough anonymous speech on the Internet is protected, there must be an avenue for redress for those who are wronged. Individuals choosing to harm another or violate an agreement through speech on the Internet cannot hope to shield their identity and avoid punishment through invocation of the First Amendment.[177]

[¶78] *Doe v. Cahill*[178] is a more recent decision applying parts of the *Dendrite* four-prong test. *Cahill* involved an anonymous blogger who was accused of posting defamatory statements about Cahill, a local politician, on a blog entitled the Proud Citizen, for which Comcast was the ISP. The trial court granted Cahill a court order requiring Comcast to disclose the blogger's identity. As required by federal statute, when Comcast[179] received the disclosure request, it notified Doe who then filed a motion seeking to prevent the court order requiring disclosure of his identity. The trial court did not apply the *Dendrite* test. Instead, it held that an ISP, under a subpoena or application for disclosure, could be required to disclose the identity of an anonymous poster (blogger) accused of defamation if the plaintiff has a good faith basis for the allegations sufficient to avoid a motion to dismiss, the information sought is materially related to the allegations, and the information sought, identity of the poster, was unavailable from other sources.[180] The court decided that Cahill satisfied all three, denied the motion and allowed the court order.[181]

[¶79] On appeal, the Delaware Supreme Court reversed the trial court, holding that the "good faith" standard used by that court in its decision was inadequate.[182] Instead, it

---

[177] *Id.* at 777-778.
[178] 884 A.2d 451 (Del. 2005).
[179] 47 U.S.C. 551(c)(2) requires a court order to a cable ISP and notice to the ISP subscriber before an ISP can disclose the identity of its subscriber to a third party.
[180] Cahill v. Doe, 879 A.2d 943, 954 (Del. Super. Ct. 2005).
[181] *Id.* at 956.
[182] Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005) ("We are concerned that setting the standard too low [by adopting the 'good faith' standard] will chill potential posters from exercising their First Amendment right to speak anonymously.").

opted to apply two of the four requirements established for disclosure in *Dendrite's* four prong test. The Court retained the notification provision (see condition 1 above) which required the plaintiff to constructively notify the defendant of the subpoena or order for disclosure by posting an appropriate message on the same message board (blog) where the alleged defamatory statements were posted and also give the anonymous defendant a reasonable opportunity to file an objection.[183] The Court also concluded that the summary judgment standard requiring the plaintiff to establish a prima facie cause of action for defamation against the fictitiously-named anonymous defendants (see condition three above) was more appropriate than the motion to dismiss standard. The summary judgment standard would allow the Court to better balance a defamed plaintiff's right to protect his reputation and a defendant's right to anonymous free speech.[184] The Court placed a major emphasis on the fact that Cahill was a public figure seeking political office and found that the statements posted on the message board were not factual attacks on his reputation that rose to the level of libel, but were comments or opinions by an interested member of the community where the public figure was seeking political office. Accordingly, the Court reversed the decision of the trial court and denied the request for the subpoena.[185]

[¶80] From the discussion above, one could conclude that when faced with facts and issues similar to those presented in the above cases, courts would most likely attempt to balance the right to blog anonymously with the right to protect one's reputation or

[183] *Id.* at 460 ("We retain the notification provision in the *Dendrite* test.").
[184] *Id*.
[185] *Id.* at 467-68.

other legally protected interests.[186] Therefore, employees need to be cautious about their own postings and those made by third parties on employee-maintained blogs. Employees wishing to blog anonymously rather than using the identity protection possible by employing firewalls, other blocking software or password protections, should, at the very least, follow guidelines for doing so, such as those provided by the Electronic Frontier Foundation.[187] This is particularly important for the at-will employee whose blogs are critical of the employer. Under current law, following these guidelines will not necessarily immunize the at-will employee from employer retribution. Certainly, blogs containing comments that are tortious or criminal should not be condoned or protected.

VI. BEST BLOG PRACTICES

[¶81] An increasing number of employers including Microsoft, Google, Sun Microsystems, General Motors, and Yahoo! provide blog sites for employees or encourage them to create their own blogs. Some employers have begun using them as

[186] *See, e.g.*, *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000) (where the court granted a subpoena to the plaintiff to determine the identity of certain John Does who posted defamatory statements about the plaintiff; the court postulated in its decision that it had to balance the right to speak anonymously with the rights of an individual alleging defamation.).

[187] Electronic Frontier Foundation, How to Blog Safely (About Work or Anything Else) (May 31, 2005), http://www.eff.org/Privacy/Anonymity/blog-anonymously.php. These include: (1) using a pseudonym; (2) using anonymizing technologies such as invisiblog.com to hide your IP address; (3) using a ping service ("If you want to protect your privacy while getting news out quickly, try using ping servers to broadcast your blog entry for you. Pingomatic http://www.pingomatic.com is a tool that allows you to do this by broadcasting to a lot of news venues at once, while making you untraceable. The program will send out notice (a 'ping') about your blog entry to several blog search engines like Feedster and Technorati. Once those sites list your entry . . . which is usually within a few minutes . . . you can take the entry down. Thus the news gets out rapidly and its source can evaporate within half an hour. This protects the speaker while also helping the blog entry reach people fast."); (4) not being searchable on Google ("If you want to exclude most major search engines like Google from including your blog in search results, you can create a special file that tells these search services to ignore your domain. The file is called robots.txt, or a Robots Text File."); (5) registering domain names anonymously ("Even if you don't give your real name or personal information in your blog, people can look up the WHOIS records for your domain name and find out who you are. If you don't want anyone to do this, consider registering your domain name anonymously. The Online Policy Group (OPG) offers privacy-protective domain name registration at https://www.onlinepolicy.org/forms/opg-domain-create.shtml.").

recruiting tools[188] while others like Wal-Mart recognize the value and the effect positive blogs could have on public opinion of the company's image.[189] Other companies like Microsoft (Xbox game system) and Cingular Wireless (new phone) use blogs for promotion of its new products or services.[190] Whatever their use, they can serve as positive electronic forums conducive to facilitating company loyalty, maintaining solid company morale, and promoting healthy interchange of opinions. The caveat for employers is that they must create, implement and disseminate their policies and guidelines regarding what they consider to be acceptable employee blogs thereby informing the employee as to the company views on blogs.[191] The caveat for the employee is to either follow the policy or else obtain approval for the blog from the employer.

[¶82] The policy would preferably be in the form of an agreement whereby the employee agrees to abide by terms that the employer believes to be in the best interests of the company and its employees, executives, shareholders, vendors, and others depending on the type of business or service involved. Suggested terms of the agreement should include (but not necessarily be limited to):

1) Employees should blog in their own name

2) Employees assume legal responsibility for their comments that are defamatory, obscene, indecent, pornographic, or libelous whether they relate to the company or others

---

[188] Lisa Daniel, *To Blog or not to Blog,* STAFFING MGMT. ONLINE, July–Sept. 2005, http://shrm.org/ema/sm/articles/2005/julysept05cover.asp.

[189] Michael Barbaro, *Wal-Mart Enlists Bloggers in Its Public Relations Campaign*, N.Y. TIMES, Mar. 7, 2006, at C1.

[190] *Id*.

[191] For examples of employee blog policies, see IBM Blogging Policy and Guidelines, http://www.wordbiz.com/x9ksp38/IBM_Blogging_Policy_and_Guidelines.pdf (last visited Nov. 3, 2006); Yahoo! Personal Blog Guidelines: 1.0, http://jeremy.zawodny.com/yahoo/yahoo-blog-guidelines.pdf (last visited Nov. 3, 2006); and Thomas Nelson Publishers' Blogging Guidelines, http://blogs.thomasnelson.com/pages/BloggingGuidelines.htm (last visited Nov. 3, 2006).

3) Proprietary, financial, or other confidential information, and any other information deemed by the employer to be privileged should not be the subject of blogs (employees should have signed non-disclosure agreements/non-compete agreements upon hiring)

4) Employees should include a disclaimer on their blog site that states that the comments or opinions expressed on the sites are those of the blogger and not the employer (especially relevant where the comments are work related)

5) Copyrighted materials should not be posted on the blog without permission from the copyright holder (employees should be warned of potential civil and criminal liability for copyright infringement)

6) Blogs should be respectful of the company, its goods and services, executives, and co-workers, as well as the company's competition and their goods and services.

7) Blogging during work hours should be limited or prohibited; off-the-job blogging that may adversely affect the interests of the employer should be discouraged.

[¶83] To implement the blogging policy (in conjunction with other related policies[192]), the company should sponsor a regularly scheduled employee training program focusing not only on acceptable and proper use of company computers and e-mail but also blogs. The blogging policy should be written and publicized wherever feasible including posting it on the company web site(s), employee handbooks and relevant literature. Each employee should receive and acknowledge a copy of the policy, be reminded of the policy yearly, and should be reminded that their company computer is company property and that, as such, is subject to monitoring and searching at any time without notice. Employees should be notified that their voice mail and e-mail are subject to the same scrutiny. Employers should also inform their employees if they employ content monitoring or blocking software (for example, computer screen warnings regarding proper use should flash on computer screens periodically when employees first

[192] *See* Stephen Lichtenstein, *Workplace Privacy: An Oxymoron*, 35 BUS. L. REV. 51 (2002).

log-on, informing them whether the company is employing content monitoring or blocking software).[193] Finally, the policy should state that violations will lead to disciplinary action up to and including termination.

VII. CONCLUSION

[¶84] It is likely that the popularity of blogging will continue to grow thereby presenting legal issues, some of which have been presented above, for both the employer and the employee. This will no doubt eventually lead to legal precedent established by courts faced with some of the above-mentioned issues or by Congress or state legislature. Once this occurs, some guidance and predictability will evolve for employee doocing cases. Until that occurs, employers should implement blogging policies and exercise control to facilitate blogs that have a positive impact. In the meantime, communication between employer and employee regarding blogs is probably the best advice for avoiding undesirable consequences. One thing certain is that blogging has become a part of the cyberspace culture much like e-mail and other forms of electronic communication. In essence, blogs are the number one technology trend for the future that can be a recipe for healthy communication rather than for doocing.

[193] Content monitoring and blocking software includes eSniff 1100, Pearl Software, SurfControl, and SilentRunner. Most of these allow for real time auditing and monitoring of computer use. MIMEsweeper and other similar software products allow the employer to block communications that contain words and phrases that could result in potential liability for the company. This would be particularly valuable if an employee disregarded the policy and attempted to transmit offensive or harassing e-mails.