WANNA BE FRIENDS? THE POTENTIAL IMPACT OF LIFESTYLE DISCRIMINATION STATUTES ON EMPLOYER FACEBOOK POLICIES

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I. INTRODUCTION

Actor George Clooney once famously declared, "I would rather have a prostate exam on live television by a guy with very cold hands than have a Facebook page."[1] While Mr. Clooney has certainly registered his disapproval with Facebook, statistics indicate a large and growing percentage of Americans use social media sites like Facebook on a daily basis. As Facebook and various forms of social media increasingly become more popular, they tend to push the acceptable boundaries of traditional social and legal relationships. One area experiencing significant change due to these technological advances is the employer-employee relationship. As the use of new technologies continues to rise in the workplace, conflicts between the interests of employers and the privacy rights of employees are inevitable. For instance, to what extent does an employer have a legitimate interest in controlling the potentially harmful online activity of its employees? To what degree are these interests outweighed by an employee's right to conduct his personal life on his own terms?

Most observers would recognize an employer's right to terminate an employee who uses Facebook to denigrate the employer's product, or engages in patently offensive online conduct detrimental to the company's image. Conversely, most would also consider an employer's attempts to police employees' off-duty, online dating activity as invasive. Establishing the line between legitimate business interests and off-duty private activity in the face of such change is difficult. Because social mores surrounding the use of social media are rapidly evolving, statutory law and common law lag far behind in addressing this tension.

The default position in American labor law has long been "employment-at-will," which allows an employer to dismiss or discipline an employee for any reason (or no reason at all). In the absence of a contract or other exception, at-will employees have generally faced a stark choice: conform one's private life to the employer's standards, or risk termination. In response to the most blatant of employer abuses, (for instance termination based on race, or for refusal to commit crimes) the legal system has chipped away at the "at-will" doctrine with various legislative and common-law exceptions.

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[1] Mary Green & Lesley Meeser, *George Clooney Prefers Prostate Exams Over Facebook*, PEOPLE, Sept. 16, 2009, *available at* http://www.people.com/people/article/0,,20304800,00.html (quoting George Clooney at the Toronto International Film Festival).

Despite the problems created by the rise in the use of social media, employers seeking methods of conforming employees' off-duty behavior to their business interests is nothing new. The abuses of coal-mining "company towns" and the paternalistic policies of some manufacturers at the dawn of the industrial age provide illustrative examples. Famously, in its early days, the Ford Motor Company hired investigators to ensure employees refrained from excessive consumption of alcohol, kept their houses clean, and spent their leisure time properly.[2] More maliciously, mining corporations were known to force employees to rent company homes and buy their necessities at company stores.[3] Prices were deliberately set higher than salaries, forcing workers to become indebted to the company and remain in its thrall.[4]

Historically, employees have responded to perceived employer overreaching by bringing legal challenges under a variety of theories. Likewise, various theories of contract, labor, and tort law have been applied to employers' modern attempts to control employees' use of social media. In the absence of specific contractual provisions, oral promises and other assurances (e.g. employee handbooks and manuals) have been construed by courts as creating "implied contracts" to either toe the company line, or in the alternative, to respect the employee's online privacy. Employees also have attempted to assert public policy exceptions to the at-will doctrine and, in some cases, even alleged tortious invasion of privacy when their online activities resulted in adverse employment actions. In some recent cases, employees have had a small degree of success by seeking the protection of the National Labor Relations Act, alleging that communications on social media involving workplace conditions or unionization fall within the Act's ambit.

Finally, employees are beginning to assert rights to privacy under certain states' "lifestyle discrimination statutes." Although originally enacted to protect employees from termination for off-duty lawful conduct such as smoking, employees may seek to extend their protection to off-duty use of social media.[5] While the statutes were not originally designed to protect an employee's use of social media, this novel argument seeks protection of off-duty, online conduct as the use of a "lawful product" or "lawful off-premises activity" as defined by the statutes. Courts

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[2] *See* Terry Morehead Dworkin, *It's My Life – Leave Me Alone: Off-The-Job Employee Associational Privacy Rights*, 35 AM. BUS. L. J. 47, 48 (1997) (discussing Ford Motor Company "sociological department"); *See also* Tony Dokoupil, *The Last Company Town*, NEWSWEEK, Feb. 12, 2011, at 30 (discussing a "company town" in Northern California where employer provided housing, schools, utilities, etc.).

[3] Lawrence W. Boyd, *The Company Town*, EH.NET ENCYCLOPEDIA (July 30, 2003), *available at* http://eh.net/encyclopedia/article/boyd.company.town.

[4] *Id.*

[5] *See* American Civil Liberties Union, *Legislative Briefing Kit: Lifestyle Discrimination in the Workplace* (Dec. 31, 1998), *available at* http://www.aclu.org/racial-justice_womens-rights/legislative-briefing-kit-lifestyle-discrimination-workplace.

have not definitively addressed this issue, however, as the law and society's views relating to employers' social media policies continue to evolve. Like many changes in social structure, it will likely remain in flux until social mores on the subject become more defined.

In this paper, we will explore the divergent interests of employers and employees regarding the off-duty use of social media. We will then examine how common law concepts used to settle traditional labor disputes have been applied – and are likely to be applied in the future – to social media use. Finally, we will explore the possibility of lifestyle discrimination statutes being used as protection for employees' use of Facebook and social media, off-duty and off-of-work premises.

II. FACEBOOK AND SOCIAL MEDIA

Social media are forms of Internet communication outlets wherein users interact with one or more other persons to share information. One author explains in layman's terms, "Think of regular media as a one-way street where you can read a newspaper or listen to a report on television, but you have very limited ability to give your thoughts on the matter. Social media, on the other hand, is a two-way street that gives you the ability to communicate too."[6] This interactivity is the feature that makes social media sites so popular. The ability to provide one's individual input or commentary on information rather than just passively consume it gives users a personal stake in the information. Perhaps it is also this feeling of participation in an online community that makes social media websites so popular. Whatever the reason, social media sites have become ubiquitous in modern America.

The current undisputed king of social media websites is Facebook.com with over 1 billion monthly active users.[7] In fact, Facebook has so many users that if it were a nation, it would be the fifth largest in the world (behind China, India, the United States and Indonesia).[8] It is estimated that Americans spend 13.9 billion minutes a year on Facebook and the average Facebook user spends more than fifty-five minutes per day on the site.[9] The average user has 130 Facebook "friends" with whom he regularly shares information, and sends out eight new "friend" requests per month.[10] In addition, he writes an average of 25 comments on his and his friends' Facebook pages per month.[11]

Contrary to the common perception that Facebook is dominated by teenagers and college students, the fastest growing segment of users is women over

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[6] Daniel Nations, *What Are Social Media Sites?*, ABOUT.COM, http://webtrends.about.com/od/web20/a/social-media.htm (last visited July 4, 2011).
[7] FACEBOOK.COM, http://newsroom.fb.com/Key-Facts (last visited Dec. 29, 2012).
[8] "50 Interesting … Facebook Facts," RANDOMHISTORY.COM (Jan. 5, 2010), *available at* http://facts.randomhistory.com/interesting-facebook-facts.html.
[9] *Id.*
[10] *Id.*
[11] *Id.*

the age of 55.[12] While social media are often criticized for elevating the frivolous and mundane aspects of users' lives, Facebook and other social media have been credited with having an impact on important world events, such as the overthrow of Egypt's leader, Hosni Mubarak.[13] The truth is Facebook can be (and has been) used for everything from the ridiculous[14] to the revolutionary.[15] Given the popularity of Facebook, it is no surprise that its use raises many novel legal issues, including many concerning the employment relationship.

III. EMPLOYERS' BUSINESS INTERESTS AND FACEBOOK POLICIES

Many employers are justifiably concerned that their employees' use of social media (on- and off-duty) can present risks to their economic interests. This may occur intentionally, for instance where an employee divulges trade secrets or confidential information on Facebook, especially after being terminated.[16] It may also occur unintentionally, as when a user who does not understand Facebook's privacy settings shares confidential information with "friends of friends." Additionally, an employee who "friends" customers on Facebook may unwittingly create a virtual client list for others to see, or that same employee may be able simply to recreate an employer's client list once the employee is terminated and provide it to competitors.[17]

An employee can also damage the employer's brand or image by posting derogatory or defamatory comments about the company on social media websites. Because users can post comments, pictures, and video from the privacy of their own homes, it can be easy to develop a false sense of security and forget the global nature of online activity.[18] Several examples illustrate how employees' online activities can decimate a business' reputation. In 2008, some Burger King employees posted a video on Youtube.com of an employee bathing in the sink at the restaurant, causing the local health department to investigate the store.[19] In 2007, a Taco Bell employee

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[12] *Id.*

[13] Ashrafkakar, *Alarming Story of Egypt Revolution,* ALLVOICES.COM (Feb. 8, 2011), http://www.allvoices.com/contributed-news/8129523-alarming-story-of-egypt-revolution (last visited Dec. 29, 2012).

[14] Facebook has a group titled, "An Episode of SpongeBob Squarepants Changed My Life," FACEBOOK.COM

[15] In apparent appreciation for the role it played in the revolution and overthrow of President Mubarak, an Egyptian man named his child "Facebook." "Egyptian Dad Names Child Facebook," CNN.COM, http://articles.cnn.com/2011-02-21/world/egypt.child.facebook_1_facebook-page-wael-ghonim-social-media?_s=PM:WORLD (last visited Mar. 21, 2011).

[16] Ron Chapman, Jr., "Social media policies protect employers' security", DALLAS BUSINESS JOURNAL, (Feb. 4, 2011), *available at* http://www.bizjournals.com/dallas/print-edition/2011/02/04/frontlines.html.

[17] *Id.*

[18] *Id.*

[19] *Id.*

posted a video of a rat running around the restaurant. The negative publicity generated from the video caused the price of the company's stock to fall.[20]

Employees' postings displaying a poor attitude toward customers or portraying vulgar, promiscuous, or racist tendencies may also portray the company in a bad light. Caitlin Davis, an 18-year-old cheerleader for the New England Patriots, was fired after she posted photographs of herself and an unidentified friend leaning over a passed-out man, whose entire face and body was covered in distasteful and profane graffiti.[21] Ashley Johnson, a former waitress at Brixx Pizza, a restaurant in North Carolina, claimed she was fired from her job for complaining about customers on her Facebook account.[22] According to court records, Johnson became irritated after she had to stay past her shift to wait on a table. After receiving what she apparently considered an inadequate tip, Johnson berated the customers on her Facebook page for being "cheap," and used the company's name in sarcastically thanking them for their patronage.[23] One of the restaurant's co-owners said that Johnson had violated company policy and commented, "[w]e definitely care what people say about our customers."[24]

In a similar case, Dan Leone, a game-day employee at the Philadelphia Eagles stadium, said he was fired for criticizing the team via social media.[25] After Eagles' safety Brian Dawkins signed with the Denver Broncos, Leone posted a "status update" on his Facebook page stating, "Dan is [expletive] devastated about Dawkins signing with Denver…. Dam Eagles R Retarted!![sic]"[26] Days later, Leone deleted the post, but was fired regardless.[27] In all three cases, the employees likely failed to realize their conduct on Facebook was subject to their employers' scrutiny and review.

Another danger to employers' interests can arise when employees' conduct on social media results in litigation. When an employee uses social media to harass or denigrate a co-worker or subordinate, the employer may be dragged in as an unwilling party or co-defendant. The problem is often exacerbated because of characteristics unique to online media. The anonymity of social media may encourage employees or supervisors to say things online that they would never

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[20] *Id.*

[21] Catharine Smith & Craig Kanalley, "Fired Over Facebook: Thirteen Posts That Got People Canned," HUFFINGTON POST (updated May 25, 2011), http://www.huffingtonpost.com/2010/07/26/fired-over-facebook-posts_n_659170.html#s117699&title=NFL_Cheerleader_Fired (last visited Dec. 29, 2012).

[22] *Id.* at http://www.huffingtonpost.com/2010/07/26/fired-over-facebook-posts_n_659170.html#s114542&title=Waitress_Fired_For (last visited Dec. 29, 2012).

[23] *Id.*

[24] *Id.*

[25] *Id.* at http://www.huffingtonpost.com/2010/07/26/fired-over-facebook-posts_n_659170.html#s114852&title=Eagles_Employee_Alleges (last visited Dec. 29, 2012).

[26] *Id.*

[27] *Id.*

consider saying in person.[28] Because body language, tone, sarcasm, and nuance cannot be conveyed through text, comments on social media can be construed in a more offensive light than intended.[29] Finally, messages intended for one recipient may be forwarded (intentionally or not) to others for whom they were not intended.

The potentially adverse situations discussed above have prompted many employers to consider restricting employees' use of social media. The extent to which such prohibitions are legally permissible is certain to be tested in the courts. For instance, can an employer limit or completely prohibit off-duty Facebook activity? Should an employer be allowed to restrict an employee's Facebook "friends," or enforce other "friending" restrictions? Can an employer require access to an employee's Facebook account in order to monitor activity? These issues will be addressed under the rubric of "employer Facebook policies."

IV. FACEBOOK, SOCIAL MEDIA AND EMPLOYEE PRIVACY

A. EMPLOYMENT-AT-WILL DOCTRINE AND ITS EXCEPTIONS

Traditionally, employment relationships in the United States have been governed by the employment-at-will doctrine.[30] This doctrine states that in the absence of a contract, either the employer or employee may terminate the employment relationship at any time and for any reason.[31] Employment-at-will is the default position in every state, with the exception of Montana and the District of Columbia.[32]

The federal government and most states have created exceptions to the employment-at-will doctrine to prevent illegal discrimination and certain types of unfair conduct. Federal statutes such as the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA) and others prohibit employers from refusing to hire or discharging their employees for discriminatory reasons based on characteristics such as race, gender, nationality, physical disability and age.[33] Most states have recognized similar exceptions to the

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[28] Kiri Blakeley, "The 'New' Sexual Harassment," FORBES.COM (Aug. 6, 2009) http://www.forbes.com/2009/08/06/sexual-harassment-office-forbes-woman-leadership-affairs.html (last visited Dec. 29, 2012).

[29] *Id.*

[30] *See* RESTATEMENT (SECOND) OF AGENCY § 442 (1958).

[31] *See id*. *See also* ALFRED G. FELIU, PRIMER ON INDIVIDUAL EMPLOYEE RIGHTS 1 (2d ed. 1996).

[32] Montana is the only state that has not adopted the employment-at-will doctrine, along with the District of Columbia. *See* MONT. CODE ANN. § 39-2-904 (West, Westlaw through all 2011 laws, Code Commissioner changes, & 2010 ballot measures) ("A discharge is wrongful only if… the discharge was not for good cause").

[33] Additional federal statutes limiting employers' discretion under the employment-at-will-doctrine are: The Pregnancy Discrimination Act (PDA), 42 U.S.C. sec. 2000e(k) (2006), The National Labor Relations Act (NLRA), 29 U.S.C. sec. 158 (2006), The Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. sec. 2101-09 (2006), The Family and Medical Leave Act

employment-at-will doctrine. These exceptions generally fall into two categories, those based in contract and those based in public policy.

1. IMPLIED CONTRACT EXCEPTION

A majority of states have recognized the existence of an implied employment contract under certain circumstances, even where employment is at-will.[34] Thus, if an at-will employee is fired for reasons outside the terms of the implied contract, the employer may be sued for wrongful termination.[35] Many jurisdictions that have recognized implied employment contracts do so by interpreting employee handbooks and other employer policies as binding contractual obligations.[36] Some jurisdictions also recognize that oral promises made to employees may be considered part of an implied contract, even when the employee agrees to be an employee-at-will.[37]

While this exception may seem quite broad, courts actually have applied the exception sparingly. In most cases, courts will only use the implied contract exception where an employee is unfairly terminated after a long tenure of service, or if the discharge is an attempt by the employer to unfairly avoid paying wages or accrued benefits.[38] No court has yet used the implied contract exception to recognize or enforce an employee's right to privacy, however, even where certain promises of privacy had been made to the employee.[39] An at-will employee fired or disciplined for use or misuse of social media would therefore find it difficult to assert a violation of contractual right, even if the employer had made certain promises regarding such use as being private.

2. PUBLIC POLICY EXCEPTION

Courts may also apply an exception to the at-will doctrine when an employee is terminated for reasons that violate an explicit, well-established public policy of the state. Terminations have been found unlawful under this exception when the employee is discharged for refusing to participate in fraud, criminal

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(FMLA), 29 U.S.C. 2615(a) (2000), the Occupational Safety and Health Act (OSHA), 29 U.S.C. sec. 660(c), and the Fair Labor Standards Act (FSLA), 29 U.S.C. sec. 215(a)(3)(2000).

[34] MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 749-50 (3d ed. 2004).

[35] *See id*.

[36] *Id*. at 750.

[37] *See e.g*., *Kuest v. Regent Assisted Living, Inc.*, 43 P.3d 23 (Wash. App. 2002) (explaining that a court may be willing to imply contract modifications through the parties' actions, even after the parties have agreed in writing to be treated as employees at will).

[38] *See* Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment-At-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583, 1593 (1994).

[39] *See Smyth v. Pillsbury Co.*, 914 F.Supp. 97, 100 (E.D. Pa. 1996) (holding that employee had no expectation of privacy in e-mails sent over employer's network, even though employer had made specific assurances that such communication would remain confidential).

conduct, perjury, and other unlawful conduct.[40] This exception also protects employees from adverse actions resulting from performance of civic responsibilities, such as jury duty; or the exercise statutory rights, like filing a worker's compensation claim.[41]

Recent attempts have been made to expand the public policy exception to encompass employers' alleged infringement of their employees' personal freedom.[42] This argument has been raised in the context of employer's attempts to limit the off-duty activities of employees, including employees' political activities, personal relationships, and lifestyles outside of work.[43] Because employer Facebook policies raise issues of freedom of speech and association, the approaches the courts have developed in each of these areas might provide some insight into how courts might view employees who are terminated because of their Facebook use.

Employees have argued that they have a right to be free from employer compulsion to participate (or not participate) in specific political activities.[44] In general, these employees have argued that the public policy in favor of free speech, as found in the federal or corresponding state constitution, would be violated by an employer's decision to discharge an employee for refusing to participate in or support the employer's political cause or philosophy.[45]

The right to freedom of speech for employees of private employers, however, has not been recognized as a clear public policy. In *Novosel v. Nationwide Ins. Co.,* a federal circuit court of appeals held the termination of an employee for refusal to participate in his employer's lobbying efforts violated public policy.[46] Subsequent opinions by the Pennsylvania courts and the courts of the Third Circuit, however, have narrowly limited the *Novosel* holding to its facts.[47] Notwithstanding

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[40] *See* Robert Sprague, *Fired for Blogging: Are There Legal Protections for Those Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355, 375 (2007) (noting that only five states have failed to recognize the public policy exception for employees who refuse to violate the law at the request of their employer).

[41] *See e.g., Call v. Scott Brass, Inc.*, 553 N.E.2d 1225 (Ind. Ct. App. 1990) (recognizing a public policy exception for employee serving on jury duty); *Lins v. Children's Discovery Ctrs. Of Am., Inc.*, 976 P.2d 168 (Wash. Ct. App. 1999) (recognizing a public policy exception for supervisor who refused to fire employees for filing worker's compensation claims).

[42] Rafael Gely & Leonard Bierman, *Workplace Blogs and Workers' Privacy*, 66 LA. L. REV. 1079, 1093 (2006).

[43] *See id.*

[44] *Id.* at 1093-94.

[45] *Id.*

[46] *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (holding there was "an important public policy at stake… and [the employee's] discharge violate[d] a clear mandate of public policy.")

[47] *See, e.g., Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 620 (3rd Cir. 1992) (interpreting *Novosel* to have held "that using the power of discharge to coerce employees' political activity violates public policy"); *Levito v. Hussmann Food Service Co., Victory Refrigeration Division,* 1991 WL 86898 (E.D. Pa. 1991) (holding that *Novosel* applies only to coerced political activity and does not extend to more generalized speech and expression); *Martin v. Capital Cities Media, Inc.,* 354 Pa. Super. 199, 511 A.2d 830 (1986) (rejecting a claim that public policy was violated based on alleged retaliation for free expression activities and explaining that free speech is limited in the employment context). *See*

the fact that the First Amendment rights of freedom of speech and association are considered fundamental rights under the U.S. Constitution, courts have been reluctant to include them under the umbrella of public policy when it comes to private employers. Instead, courts adhere to the general principle that the First Amendment protections are only applicable to government actions, not those of a private employer.[48]

The unwillingness of some courts to include the rights to free speech and association in the public policy exception is illustrated in *Graebel v. American Dynate Corporation* and *Edmondson v. Shearer Lumber Products*.[49] In *Graebel*, the plaintiff was fired after a local newspaper's article disclosed his "racially-biased attitudes and opinions regarding the effect of the increased Asian immigration" in the local area.[50] The plaintiff argued that his termination violated his constitutional and common law rights of privacy and free speech "for speaking from the confines of his home on a matter of public concern unrelated to his employment."[51] The Wisconsin Court of Appeals found against Graebel, emphasizing the narrow nature of the public policy exception to the at-will doctrine.[52] The court noted that in Wisconsin, the exception is limited to cases where an employee refuses to violate public policy as established by a statutory or constitutional provision, the spirit of a statutory provision or administrative rules.[53] While recognizing the "importance of one's free speech rights," the court concluded that "the public policy exception may not be used to extend constitutional free speech protection to private employment."[54]

Similarly, the Idaho Supreme Court rejected a plea to include the rights of speech and association into its state's public policy exception. In *Edmondson v. Shearer Lumber Products*, an employee at a lumber mill was terminated after publicly criticizing his employer's management of a local national forest.[55] The plaintiff argued that he had been wrongfully terminated because he exercised his constitutionally protected rights of free speech and association. The Idaho Supreme Court upheld a grant of summary judgment for the employer, stating "an employee does not have a cause of action against a private sector employer who terminates the

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also, Lee v. Wojnaroski, 751 F. Supp. 58 (W.D. Pa. 1990); *McDaniel v. American Red Cross, Johnstown Region,* 58 F. Supp.2d 628 (W.D. Pa. 1999).

[48] Gene Policinski, "First Amendment does not shield us from private infringement," Oct. 31, 2009, *available at* http://gazettextra.com/news/2009/oct/31/first-amendment-doesnt-shield-us-private-infringem/ (last visited Dec. 29, 2012).

[49] *Graebel v. American Dynate Corp.*, No. 99-0410, 1999 WL 693460 (Wis. Ct. App. 1999) (unpublished disposition); *Edmondson v. Shearer Lumber Products*, 75 P.3d 733 (Idaho 2003).

[50] *Graebel*, 1999 WL 693460 at *1.

[51] *Id.*

[52] *Id.* at *5.

[53] *Id.*

[54] *Id.*

[55] *Edmondson* at 733.

employee because of the exercise of the employee's constitutional right of free speech."[56]

Even where a court is willing to entertain a public policy argument based on the exercise of free speech, the plaintiffs have generally been unsuccessful in fighting adverse employment actions. For instance, in *Wiegand v. Motiva Enterprises, LLC*, the plaintiff was a Texaco gas station supervisor who operated a website devoted to selling Neo-Nazi paraphernalia.[57] When he was hired, Wiegand signed an employee handbook that indicated his at-will employee status.[58] Wiegand disclosed that he sold "non-mainstream CDs and flags," but the company did not investigate further at the time.[59] In addition, his supervisor claimed he "did not care about what plaintiff [Wiegand] did in his free time."[60] When a local newspaper publicized the website, Texaco terminated Wiegand on the ground that his off-duty activity "violated the company's 'core values' of 'respect for all people.'"[61]

Wiegand filed a wrongful termination action against Texaco, claiming "an employee, whether public or private, should not have to be fearful about expressing his personal views in his own home, on his own time. He should not have to worry about losing his job because of his exercise of his first amendment rights in such a private manner that does not affect his employer."[62] The New Jersey District Court noted that under New Jersey law, at-will employees "may sustain a claim for wrongful termination if [they] can show [their] discharge was 'contrary to a clear mandate of public policy.'"[63] The court also noted that matters of public policy are determined from both United States and state constitutions, federal, state, and administrative rules and regulations, and common law.[64]

The United States District Court for the District of New Jersey recognized that under appropriate circumstances, the right to free speech could form the basis for a public policy exception to the at-will doctrine. The court found Wiegand's speech was "commercial hate speech" unprotected by the First Amendment, however, and therefore held his termination was not contrary to public policy.[65] In reaching its decision, the district court relied on two United States Supreme Court decisions involving public employment.[66] Those cases held states cannot "condition

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[56] *Id.* at 739.
[57] 295 F. Supp.2d 465 (D.N.J. 2003); *see generally* n.42, *supra.*
[58] *Id.*
[59] Wiegand's website included merchandise that was highly offensive to some, including Nazi flags, and shirts with sayings like "Skinheads" and "Blue Eyed Devils." *Id.* at 466.
[60] *Id.* at 468.
[61] *Id.* at 466.
[62] *Id.* at 474.
[63] *Id.* at 473 (citing *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505 (1980)).
[64] *Id.* at 473 (citing *MacDougall v. Weichert*, 677 A.2d 162 (1996)).
[65] *Id.* at 475.
[66] *See id.* (citing *Connick v. Meyers*, 461 U.S. 138 (1983), *see also Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968)).

employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression," but that under certain circumstances states can "regulat[e] the speech of [their] employees."[67]

In the cases cited in *Wiegand,* the Supreme Court balanced the public employee's interest in commenting on matters of public concern (e.g., political, social, or community concerns) and the public employer's interest in efficiently running its services through its employees.[68] In general, if the employee's speech is deemed to be of a personal nature, then the state has the discretion to do as it sees fit to promote the efficient running of its business.[69] The district court applied a similar balancing test to private-sector employment, concluding that Texaco was within its rights to terminate Wiegand because his speech and public conduct could negatively affect the company's business interests.[70]

Another type of off-duty conduct that has been raised in wrongful discharge against public policy cases relates to employees' dating practices. In these cases courts have generally sided with employers, especially where supervisor-subordinate relationships were involved, and have been wary of employee attempts to argue discharges of this kind are in any way violative of "public policy."[71] Thus, in a case involving the discharge of an employee for bringing a woman other than his wife to an employer banquet, a court explicitly rejected employee arguments regarding "freedom of association."[72] The court held that restricting the right to associate with a non-spouse at an employer banquet was not a threat to a recognized aspect of public policy of the kind which merited an exception to the traditional doctrine of employment-at-will.[73] Finally, in the case of *Patton v. J. C. Penney Co.,* the Supreme Court of Oregon directly held that the employment-at-will doctrine gave the retailer the right to fire an employee for dating a co-worker, and that any interference with the employee's "personal lifestyle" in this regard did not "trigger the public policy exception to the employment-at-will doctrine."[74]

Because social media involves a combination of both speech and association, employees terminated for violating employers' Facebook policies may attempt to claim that public policy protects these activities. The level of protection in such cases will likely depend on the nature and content of the material posted. To the extent the employee's communications involve matters of important "public concern," they might receive a higher degree of protection. *Wiegand* suggests, however, that courts are likely to balance the public nature of the content against the

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[67] Wiegand at 476 (citing *Pickering* at 568).
[68] *Id.* at 477.
[69] *Id.* (citing *Connick* at 146).
[70] *Id.*
[71] Gely & Bierman, *supra* n.57, at 1094.
[72] *Staats v. Ohio Nat'l Life Ins. Co.*, 620 F. Supp. 118 (W.D. Pa. 1985).
[73] *Id.*
[74] *Patton v. J.C. Penney Co.*, 719 P.2d 854 (Or. 1986).

legitimate business interests of the employer. The more the employee's social media activity is focused on work-related issues, as opposed to matters of general public concern, the less protection it is likely to receive from the courts.

B. COMMON LAW TORT OF INVASION OF PRIVACY

The common law right of privacy has been described as "the right to be left alone."[75] Typically, four acts qualify as invasions of privacy: appropriation of identity[76], public disclosure of private facts[77], false light publication[78] and intrusion on seclusion[79]. If an employee were to claim an invasion of his privacy based on an employer's Facebook policy, the only likely type would be intrusion on seclusion. To prove intrusion on seclusion, an employee would have to show that the employer intentionally encroached upon his solitude or seclusion or private affairs or concerns in an unreasonably intrusive manner.[80] Common examples of intrusion by an employer generally involve physical searches of an employee's personal effects, surveillance, and intrusive questioning about the employee's private life. The outcome of these cases generally turns on whether the employee had a reasonable expectation of privacy with regard to the area of alleged intrusion.

Courts decide what a "reasonable" zone of privacy is by applying social norms and everyday rules of tolerance to an employer's actions. For instance, opening and reading an employee's personal mail has been held to violate an employee's privacy,[81] but opening an employee's mail to determine whether it is business-related may not.[82] Surveillance of the interior of an employee restroom invades privacy,[83] but surveilling the entrance to the restroom does not.[84] Searching

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[75] *See* Charles Warren & Louis Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890); RESTATEMENT (SECOND) OF TORTS §652 (1976); *Olmstead v. United States*, 277 U.S. 438 (1928).

[76] RESTATEMENT (SECOND) OF TORTS §652(c) (1977) (one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy).

[77] RESTATEMENT (SECOND) OF TORTS §652(d) (1977) (one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that: (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public).

[78] RESTATEMENT (SECOND) OF TORTS §652(e) (1977) (one who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if: (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed).

[79] RESTATEMENT (SECOND) OF TORTS §652(b) (1977) (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).

[80] *Id.*

[81] *Vernars v. Young*, 539 F.2d 966, 968-69 (3d Cir. 1976); *See generally* Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L. REV. 221, 227-28 (1996).

[82] *Doe v. Kohn Nast & Graf, P.C.*, 866 F. Supp. 190 (E.D. Pa. 1994).

[83] *See Speer v. Ohio Dep't of Rehab. & Corr.*, 624 N.E.2d 251, 254 (Ohio Ct. App. 1993).

[84] *See Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993).

an employee's locked work locker might be an invasion of privacy,[85] but searching his desk may not.[86] Questioning an employee about the details of her sex life invades her privacy,[87] but questioning her about marital status, number of children, or home ownership does not.[88]

Just where employees' off-duty use of Facebook fits into society's privacy hierarchy remains to be seen, as the level of privacy a user can reasonably expect remains in flux. Can off-duty Facebook posts be considered "secluded" as required by the common law? Because Facebook has privacy settings that restrict others' access to certain posted information, an employee may argue the protected information is secluded. Even when privacy settings are in place, however, "friends of friends" may share supposedly private information. In any event, users of social media voluntarily share personal information with others in the social network. Because the entire purpose of social media is at odds with a claim of "seclusion," any tort claim based on this theory would face significant challenges. While society recognizes the right to keep one's private papers free from intrusion, the reasonableness of any expectation of privacy in information deliberately posted to a social network is more dubious.

Further, the tort of intrusion on seclusion not only requires an intrusion into a private area, but it requires that the intrusion be unreasonably offensive. The infamous case of *Smyth v. Pillsbury Co.*, demonstrates that an employer must not only invade an employee's privacy, but do so in a way that is highly offensive in order to be considered tortious.[89] The plaintiff in *Smyth* was an at-will employee discharged for transmitting inappropriate and unprofessional comments over the employer's e-mail system.[90] Defendant Pillsbury had assured employees that their e-mail communications were confidential and would not be intercepted or used as grounds for discipline. Assurances notwithstanding, Pillsbury intercepted Smyth's messages and used their contents to terminate his employment. Smyth sued for wrongful discharge under the public policy exception and the tort of intrusion on seclusion. The court held that Smyth's firing was not a violation of public policy and that once Smyth had communicated over an e-mail system utilized by the entire company, any reasonable expectation of privacy Smyth may have had in the e-mails (regardless of the company's assurances of confidentiality) were lost. Further, the court posited that even if Smyth had a reasonable expectation of privacy in the e-

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[85] *See Pulla v. Amoco Oil Co.*, 882 F. Supp. 836, 867 (S.D. Iowa 1994), *aff'd in part and rev'd in part*, 72 F.3d 648 (8th Cir. 1995).

[86] *See Simpson v. Unemployment Compensation Bd. of Rev.*, 450 A.2d 305, 309 (Pa. Commw. Ct. 1982).

[87] *See Terrell v. Rowsey*, 647 N.E.2d 662, 665 (Ind. Ct. App. 1995).

[88] *See K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 637 (Tex. App. 1994).

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

[90] *See id.* (Smyth sent e-mails concerning the sales management at the company and threatened to "kill the bastards" and referred to the company Christmas party as the "Jim Jones Kool-Aid [*sic*] affair").

mails, "a reasonable person would not consider the defendant's interception of these communications to be a substantial and highly offensive invasion of his privacy."[91]

Smyth suggests an employee's interest in seclusion lies not in a freedom from intrusion, but only in a freedom from *offensive* intrusion.[92] As University of Illinois Professor Matthew Finkin has commented, "the inescapable conclusion is that what the law of intrusion actually regulates is not privacy, but outrage. The law protects freedom from emotional distress, not freedom of informational control."[93]

At least one recent employment dispute, however, may indicate a trend toward public recognition of a privacy expectation in social media. Like many cities, Bozeman, Montana required applicants for municipal jobs to consent to a background investigation. Bozeman instituted a new policy, however, requiring applicants to disclose their social networking login usernames and passwords as part of that process.[94] When news of the hiring policy was broadcast, city administrators were met with a barrage of criticism from privacy rights groups and social media users who perceived the policy as a violation of privacy rights.[95] Protestors argued the city would have access not only to the applicants' information, but also the information posted by the applicants' friends, who had no relationship with the city.[96] Ultimately, the city decided to withdraw its policy under the weight of overwhelming criticism.[97] While such concerns are not unfounded, society has yet to agree that intrusions on Facebook are per se "outrageous" or "offensive," giving employees little recourse under tort law for adverse employment actions based on social media use.

C. NATIONAL LABOR RELATIONS ACT – POTENTIAL PROTECTION

Because of the number of disciplinary actions and terminations of employees based on Facebook and other social media postings, the National Labor Relations Board (NLRB) has also filed numerous cases on behalf of employees in the past year. In May of 2011, the NLRB disclosed that it currently has more than 20 cases involving worker complaints posted on the social media sites such as Facebook.[98] In what could have been a ground-breaking case for employees and their

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[91] *Id.* at 101.
[92] *See* n.81, *supra.* Finkin at 227-28.
[93] *Id.* at 228.
[94] Stephanie Hoffman, *Montana City Asks Job Applicants to Fork Over Social Networking Passwords*, WWW.CRN.COM (Jun. 19, 2009), *available at* http://www.crn.com/blogs-op-ed/the-channel-wire/218100385/montana-city-asks-job-applicants-to-fork-over-social-networking-passwords.htm;jsessionid=hPyUpRoeJDz2f5YnwT1V6g**.ecappj02 (last visited Dec. 29, 2012).
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] Melanie Trottman, "NLRB Faults Company for Firing Workers Over Facebook Posts," WALL ST. J. (May 18, 2011), *available at*

privacy rights in social media, the NLRB recently settled a claim it brought on behalf of an employee fired for comments she made on Facebook. In 2010, American Medical Response of Connecticut fired an emergency medical technician, Dawnmarie Souza, for derogatory comments she made about her supervisor on her Facebook page.[99] The NLRB's complaint alleged that as part of a disciplinary action, Ms. Souza was asked to prepare an incident report, wherein she requested representation from her union representative.[100] Her supervisor allegedly threatened her with discipline due to the request, prompting Souza to mock him from her home computer on Facebook.[101] Souza posted comments with profanities designed to ridicule her supervision, including writing, "love how the company allows a 17 to become a supervisor" – "17" is the company's code for a psychiatric patient.[102] Souza was fired as a result of her comments and the NLRB filed a complaint on her behalf, claiming a violation of Section 7 of the National Labor Relations Act (NLRA).[103] This portion of the NLRA gives workers the right to consult with co-employees to form unions, and prohibits employers from punishing workers for "concerted activity" discussing working conditions or unionization.[104]

Because Souza's Facebook comments were shared with co-workers, some of whom posted supportive responses, the NLRB held they constituted "concerted activity" protected by the statute.[105] Souza's employer argued that her comments were disloyal and not related to her working conditions. Disloyal and unrelated comments can result in a court determining that the comments are outside of the "concerted activity" covered by the NLRA and may be grounds for termination.[106] The NLRB issued a statement on *Souza* indicating that the NLRB had reached a settlement with American Medical Response of Connecticut to dismiss the NLRB

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http://online.wsj.com/article/SB10001424052748703509104576331861559033254.html (last visited Dec. 29, 2012).

[99] Steven Greenhouse, "Company Accused of Firing Over Facebook Post," N.Y. TIMES (Nov. 8, 2010), *available at* http://www.nytimes.com/2010/11/09/business/09facebook.html (last visited Dec. 29, 2012).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] Section 7 of the NLRA states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C.A. Sec. 157 (2006).

[104] *See id.*

[105] *See* n. 99, *supra.*

[106] *See, e.g., NLRB v. Local Union No. 1229,* 346 U.S. 464, 471, (1953) (upholding discharge where employees publicly disparaged quality of employer's product, with no discernible relationship to pending labor dispute); *George A. Hormel & Co. v. NLRB,* 962 F.2d 1061, 1064 (D.C.Cir.1992) (stating that employee violates duty of loyalty by supporting boycott of employer's product, unless boycott is non-disparaging and related to ongoing labor dispute).

complaint in exchange for the company revising its "overly broad rules" to ensure that employees would be free to discuss wages, hours and working conditions.[107]

The NLRB has recently reiterated its position in the *American Medical Response* case several times, holding that employee complaints on Facebook and other social media may constitute "protected concerted activity".[108] The NLRB has not, however, held all types of speech are protected when using social media. In a case involving the Arizona Daily Star newspaper, the NLRB held that remarks posted on social media that are offensive, banned under company policy, and do not relate to workplace issues do not qualify for protection.[109]

Although the NLRB's position in *Souza* has not yet been adopted by a court, the implications of these cases for employee privacy rights are considerable. Ultimately, if a court were to determine that co-workers' Facebook posts about working conditions were protected by the NLRA, the effect could be a vast change in employer's Facebook policies. Although the NLRA typically only applies to union activity, Section 7 of the Act (dealing with "concerted activity") was designed to protect workers discussions in the pre-formation stage of unionization, and therefore applies to all employees regardless of union affiliation. To qualify as "concerted activity" under Section 7, "conduct need not take place in a union setting and it is not necessary that a collective bargaining agreement be in effect; it is sufficient that the complaining employee intends or contemplates, as an end result, group activity which will also benefit some other employees."[110]

A worker fired for complaints about his employer on social media may seek redress under the NLRA if he or she can show the communications were "concerted activity" made in contemplation of collective bargaining or "group activity". To prove concerted activity, an employee likely would need to show that the comments were related to specific work conditions, not defamatory, and that they were made to co-employees. This would separate general complaining about work (which is not protected under the NLRA) from legitimate attempts at organizing to improve conditions. A Facebook comment to co-workers to the effect "we'll never get safe working conditions in this factory unless we band together" would likely be protected. Derogatory comments about a supervisor, on the other hand, would not.

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[107] Randi W. Kochman, "NLRB Settles *In Re American Medical Response* Facebook Termination Case," EMPLOYMENT LAW MONITOR (Feb. 15, 2011), *available at* http://www.employmentlawmonitor.com/2011/02/articles/employment-policies-and-practi/nlrb-settles-in-re-american-medical-response-facebook-termination-case/ (last visited Dec. 29, 2012).

[108] Scott Faust, "NLRB Issues Complaint in NY Facebook Case," PROSKAUER ROSE LLP'S LABOR RELATIONS UPDATE (May 20, 2011) http://www.laborrelationsupdate.com/nlrb/nlrb-issues-complaint-in-ny-facebook-case/ (last visited Dec. 29, 2012).

[109] Tim Gould, "NLRB Stance on Social Networks Getting a Little Clearer," HR MORNING.COM (May 20, 2011), *available at* http://www.hrmorning.com/nlrb-stance-on-social-networks-getting-a-little-clearer/ (last visited Dec. 29, 2012).

[110] *NLRB v. Hotel Employees & Restaurant Employees Int'l Union Local 26*, AFL-CIO, 446 F.3d 200 (1st Cir. 2006).

V. LIFESTYLE DISCRIMINATION STATUTES

In addition to the possible recourse discussed above, employees in some states may attempt to seek protection for off-duty conduct under recent statutes known as lifestyle discrimination statutes. In the early 1990's many states passed statutes regulating employers' control over their employees' off-duty conduct. The statutes have become known as "lifestyle discrimination statutes".(Cite needed?) The title of the statutes implies that they give employees the legal freedom to live their off-duty lives free from all employer interference. In practice, however, the protection of such statutes is much narrower, and generally only prohibits employers from regulating employees' off-duty use of tobacco and other lawful products. The language of a few states' lifestyle discrimination statutes is broader and seeks to protect employees from adverse employer action based on many other lawful, off-duty activities. Where such statutes exist, they may provide employees an additional avenue to challenge adverse employment actions based on their use of Facebook and social media.

A. NARROWLY WRITTEN LIFESTYLE DISCRIMINATION STATUTES

The original wave of lifestyle discrimination statutes were designed primarily to protect smokers from discrimination at work. Some laws exclusively pertain to "tobacco products," while others contain broad wording to protect employees who use any "lawful products."[111] New Jersey's statute falls into the first category, and states,

> No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee… because that person does or does not smoke or use other tobacco products, unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee.[112]

Approximately seventeen states have statutes similar to New Jersey's - applying only to tobacco use. Obviously, these statutes would provide no protection to employees seeking relief from employers' Facebook policies.

While more broadly drafted "lawful products" statutes could theoretically be interpreted to include use of social media, few courts have had occasion to interpret them. Montana's "lawful product" statute was the subject of a state

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[111] *See* Marisa Anne Pagnattaro, *What Do You Do When You Are Not At Work?: Limiting the Use Of Off-Duty Conduct As the Basis For Adverse Employment Decisions,* 6 U. PA. J. LAB. & EMP. L. 625 (2004).

[112] N.J. STAT. ANN. § 34:6B-1.

Supreme Court case in 1998.[113] Although the case did not involve Facebook or an issue of off-duty computer use, the decision indicates the "lawful products" statutes may be interpreted narrowly. Plaintiff Jerry McGillen was suspended by employer Plum Creek Manufacturing for sleeping on the job.[114] As a practical joke on his supervisor after the suspension, McGillen placed an ad in the *Mountain Trader*, a weekly trade publication.[115] The ad encouraged any interested parties to call the supervisor late in the evening to inquire about the purchase of a truck for sale.[116] McGillen ultimately admitted he placed the ad in the publication and was terminated.[117] McGillen then filed a wrongful termination action against his employer based on the protection he claimed under the Montana lifestyle protection statute.[118] The statute states that an employer "may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual legally uses a lawful product off the employer's premises during nonworking hours."[119] McGillen argued that taking out the advertisement that led to his dismissal was the use of a "lawful product" under the statute.[120] The Supreme Court of Montana found in favor of Plum Creek, noting that the definition of "lawful product" in the statute "means a product that is legally consumed, and includes food, beverages and tobacco."[121] The Court further stated that the purpose of the statute is to "protect an employee from discharge for the use of a legal product, such as alcohol or tobacco, off the employer's premises."[122] Montana's narrow construction of the "lawful product" statute would offer employees little or no protection as applied to employer Facebook policies.

Even though Montana has the only relevant reported case concerning the "lawful product" statutes, there is reason to believe that other states would follow Montana's narrow construction. In 1991, the Illinois General Assembly enacted the Right to Privacy in the Workplace Act ("Privacy Act"), mandating that the use of lawful products off work premises during non-working hours may not be the basis of an employer's discharge, refusal to hire, or imposition of other disadvantages in compensation, terms, conditions, or privileges of employment.[123] Tobacco and alcohol are given as examples of the lawful products covered by the Privacy Act. The Act excludes non-profit corporations whose purpose is to discourage use of a product. For example, the American Lung Association may choose to hire only non-smokers. [124]

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[113] *McGillen v. Plum Creek Timber Co.*, 964 P.2d 18 (Mont. 1998).
[114] *Id.* at 20.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *See id.*
[119] MONT. CODE ANN. § 39-2-313(2) (2003).
[120] *See* n.113, *supra.* at 20-21.
[121] *Id.* at 23-24.
[122] *Id.* at 24.
[123] 820 ILCS 55/5 (2006).
[124] 820 ILCS 55/5(b) (2006).

The legislative debate over the Privacy Act focused on small employer concerns about increased lawsuits, increased insurance risks for employees who smoke or drink, and the use of wellness programs to decrease health insurance costs.[125] As originally introduced, the Privacy Act would have prohibited workplace decisions based on employees engaging in lawful activity off work premises, not just the use of lawful products. The Illinois House later confined the bill's application to the use of lawful products.[126] Even with the amendment, votes in the House and Senate were close.[127] Illinois Senate sponsor Ted Leverenz stated, "What you do in your private life, as long as it is lawful, should not be involved with the conditions or whether you are going to be hired or terminated," suggesting some legislators took a relatively expansive view of the off-duty conduct that might be protected.[128]

Subsequently, the Illinois Department of Labor promulgated rules defining "lawful products" as all tobacco, alcoholic beverages, food products, and over-the-counter and lawfully prescribed drugs, with the exception of over-consumption of a product which impairs work performance.[129] However, there are no reported decisions interpreting the Act. Proponents of employee privacy have introduced amendments in the Illinois General Assembly to broaden the "lawful products" statute by prohibiting employers from discriminating based on an employee's "lawful activities" during non-working hours away from the workplace.[130] However, the amendments have not passed the General Assembly.[131] Such proposed legislation, should it be enacted, could give covered employees some recourse against unfair employee Facebook policies.

B. BROAD LIFESTYLE DISCRIMINATION STATUTES (NORTH DAKOTA, CONNECTICUT, NEW YORK, CALIFORNIA, COLORADO)

Five states – California, Colorado, Connecticut, New York, and North Dakota – provide more comprehensive statutory protection for an employee's lawful off-duty activities. The few cases interpreting those states' statutes indicate a reluctance to construe them broadly.

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[125] Kim L. Kern, *Workplace Privacy in Illinois: A Review*, 83 ILL. B.J. 454 (1995) (citing Right to Privacy in the Workplace Act, Senate floor debate on HB 1533, 87th GA at 124, 127, 129 of Senate transcript, June 24, 1991 (comments by Sen. Frank Hudson, Sen. David Barkhausen and Sen. Joyce Holmberg)); House debate on HB 1533, 87th GA at 52 of House transcript, May 2, 1991 (comments by Rep. Penny Pullen).

[126] *Id.* (citing Right to Privacy in the Workplace Act, Senate floor debate on HB 1533, House Amendment Number 1, offered May 1, 1991).

[127] *Id.* at 458.

[128] *Id.* (citing Right to Privacy in the Workplace Act, Senate floor debate on HB 1533, 87th GA, comments by Sen. Leverenz, Senate floor debate June 24, 1991 at 131 of Senate transcript).

[129] 56 ILL. ADMIN. CODE 360.100 *et seq.* (2000).

[130] Kern, n.125, *supra.* at 458.

[131] *See id.*

1. CALIFORNIA

The California lifestyle discrimination statute seems to be one of the most expansive in the nation in protecting employees' off-duty conduct. Section 98.6 of the California Labor Code states that, "no 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, "[132] which includes "lawful conduct occurring during nonworking hours away from the employer's premises."[133] The statute protects lawful off-duty conduct by giving both employees and job applicants the right to bring claims against employers through the state's Labor Commissioner.[134]

The statute appears, facially at least, to protect all lawful off-duty conduct without exception. Two California Court of Appeals decisions have severely limited the application of the statute, however. In *Barbee v. Household Automotive Finance Corp*., the plaintiff sued after being fired for engaging in an off-duty relationship with a subordinate.[135] The court rejected his claim that the statute protected his right to free association, or privacy in his relationship with a subordinate.[136] Moreover, the Court held the California statute does not state a specific "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 constitutional rights."[137]

Under the California statute, an employee might argue that employers' Facebook policies violate his First Amendment freedom of speech, as well as his freedom of association. However, the Court of Appeals in *Grinzi v. San Diego Hospice* held that a right of free speech protects only against governmental interference, and not from interference by a private employer.[138] Thus, at-will employees in California, without constitutional or statutory protection for freedom of speech or association, seem to be unprotected by California's law when using Facebook and other social media.

2. COLORADO

Colorado's lifestyle discrimination statute states, "It is unlawful for any employer to terminate the employment of any employee due to that employee engaging in any lawful activity off the premises… during non-work hours unless such a restriction relates to a bona fide occupational requirement or is reasonably

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[132] CAL. LAB. CODE § 98.6 (West 2003).
[133] CAL. LAB. CODE § 96(k) (West 2003).
[134] *Id.*
[135] *Barbee v. Household Automotive Finance Corp.,* 113 Cal. App. 4th 525, 529 (Cal. Ct. App. 2003).
[136] *See id.*
[137] *Barbee* at 535.
[138] *Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72 (Cal. Ct. App. 2004).

related to the employment activities and responsibilities of a particular employee or… is necessary to avoid a conflict of interest."[139] While at first blush the statute appears to afford broad protections, it applies only to the *termination* of an employee and not hiring or other employment actions. In practice, the right to engage in off-duty activities may also be significantly limited by the exceptions for bona fide occupational requirements, necessary job duties and conflicts of interest.

Like California, Colorado's statutory protection for an employee's off-duty conduct has been narrowly interpreted. In the only reported case interpreting the statute, *Marsh v. Delta Airlines, Inc.,* an airline employee was fired for writing a letter critical of his employer to the editor of a local newspaper. [140] Because the letter was not related to a matter of public concern (such as airline safety), the court held it was not protected as a "lawful activity."[141]

The United States District Court for the District of Colorado noted that the statute was designed by the state legislature to "shield employees who are engaging in off-the-job activity that is unrelated to the employee's job duties, from termination for participation in non-work related activities."[142] The court further interpreted the statute's exceptions as evidence the legislature intended to balance the rights of off-duty employees against the business needs of an employer. Moreover, the court found an implied duty of loyalty in public communications was a bona-fide occupational requirement, excluding Marsh's "disloyal" communication from the purview of the statute.[143]

The narrow interpretation of the Colorado statute in *Marsh* suggests that notwithstanding its broad language, negative comments made on Facebook unrelated to a "public concern" would be excluded. Likewise, the statute's exception for conflicts of interest would likely exempt employers' "friending" policies regarding supervisors and subordinates from the statute's protection.

3. CONNECTICUT

Unlike California and Colorado, Connecticut's statute provides broad protection for an employee exercising federal or state constitutional rights.[144] The statute prohibits any employer from disciplining an employee "on account of the exercise by such employee of rights guaranteed by the first amendment to the U.S. Constitution … provided that such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship

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[139] COL. REV. STAT. § 24-34-402.5.
[140] *Marsh v. Delta Airlines, Inc.*, 952 F. Supp. 1458 (D. Colo. 1997).
[141] *Id.*
[142] *Id.* at 1462-63.
[143] *Id.* at 1463.
[144] CONN. GEN. STAT. § 31-51q (2003).

between the employee and employer…."[145] Connecticut enacted its Free Speech Act to remedy the disparity between public sector employees who enjoy First Amendment free speech protection when commenting on matters of public concern and private sector at-will employees who have no First Amendment protection in their employment.[146] The statute extends the same protection for free speech that the First Amendment gives public employees to private sector employees, with the exception that the speech is not protected if it substantially or materially interferes with the employee's job.[147]

The Connecticut statute is noteworthy in that it does not distinguish between an employee's exercise of First Amendment free speech rights and free association rights. An employer's "friending" policy that restricts employees' ability to add co-workers or supervisors as Facebook friends could be deemed to violate the employees' rights of freedom of association. However, to date, no cases have been decided interpreting the breadth of the statute's First Amendment coverage.

The ambiguous wording of the statute also leaves a potential defense for employers. The statute protects employees' First Amendment activities "unless they interfere with the employee's bona fide job performance." As in Colorado, a court could interpret "bona fide job performance" to include a duty of loyalty, exempting any derogatory communications from the protection of the statute. Because the statute also excludes activity that interferes with the working relationship between employee and employer, an employer's prohibitions on "friending" supervisors or subordinates might well be outside the coverage of the law.

4. NEW YORK

New York's Labor Code protects four categories of off-duty conduct for which an employer is not able to discriminate against job applicants or terminate employees because of participation in the protected categories of off-duty conduct. The statute prohibits employers from refusing to hire or discharging an employer because of: 1) an employee's off-duty political activity, 2) an off-duty employee's use of lawful, consumable products, 3) an off-duty employee's legal recreational activities, and 4) an employee's membership in a union.[148] Under the New York statute, employers maintain the right to discriminate against job applicants or terminate employees at-will when the protected conduct would cause a material conflict of interest related to trade secrets, proprietary information, or business interests.[149]

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[145] *Id.*

[146] Shelbie J. Byers, Note, *Untangling the World Wide Weblog: A Proposal for Blogging, Employment-At-Will, and Lifestyle Discrimination Statutes,* 42 VAL. U. L. REV. 245, 270 (2007).

[147] *Id.*

[148] N.Y. LAB. LAW § 201(d)(2)(d) (McKinney 2005).

[149] N.Y. LAB. LAW § 201(d)(3)(a) (McKinney 2005).

New York's lifestyle discrimination statute is unique in that it protects lawful recreational activities. So far, the cases interpreting the phrase "recreational activities" have refused to include intimate relationships or extramarital affairs.[150] One case, however, has included conversation at a casual diner in the definition of recreational activities.[151] When applied to employers' Facebook policies, the New York statute would likely include use of Facebook as a recreational activity and grant employees protection, as long as the Facebook activity did not fit into one of the recognized exceptions. If New York courts interpret the "business interest" portion of the exceptions in the same way Colorado has, then the speech aspect of employees' Facebook use would not likely be protected.

5. NORTH DAKOTA

North Dakota has a broad lifestyle discrimination statute which applies to both employees and job applicants, prohibiting employers from engaging in discriminatory practices because of a job applicant or employee's participation in lawful off-duty activities.[152] The statute contains an exception for which protection is not extended if the activity is in direct conflict with an employer's essential business related interest.[153] The requirement that the activity be in direct conflict with an essential business interest affords employees using Facebook broader protection than states that provide an exception when there is a mere appearance of a conflict of interest or a material conflict of interest.[154] The stronger wording of the exception, requiring interference with an "essential" business interest, may provide leeway for employees to challenge Facebook "friending" policies that do not result in conflicts of interest on their face. Co-worker friend requests, and maybe even supervisor friend requests, may not automatically cause conflicts of interest such that it harms an essential business interest of the employer. It seems as though the North Dakota statute may provide considerable protection to an employee's off-duty Facebook activity, but there is still some uncertainty as to exactly which lawful activities will be afforded protection.

VI. CONCLUSION

Social media present the latest frontier in an ongoing attempt to balance the business interests of employers with the privacy interests of employees. Employers are justifiably wary about the risks inherent in employees' use of social networks, including the disclosure of confidential information, bad publicity resulting from employee comments or unseemly behavior, and lawsuits resulting from harassment

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[150] *State v. Wal-Mart Stores, Inc.*, 621 N.Y.S.2d 158 (N.Y. App. Div. 1995) (excluding romantic relationships from the definition of recreational activities).
[151] *See, e.g., Cavanaugh v. Doherty*, 675 N.Y.S.2d 143 (N.Y. App. Div. 1998).
[152] N.D. CENT. CODE § 14-02.4-01 (2005).
[153] *Id.*
[154] *See* n.146, *supra.* at 273-74.

or other unlawful conduct. Employees, on the other hand, may justifiably resist what they perceive as meddlesome intrusion into their private lives by their employers. Legal issues are certain to grow as technology makes us increasingly interconnected and social media provides a platform to make more of our personal thoughts and actions available to a wider public. Certainly, not all issues related to employers' restrictions of employees' use of social media and Facebook can be addressed in this article. Many problems have yet to manifest themselves and the legal issues that have arisen are just beginning to be addressed by courts and policy makers. More research undoubtedly will be required as employers, employees, courts, and legislatures struggle to resolve the various, competing interests involved.

Much of the current tension results from society's evolving standards of appropriate online conduct. Because users often interact with social media in the physical privacy of their own homes, they can easily forget that their communications are shared globally and instantaneously. As society becomes more aware that little shared on social media is truly "private," courts may begin to treat online employee conduct more like its in-person corollary. An employee who would expect to be fired for treating a customer with disrespect at the counter can probably expect in the future to be terminated for a profane description of customers to a million "friends of friends" on Facebook. By the same token, employers who once sought to monitor workers' housekeeping or weekend drinking should recognize that society will tolerate only limited intrusions into employees' online private lives. Because Facebook and similar social media sites appear to be a permanent (and growing) facet of life, tension between employers and employees in the digital age will continue to be at the forefront of modern labor litigation. For now, it appears unlikely that the traditional forms of protection for employees will apply to employers' attempts to enforce restrictive Facebook policies. Exceptions to the at-will employment doctrine, breach of contract claims and invasion of privacy actions will likely have limited success for various reasons discussed above.

Likewise, it appears uncertain whether lifestyle discrimination statutes will provide employees with any legal protection for their off-duty use of Facebook and other social media. Most states that have passed the statutes have limited their protection to certain, consumable products (like tobacco or alcohol) and do not leave room for courts to extend protection to the use of a "product" like Facebook. In the few states that have passed more broadly defined lifestyle discrimination statutes, courts have been unwilling to interpret them to extend protection to behavior involving speech or communication. Until or unless society determines that employer intrusions into employees' off-duty use of social media, like Facebook, are unacceptable, the courts seem unwilling to use the lifestyle discrimination statutes to curb them.