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Untangling the World Wide Weblog: A Proposal for Blogging, Employment-at-Will, and Lifestyle Discrimination Statutes

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UNTANGLING THE WORLD WIDE WEBLOG: A PROPOSAL FOR BLOGGING, EMPLOYMENT-AT-WILL, AND LIFESTYLE DISCRIMINATION STATUTES

I. INTRODUCTION

*Laws are like spider's webs: if some poor weak creature
come[s] up against them, it is caught; but a bigger one can
break through and get away.¹*

Imagine landing your dream job. All of your hard work and education has finally paid off. You accept the job offer, give two weeks' notice at your current place of employment, and move to another state to start your dream job. Being far from home, and wanting to keep in touch with family and friends scattered around the country, you start up a blog. You plan to use your blog to allow your family and friends to read a daily account of your life as you start your new job and begin setting up your new apartment. Within two weeks of starting your dream job, you are fired and unemployed. Unfortunately, this is the true story of Mark Jen, the computer engineer who lost his dream job at Google within two weeks of starting, because of his blog.²

Now consider the tragedy of losing a loved one in your life. You are depressed, numb, and unable to express your feelings to a therapist. You decide to start a blog as a form of therapy, because you think it may be easier to write about your heartache than to talk about it. Your online diary allows you to share your thoughts and feelings, and helps you through the tough times. You return home one day to find an urgent message from your employer on your answering machine requesting a call back. During the discussion, you learn that your employer is firing you because of pictures you posted on your blog. To your surprise, you have lost your job after giving the company eight years of faithful service with no prior employment discipline. For Ellen Simonetti, better known as Queen of the Sky, this scenario is the true account of what happened when Delta Airlines fired her because of her blog, *Diary of a Flight Attendant*.³

¹ THE OXFORD DICTIONARY OF QUOTATIONS 512 (5th ed. 1999) (quoting Solon).

² See Mark Jen, *The Official Story, Straight From the Source* (Feb. 11, 2005, 9:35 a.m.), <http://blog.plaxoed.com/?p=27> (last visited Sept. 7, 2007) (describing the events leading up to his termination from Google).

³ See Ellen Simonetti, *Perspective: I Was Fired For Blogging*, CNET NEWS.COM, Dec. 16, 2004. Ellen Simonetti was fired because some of her pictures were in uniform; however, Ms. Simonetti filed a claim with the Equal Employment Opportunity Commission claiming

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After reading about the firings of employee bloggers Mark Jen and Ellen Simonetti, you now know what it means to be dooced.⁴ Being dooced refers to an employer's termination of an employee because of the employee's blog postings.⁵ In recent years, many employees have found out the hard way that their "clever little blog" can get them fired.⁶

Dooched employees have created a media frenzy, leaving employment lawyers scrambling to advise corporate clients on how to effectively and legally address employee blogging both proactively and retroactively.⁷ Furthermore, blogging employees are wondering what their rights are, if any, to engage in lawful off-duty blogging activities.⁸

that numerous male Delta employees had pictures posted on the internet in uniform for which they were not punished. *Id.* Additionally, Ms. Simonetti filed a lawsuit in federal court alleging, *inter alia*, discrimination based on sex "pursuant to the Civil Rights Acts of 1964 and 1991." Complaint at *1, *Simonetti v. Delta Air Lines, Inc.*, No. 1:05-CV-2321, 2005 WL 2897844 (N.D. Ga. Sept. 7, 2005), *dismissed without prejudice*, No. 1:05-CV-2321 (Oct. 28, 2005) (dismissing action pending order by the bankruptcy court lifting the stay due to Delta's bankruptcy filing).

⁴ See Heather Armstrong, About This Site, <http://www.dooce.com/about.html> (last visited Aug. 7, 2007) (giving a chronological account of Heather Armstrong's blogging experience beginning in February 2001 through her firing in February 2002, to how she is currently making use of her blog).

⁵ See Armstrong, *supra* note 4 (describing the history of Ms. Armstrong's blog). Ms. Armstrong coined the word "dooched," which derived from her workplace nickname, "dooce." *Id.* Armstrong also named her blog Dooce. *Id.* Armstrong was fired for her blog postings on dooce.com, which subsequently led to the term "dooched" being used to refer to bloggers who have been fired for their online blog postings. *Id.*

⁶ Stephanie Armour, *Warning: Your Clever Little Blog Could Get You Fired*, USA TODAY, June 15, 2005, at 1B (telling the stories of several employees who were fired for blogging).

⁷ Armour, *supra* note 6, at 1B; see, e.g., Kenneth Ebanks et al., *Blogs Pose New Legal Issues and Potential Liability for Corporate America*, COVINGTON & BURLING, Apr. 14, 2005, <http://www.cov.com/files/Publication/95294ee2-4c37-4d24-9f6a-ccaca7f7debb/Presentation/PublicationAttachment/a5acd981-b292-4bac-9e23-d749027925f0/oid57967.pdf>; Kenneth Ebanks et al., *Employee Blogging*, COVINGTON & BURLING, Apr. 18, 2005, <http://www.cov.com/files/Publication/8f1fe39d-4de9-46c4-9003-e75b7c277a1f/Presentation/PublicationAttachment/15431acd-319c-41ce-b22e-ea7f0f70b0e2/oid57969.pdf>. Blogs pose company liability concerns for:

defamation, copyright and trademark infringement, disclosure of trade secrets or private consumer information, and other business torts. Even comments posted to a blog by unrelated third parties might give rise to claims of corporate liability. And any corporation that distributes a blog everywhere the Internet reaches . . . should be cognizant of the profound implications for legal liability relating to personal jurisdiction and governing law.

Ebanks et al., *Blogs Pose New Legal Issues and Potential Liability for Corporate America*, *supra*.

⁸ Armour, *supra* note 6, at 1B. From the start, it is important to establish that this Note is confined at addressing only blogging that takes place away from the workplace and off-duty. The applicable legal consequences and policies are different for on-duty blogging and are beyond the scope of this Note.

To make matters worse, there are conflicts within employment law jurisprudence applicable to the blogging phenomenon, particularly with the policies of the employment-at-will doctrine and lifestyle discrimination statutes that protect lawful off-duty activities.⁹ The judicially created public policy exceptions to the employment-at-will doctrine do not necessarily provide protection for an employee's off-duty blogging activities.¹⁰ Existing lifestyle discrimination statutes leave loopholes where not all aspects of blogging are protected; thus, at-will employee bloggers seeking protection for their blogging activities must turn to their state legislatures to either enact or amend existing lifestyle discrimination statutes to protect lawful off-duty blogging activities and the speech associated with the blog in furtherance of the public policies behind lifestyle discrimination statutes.¹¹ Statutory legislation is the answer to give at-will employee bloggers certainty as to their right to blog while away from work, because neither the currently enacted lifestyle discrimination statutes nor the judicially enforced public policy exceptions to the employment-at-will doctrine adequately protect lawful off-duty activities, such as blogging and the speech that is associated with those blogging activities.¹² Certainty as to employees' rights while engaging in lawful off-duty activities, particularly while blogging, is needed to protect employees from surprise firings from places of employment that do not already have clearly communicated blogging policies.¹³

First, this Note discusses the history of blogging and its place in employment law.¹⁴ Second, this Note analyzes the adequacy of current employment law jurisprudence in addressing blogging and the employment relationship and discusses the need to protect at-will

⁹ See *infra* Parts II.B-C (discussing blogging in the context of judicial and legislative employment law).

¹⁰ See *infra* Part III.B (analyzing the public policy exceptions to the employment-at-will doctrine and their potential applicability to bloggers).

¹¹ See *infra* text accompanying notes 166-171 (illustrating several policy grounds for providing comprehensive legislative protection for at-will employee bloggers through lifestyle discrimination statutes).

¹² See *infra* Parts III.A-B (analyzing the need for legislative action to protect blogging and the online speech associated with blogging).

¹³ See *supra* notes 2-8 and accompanying text (identifying blog-related firings). For examples of employers with clearly communicated blogging policies, see *infra* note 58. See also *infra* notes 166-71 (providing policy reasons for lifestyle discrimination statutes' protection of bloggers).

¹⁴ See *infra* Part II. This Part discusses the general history of blogging. *Id.* This Part also explains and examines judicial and legislative employment law. *Id.*

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employee blogger's speech.¹⁵ Third, this Note proposes a model comprehensive lifestyle discrimination statute to protect at-will employee bloggers in an effort to further the public policies behind lifestyle discrimination statutes.¹⁶

II. BACKGROUND

With each new headline reporting another story of a dooced employee, mounting tension continues to fester between employers and employees, each seeking answers about legal rights.¹⁷ Likewise, courts are searching for answers to the novel legal questions blogs present to employment law jurisprudence.¹⁸ Despite the legal issues blogs raise, the popularity of blogging has not decreased.¹⁹ The roots of the legal issues surrounding the blogging culture begin with the history of the laws in conflict.²⁰

First, this Part explains the general history of blogging, sets out the generally applicable legal principles related to blogging, and explains how blogging has made its way into employment relationships.²¹ Second, this Part discusses blogging in the context of judicially created employment law, particularly, the employment-at-will doctrine.²² Finally, this Part discusses blogging in the context of legislatively created employment laws, specifically lifestyle discrimination statutes.²³

¹⁵ See *infra* Part III. This Part explains why at-will employee bloggers' speech should be protected, and why the legislature is the best place for protection. *Id.* Additionally, this Part analyzes the various shortcomings of the employment-at-will public policy exceptions and the loopholes in the current lifestyle discrimination statutes as applied to bloggers. *Id.*

¹⁶ See *infra* Part IV. The author proposes a model comprehensive lifestyle discrimination statute that would protect at-will employee bloggers' lawful off-duty blogging activities and the speech that necessarily accompanies blogging. *Id.*

¹⁷ See Paul S. Gutman, Note, *Say What?: Blogging and Employment Law in Conflict*, 27 COLUM. J.L. & ARTS 145, 147 (2003).

¹⁸ Henry Hoang Pham, *Bloggers and the Workplace: The Search for a Legal Solution to the Conflict Between Employee Blogging and Employers*, 26 LOY. L.A. ENT. L. REV. 207, 210 (2006).

¹⁹ See Elizabeth R. Rita & Eric D. Gunning, *Navigating the Blogosphere in the Workplace*, COLO. LAW., May 2006, at 55 (attributing the growth of blogging partly to the creation of user-friendly software that makes the setup and maintenance of blogs simple for even below-average computer users); Gutman, *supra* note 17, at 146-47 (identifying several user-friendly, web-based blog software options). The software enables users to set up a blog in less than five minutes. Gutman, *supra* note 17, at 146-47. "Because these applications are available from any computer with World Wide Web access, one does not have to own a computer to speak online. Only access is needed." *Id.*

²⁰ See *infra* Part II.A.1 (detailing the history of blogging).

²¹ See *infra* Part II.A (discussing the blogging and its emergence within the law).

²² See *infra* Part II.B (examining blogging and the employment-at-will doctrine).

²³ See *infra* Part II.C (explaining the current types of lifestyle discrimination statutes).

A. *The Emergence of Blogs: From the World Wide Web to a Web of Legal Issues*

Bloggging is a relatively new phenomenon that has found popularity among a wide variety of age groups and professions.²⁴ Recently, bloggging has also emerged in employment law, where it is creating a host of new legal controversies.²⁵ This Section offers a history of bloggging and its emergence in the law.²⁶ This Section also gives a brief overview of general legal principles applicable to bloggging.²⁷ Finally, this Section explains how bloggging has appeared in the employment relationship.²⁸

1. History of Bloggging

Historically, internet users created weblogs as a way to help other internet users bypass traditional search engines, cut down on search time, and provide commentary about useful websites in one convenient place.²⁹ The function of a weblog, now commonly referred to as a blog, has changed significantly in recent years into a pop culture phenomenon used for computer-mediated communications that enable online socializing.³⁰ Blogs now host a wide assortment of information ranging

²⁴ See *supra* note 19 (discussing the how the growth of bloggging has been propounded by recent technological developments).

²⁵ See *infra* Part II.A.2 (discussing a general overview of bloggging and its place in the law).

²⁶ See *infra* Part II.A.1.

²⁷ See *infra* Part II.A.2.

²⁸ See *infra* Part II.A.3.

²⁹ Gutman, *supra* note 17, at 145. Gutman explains that the need for expediting the search process stemmed from the days when high-speed internet access was rare and most dial-up internet connections charged an hourly fee. *Id.* See generally Rebecca Blood, *Weblogs: A History and Perspective*, REBECCA'S POCKET, Sept. 7, 2000, http://www.rebecca.blood.net/essays/weblog_history.html (last visited Sept. 7, 2007) (discussing the origin of the term "weblog" and its beginning use as a filtering system in which the web has been "pre-surfed" in order to direct users to particularly useful websites); Wikipedia, Blog, <http://en.wikipedia.org/wiki/Blog> (last visited Sept. 7, 2007) (reporting the chronological history of bloggging beginning in 1994 through the present).

³⁰ SUSAN C. HERRING ET AL., CONVERSATIONS IN THE BLOGOSPHERE: AN ANALYSIS "FROM THE BOTTOM UP" 1 (2005), available at <http://www.blogninja.com/hicss05.blogconv.pdf>. Other common computer-mediated communications that promote online socializing include email and instant messaging. *Id.* at 1 n.1. See also AMANDA LENHART & SUSANNAH FOX, BLOGGERS: A PORTRAIT OF THE INTERNET'S NEW STORYTELLERS 6 (2006), available at <http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf>. Blogggers regularly use technology as a way of socializing. LENHART & FOX, *supra*. Research identifies blogggers as:

among the most enthusiastic communicators of the modern age, taking advantage of nearly every opportunity to communicate. Seventy-eight

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from daily life experiences, politics, and government, to sports and entertainment, making an exact definition debatable and incomplete.³¹ Moreover, blog popularity and growth has led to the development of commonplace online blog language and definitions.³² With thousands of

percent of bloggers say they send or receive instant messages. By comparison, 38% of all internet users send and receive instant messages. Again, bloggers outstrip their high-speed counterparts (40% of home broadband users IM) and even internet users between 18 and 29 years old (54% of whom IM). Fifty-five percent of bloggers say they send or receive text messages using a cell phone, compared with 40% of home broadband users and 60% of younger internet users.

Id. Contra Rafael Gely & Leonard Bierman, *Workplace Blogs and Workers' Privacy*, 66 LA. L. REV. 1079, 1081 (2006) (asserting that September 11, 2001, and the Iraq war have changed blogs from "blurts about the writer's day" into a new form of communication). "[D]uring the crisis, the market for serious news commentary soared. . . . [P]eople were not just hungry for news, . . . [people] were hungry for communication, for checking their gut against someone they had come to know, for emotional support and psychological bonding." *Id.* at 1081-82.

³¹ David L. Hudson, Jr., *Blogs and the First Amendment*, 11 NEXUS 129, 129 (2006); LENHART & FOX, *supra* note 30, at 1.

The Pew Internet Project blogger survey finds that the American blogosphere is dominated by those who use their blogs as personal journals. Most bloggers do not think of what they do as journalism.

Most bloggers say they cover a lot of different topics, but when asked to choose one main topic, 37% of bloggers cite "my life and experiences" as a primary topic of their blog. Politics and government ran a very distant second with 11% of bloggers citing those issues of public life as the main subject of their blog.

Entertainment-related topics were the next most popular blog-type, with 7% of bloggers, followed by sports (6%), general news and current events (5%), business (5%), technology (4%), religion, spirituality or faith (2%), a specific hobby or a health problem or illness (each comprising 1% of bloggers). Other topics mentioned include opinions, volunteering, education, photography, causes and passions, and organizations.

LENHART & FOX, *supra* note 30, at ii; cf. Merriam-Webster Online, Blog, <http://www.webster.com/dictionary/blog> (last visited Sept. 7, 2007) (defining a blog as "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer"). But see HERRING ET AL., *supra* note 30, at 1 (pointing out that some authors are of the opinion that a blog must be linked to other blogs in order to be defined as a blog).

³² See Merriam-Webster Online, Merriam-Webster Announces 2004 Words, <http://www.m-w.com/info/pr/2004-words-of-year.htm> (last visited Aug. 7, 2007) (announcing "blog" as the 2004 word of the year based on online lookups). Some blogging websites provide links to dictionary-like compilations that define blogging terms to keep bloggers informed of current blogging vocabulary. See, e.g., Pointblog.com, *What's A Blog?*, in HANDBOOK FOR BLOGGERS AND CYBER-DISSIDENTS 7-8 (2005), http://www.rsrf.org/IMG/pdf/Bloggers_Handbook2.pdf. Examples of commonly used blogging terms include:

BLOG

blogs created daily, and millions of others maintained, questions about what legal issues blogs present inevitably have followed as blogging makes its way from the World Wide Web to the courthouse.³³ Such courthouse folly raises many legal issues, including First Amendment speech protections.³⁴

2. General Overview of Blogging and the Law

The United States Supreme Court's First Amendment jurisprudence is definite in its protection of anonymous speech as well as its extension to anonymous internet speech.³⁵ First Amendment speech protection is

Short for Weblog. A website that contains written material, links or photos being posted all the time, usually by one individual, on a personal basis.

(TO) BLOG

Run a blog or post material on one.

BLOGGER

Person who runs a blog.

BLOGOSPHERE

All blogs, or the blogging community.

BLOGROLL

List of external links appearing on a blog, often links to other blogs and usually in a column on the homepage. Often amounts to a "sub-community" of bloggers who are friends.

BLOGWARE

Software used to run a blog.

Id.

³³ See William H. Floyd III & James T. Hedgepath, *The Electronic Workplace*, S.C. LAW., May 2006, at 38; Jennifer L. Peterson, *The Shifting Legal Landscape of Blogging*, WIS. LAW., Mar. 2006, at 8; Rita & Gunning, *supra* note 19, at 55.

³⁴ See *infra* Part II.A.2 (discussing blogging and some applicable general legal principles). The First Amendment's freedom of speech clause proscribes the government from interfering with this right, declaring that "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. Employees find it surprising that the First Amendment only limits government action, and fails to protect employees working in the private sector or to restrict private employers' behavior. For a discussion of First Amendment rights and the non-applicability to private sector employees, see Patrick D. Robben, *Protecting the Anonymity of Bloggers and Blog Sources: Evolving Case Law Applies Old Principles to New Technology*, 10 J. INTERNET LAW NO. 4, 1 (2006).

³⁵ *McIntyre v. Oh. Elections Comm'n*, 514 U.S. 334, 342 (1995) (referring to the interest in advancing of the marketplace of ideas as outweighing the public's interest of identity disclosure). In *McIntyre*, the Supreme Court invalidated a portion of the Ohio Code, which prohibited the distribution of campaign literature without the name and address of the individual distributing the literature. *Id.* at 357. "Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of freedom of speech protected by the First Amendment." *Id.* at 342. The Court identified one of the purposes of anonymous speech as avoiding fear of official or economic retaliation and bias. *Id.* The Court analogized this purpose with the practice of grading law school exams "blindly" in that the law professor does not know the identity of the writer while grading the paper. *Id.* at n.5.

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not triggered, however, for certain low value speech categories such as obscenity,³⁶ fighting words,³⁷ and defamation.³⁸ While the First Amendment protects freedom of speech, anonymous speech, and internet speech, there has yet to be a decision as to whether bloggers' online speech is protected within any of the aforementioned categories.³⁹

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct.

Id. at 357; *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 200 (1999) (invalidating a Colorado law that required initiative-petition circulators to wear an identification badge stating their names). The Supreme Court in *Buckley* relied on *McIntyre* in invalidating the law on First Amendment grounds. *Buckley*, 525 U.S. at 199. *See also*, *Reno v. ACLU*, 521 U.S. 844, 870 (1997). The Supreme Court recognized the Internet as “a unique medium—known to its users as ‘cyberspace’—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.” *Id.* at 851. “Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.” *Id.* at 870; *Doe v. 2TheMart.Com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (noting that “Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas”); *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) (“Anonymous internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering.”).

³⁶ *Roth v. United States*, 354 U.S. 476 (1957); *see also* *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, the Court enumerated an obscenity test that is still used today. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 985 (2d ed. 2002).

The Court said that “the basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.”

Id.

³⁷ *Chaplinski v. New Hampshire*, 315 U.S. 568 (1942). The Court defined fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.* at 572. The *Chaplinski* Court held that fighting words include calling someone a “damn Fascist.” *Id.* at 574. “The Supreme Court never has overturned *Chaplinski*; fighting words remain a category of speech unprotected by the First Amendment. But in more than half a century since *Chaplinski*, the Court has never again upheld a fighting words conviction.” CHERMERINSKY, *supra* note 36, at 968.

³⁸ *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964) (holding public officials must show by clear and convincing evidence the falsity of the defamatory statement, and actual malice to recover in a defamation case).

³⁹ Julie China, *Blogger's Anonymous*, FED. LAW., Mar. 2006, at 6.

When the anonymity protections of the First Amendment are invoked in a tort action, the issues must be resolved by balancing the benefits of secrecy versus the need for disclosure.⁴⁰ For bloggers, the anonymity protections of the First Amendment are most likely to be invoked by those that blog using a screen name or other pseudonym.⁴¹ A clash exists between the anonymous speech that the First Amendment protects and the necessity of disclosure in defamation suits.⁴²

The tort of defamation requires, at minimum, a false and defamatory statement concerning another, an unprivileged publication to a third party, fault amounting at least to negligence on the part of the publisher, and either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.⁴³ Recently, courts have seen a rise in the number of defamation suits filed by plaintiffs who claim defamation perpetrated by an anonymous online speaker.⁴⁴

The law is currently unsettled as to when and under what circumstances courts will compel disclosure of a blogger's identity in a defamation proceeding.⁴⁵ Courts must exercise discretion and caution when identifying anonymous speakers because of the growing threat to First Amendment freedom of anonymous speech.⁴⁶ Essentially, courts must determine the scope of a blogger's First Amendment right to anonymous online speech, and what a plaintiff must show to discover an

⁴⁰ CHEMERINSKY, *supra* note 36, at 941.

⁴¹ Peterson, *supra* note 33, at 8, 11.

⁴² China, *supra* note 39, at 6.

⁴³ RESTATEMENT (SECOND) OF TORTS § 558 (1977). Generally, "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* § 559. While the Restatement (Second) of Torts provides an initial analysis of defamation law, the boundaries of defamation "have been constrained by a speaker's free speech rights under the First Amendment." Jennifer O'Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamations Cases*, 70 FORDHAM L. REV. 2745, 2751 (2002).

⁴⁴ O'Brien, *supra* note 43, at 2746.

⁴⁵ See *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, No. 0425 Mar. Term 2004, 2006 WL 37020, at *4 (Pa. Com. Pl. Jan. 4, 2006) ("Faced with the problems and benefits of Internet, courts have arrived at differing standards for determining whether to allow disclosure of an anonymous internet user's identity when the user is sued for making defamatory statements over the Internet.").

⁴⁶ Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795, 801 (2004). Mr. Vogel warns that although "well intentioned, the rush to apply new standards should be slowed." *Id.*

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anonymous blogger's identity.⁴⁷ In balancing the competing interests, the anonymous blogger has a First Amendment right to speak anonymously and the plaintiff has the right to protect proprietary interests and reputation through the pursuit of the available causes of action based on the conduct of the anonymous blogger.⁴⁸ Leaving

⁴⁷ Doe v. 2TheMart.Com Inc., 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001). In *2TheMart.Com Inc.*, the court articulated a balancing test for determining when, through a civil subpoena, the identity of an anonymous Internet user who is not a party to the underlying litigation would be disclosed. *Id.* at 1095. The test is:

whether: (1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

Id.

⁴⁸ Dendrite Int'l, Inc. v. Doe No.3, 775 A.2d 756, 760 (N.J. 2001). The New Jersey Supreme Court set forth its state's standard for when granting an order compelling an Internet Service Provider to disclose the identity of an anonymous Internet poster who is sued for allegedly violating the rights of an individual, corporation or business. *Id.* The New Jersey Supreme Court outlined a balancing test in which

the trial court should first require the plaintiff to undertake efforts 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.

The court shall also require the plaintiff to identify and set for the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted . . . the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.

Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must 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.

Id. at 760-61. See also Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005) (adopting a standard to apply when a public figure plaintiff seeks to identify an anonymous defendant). The Delaware Supreme Court adopted a standard "that appropriately balances one person's right to speak anonymously against another person's right to protect his reputation." *Id.* The Delaware Supreme Court held that a plaintiff bringing a defamation suit against an

behind defamation, an alternative tort theory that is available is invasion of privacy.⁴⁹

Invasion of privacy is a cause of action in which bloggers could find themselves as either a plaintiff or defendant.⁵⁰ Invasion of privacy consists of four different theories: intrusion upon seclusion, publicizing private facts, false light, and appropriation of name or likeness.⁵¹ There is a trend in employment law to bring wrongful termination suits under a common law invasion of privacy theory as employees have become increasingly sensitive about keeping their employers out of their private lives.⁵² While common law invasion of privacy can signal a cause of action on its own, in the employment relationship, it can also be used in conjunction with a wrongful termination suit as an argument for an extension of a public policy exception to the employment-at-will doctrine.⁵³ Blogging employees, especially those working under an employment-at-will presumption, are finding out that tortious wrongful termination suits are often misplaced under the current employment law jurisprudence.⁵⁴

3. Blogging and the Employment Relationship

Constitutional and tort law conflicts are just some of the many legal issues that blogs present in employment law, affecting both employers and employees alike.⁵⁵ Nevertheless, the popularity of blogging continues to grow.⁵⁶ Employees maintain blogs about many different

anonymous blogger must meet a summary judgment standard before the courts would order disclosure of the anonymous defendant's identity. *Id.* at 457.

⁴⁹ See *infra* notes 50-53 and accompanying text (discussing the invasion of privacy claims that a blogger may have brought against him or that he may bring).

⁵⁰ See Electronic Frontier Foundation, Bloggers' FAQ—Privacy, <http://www.eff.org/bloggers/lg/faq-privacy.php> (last visited Aug. 9, 2007) (answering questions about invasion of privacy liability).

⁵¹ RESTATEMENT (SECOND) OF TORTS § 652A (1977).

⁵² MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 480 (3rd ed. 2004).

⁵³ See *infra* Part II.B (discussing the public policy exceptions to the employment-at-will doctrine).

⁵⁴ See *infra* Part II.A.3 (discussing a general overview of blogging and the employment relationship).

⁵⁵ See *supra* notes 35-48 and accompanying text (identifying the several legal issues applicable to blogging).

⁵⁶ See *supra* note 19 and accompanying text (describing the growth of blogging). Employers are increasingly becoming aware of the potential issues employees' blogs raise because of bloggers' ability to "post content that disparages the company, defames the company's image, calls into question the company's financial performance, harasses other employees, or leaks the company's proprietary information." Rita & Gunning, *supra* note 19, at 56.

subjects, some of which are specifically geared toward other employees in the same industry or profession.⁵⁷ Some employers have corporate blogs with corresponding corporate blogging policies, which encourage employee blogging if done in compliance with the aforementioned corporate blogging policies.⁵⁸ A number of employee blogs that describe

⁵⁷ Gely & Bierman, *supra* note 30, at 1086. Employee blogs that are geared specifically toward a particular industry often solicit feedback from fellow employees or are informational to keep co-workers up to date on “issues of collective concern.” *Id.* Other employee bloggers seek to discuss the various aspects of their jobs with others in the same industry. *Id.* “Bloggers of this type can be found in a variety of professions such as law, accounting, and medicine, as well as in other industries such as the construction industry.” *Id.*

⁵⁸ See, e.g., Sun Microsystems, Sun News—Sun Blogs, <http://www.sun.com/aboutsun/media/blogs/policy.html> (last visited Aug. 9, 2007) (outlining advice for employee blogs and encouraging employees to blog about their work, provided that the employee follows “the advice in this note”); Sun Microsystems, Sun’s Blogging Guidelines, <http://www.sun.com/aboutsun/media/blogs/BloggingGuidelines.pdf> (last visited Aug. 9, 2007) (summarizing the company’s general guidelines for employee blogs). Sun Microsystems’ advice centers on being careful and responsible; however, the company clearly states, “violation of any applicable company policy may result in disciplinary action up to and including termination of employment.” Sun Microsystems, Sun’s Blogging Guidelines, *supra*.

Posting the wrong thing on your blog could:

- Lose Sun its right to export technology outside the U.S.
- Get Sun and you in legal trouble with U.S. and other government agencies.
- Lose Sun its trademark on key terms like Java and Solaris.
- Cost us the ability to get patents.
- Cost you your job at Sun.

Id. The most important rules for Sun employees to follow when blogging include:

1. Do not disclose or speculate on non-public financial or operation information. The legal consequences could be swift and severe for you and Sun.
2. Do not disclose non-public technical information (for example, code) without approval. Sun could instantly lose its right to export its products and technologies to most of the world or to protect its intellectual property.
3. Do not disclose personal information about other individuals.
4. Do not disclose confidential information, Sun’s or anyone else’s.
5. Do not discuss work-related legal proceedings or controversies, including communications with Sun attorneys.
6. Always refer to Sun’s trademarked names properly. For example, never use a trademark as a noun, since this could result in a loss of our trademark rights.
7. Do not post others’ material, for example photographs, articles, or music, without ensuring they’ve granted appropriate permission to do this.

Follow Sun’s Standards of Business Conduct and uphold Sun’s reputation for integrity. In particular, ensure that your comments about companies and products are truthful, accurate, and fair and can

be substantiated, and avoid disparaging comments about individuals. *Id.* Yahoo advises its employees of the legal ramifications of their blogs, and has instituted best practices guidelines for employees to follow if they blog. Yahoo! Personal Blog Guidelines: 1.0, <http://jermey.zawodny.com/yahoo/yahoo-blog-guidelines.pdf> (last visited Aug. 9, 2007). Yahoo's best practices guidelines are not rules, and therefore cannot be broken, but should voluntarily be followed.

Id. at 2. There are four best practices guidelines, including:

Be Respectful of Your Colleagues

1. Be thoughtful and accurate in your posts, and be respectful of how other Yahoos may be affected. All Yahoo! employees can be viewed (correctly or incorrectly) as representative of the company, which can add significance to your public reflections on the organization (whether you intend to or not). Yahoos who identify themselves as Yahoo! employees in their blogs and comment on the company at any time, should notify their manager of the existence of their blog just to avoid any surprises. To be clear, you are not being asked to alert your manager of your posts, just to consider letting them know you have a blog where you may write about Yahoo!. Whether your manager chooses to occasionally read your blog or not, the courtesy head's up is always appreciated.

Get Your Facts Straight

2. As a Yahoo! employee with intranet access, you have the opportunity to contact the Yahoos who are responsible for the products, services, or other initiatives that you may want to write about. To ensure you are not misrepresenting your fellow Yahoos or their work, consider reaching out to a member of the relevant team before posting. This courtesy will help you provide your readers with accurate insights, especially when you are blogging outside your area of expertise. If there is someone at Yahoo! who knows more about the topic than you, check with them to make sure you have your facts straight.

Provide Context to Your Argument

3. Please be sure to provide enough support in your posting to help Yahoos understand your reasoning, be it positive or negative. We appreciate the value of multiple perspectives, so help us to understand yours by providing context to your opinion. Whether you are posting in praise or criticism of Yahoo!, you are encouraged to develop a thoughtful argument that extends well beyond "(insert) is cool" or "(insert) sucks."

Engage in Private Feedback:

4. Not everyone who is reading your blog will feel comfortable approaching you if they are concerned their feedback will become public. In order to maintain an open dialogue that everyone can comfortably engage in, Yahoo! bloggers are asked to welcome "off-blog" feedback from their colleagues who would like to privately respond, make suggestions, or report errors without having their comments appear your blog. Bloggers want to know what you think. If you have an opinion, correction or criticism regarding a posting, reach out for the blogger directly. Whether privately or on their blog, let the blogger know your thoughts.

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aspects of an employee's personal life and work life, have received extensive media attention after the blog caught the attention of the blogger's employer, and ended in termination.⁵⁹ Unfortunately, it is usually only after an employee is fired that the employee learns of the employment relationship's legal considerations.⁶⁰ Furthermore, while employers and employees alike have legal rights, remedies, and responsibilities within the employment relationship, the employment-at-will doctrine usually trumps many of the *employee's* rights.⁶¹

B. *Blogs and the Application of Judicial Employment Law: Employment-at-Will*

*[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employe[e]s 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[e] may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.*⁶²

Id. at 2-3. See also Floyd III & Hedgepath, *supra* note 33, at 38 (discussing the popularity of corporate and workplace blogs in major corporations, including IBM); Peterson, *supra* note 33, at 10 (discussing the rational behind corporate blogging including marketing new ideas and products); Ebanks et al., *supra* note 7.

Commentators are already calling 2005 "The Year of the Corporate Blog," as a number of the nation's leading companies – including GM, Boeing, Microsoft and Sun Microsystems – have leapt into the fray, publishing official corporate blogs or quasi-official blogs authored by corporate insiders. These corporate blogs can permit global communication at minimal cost, raise a company's profile, help roll out a new product or redefine a brand's image.

Ebanks et al., *supra* note 7.

⁵⁹ Hudson, *supra* note 31, at 133-34; see *supra* notes 2-6 and accompanying text (detailing the stories of dooced employees).

⁶⁰ Gely & Bierman, *supra* note 30, at 1103; see also Peterson, *supra* note 33, at 8,10 (warning that "bloggers should be – but almost universally are not – familiar with basic legal issues inescapable in a medium in which every thought can be read by an Internet audience of untold millions"); Armour, *supra* note 6, at B1 (reporting on several employees' stories of termination because of the content of their blogs, many of which claimed to have had no warning). See generally Electronic Frontier Foundation, Bloggers' FAQ: Labor Law, <http://www.eff.org/bloggers/lg/faq-labor.php> (last visited Sept. 7, 2007) (discussing legal issues arising from employees' blogs).

⁶¹ See *infra* Part II.B (examining blogging and the employment-at-will doctrine).

⁶² *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507 (1884), *rev'd on other grounds*, *Hutton v. Waters*, 179 S.W. 134 (Tenn. 1915).

Employment law in the United States is founded on the employment-at-will doctrine.⁶³ The employment-at-will doctrine is a departure from the English common law regarding the agricultural master and servant relationships.⁶⁴ Originally, the employment-at-will doctrine was a legal *presumption* that governed employer and employee relations, and provided that the employment relationship was terminable by either party without penalty.⁶⁵ Today, the employment-at-will doctrine is largely a legal *rule*, “not subject to rebuttal except in extraordinary circumstances.”⁶⁶ Nearly every state follows the

⁶³ ALFRED G. FELIU, PRIMER ON INDIVIDUAL EMPLOYEE RIGHTS 1 (2d ed. 1996). In the 1880’s the employment-at-will doctrine began to permeate American law. *Id.*

[I]n 1877, Horace Gay Wood, a respected attorney from Albany, New York, published a treatise entitled [sic] *Master and Servant*, which authoritatively announced that in the United States “the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof.” Although Wood’s analysis has subsequently been fully discredited, the rule he announced was uniformly followed by the U.S. courts.

Id. at 3. Over the years, the employment-at-will doctrine grew and developed into a body of law that governed employer and employee relations. *Id.* at 1. Since the 1970’s the employment-at-will doctrine has remained unfettered, consistent, and largely unchanged. *Id.* See generally RESTATEMENT (SECOND) OF AGENCY § 442 (1958). The American Law Institute defines employment-at-will or period of employment as the following:

Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events.

Id.

⁶⁴ ANDREW D. HILL, “WRONGFUL DISCHARGE” AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 1 (1987); see also FELIU, *supra* note 63, at 1. In England when a servant was hired, the presumption was for a one-year term. Felu, *supra* note 63, at 2. The one year term presumption worked well in an agricultural society because “masters were assured of labor during the planting and harvesting seasons, while servants were secure in the knowledge that they would be cared for during the harsh winter months.” *Id.* The need for the employment-at-will doctrine grew out of the industrialization in America and “provided American industry with a steady and flexible workforce that helped propel the economic growth of a rapidly industrializing nation.” *Id.* at 3.

⁶⁵ FELIU, *supra* note 63, at 1. As a legal presumption, the employment-at-will doctrine could be rebutted by the particular facts and circumstances of the case. *Id.* See also Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 677 (1996) (“Just as the employee is free to quite her job for any reason at all, the employer may discharge an employee ‘for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong.’”).

⁶⁶ FELIU, *supra* note 63, at 1. The shift from a legal presumption to a legal rule changed the dynamics of challenging wrongful discharge claims. *Id.*; see also Kim, *supra* note 65, at 677. Ms. Kim points out that although the employment-at-will doctrine is a presumption of which the parties are always free to contract to the contrary, today, the presumption has the weight of a legal rule. *Id.* at 677.

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employment-at-will doctrine.⁶⁷ Courts have created exceptions in specific circumstances to deviate from the general rules of the employment-at-will doctrine.⁶⁸ These exceptions generally fall into two categories, those based in contract and those based in public policy, each of which are discussed in turn in this Section.⁶⁹

1. Exceptions Based in Contract

The good faith and fair dealing exception is the least recognized exception to the employment-at-will doctrine because of a grounded adherence to the right of freedom of contract.⁷⁰ The good faith and fair dealing exception is an outgrowth of implied contract law.⁷¹ Jurisdictions that recognize the good faith and fair dealing exception have generally done so by interpreting employee handbooks as an implied contractual obligation.⁷² Employers may overcome the

⁶⁷ Montana and the District of Columbia do not adhere to the employment-at-will doctrine. See MONT. CODE ANN. § 39-2-904 (2005) (“A discharge is wrongful only if . . . the discharge was not for good cause . . .”).

⁶⁸ Kim, *supra* note 65, at 678 (noting that the exceptions to the employment-at-will doctrine may seem numerous, but “they are generally narrow in scope and quite specifically defined”).

⁶⁹ See *infra* Parts II.B.1-2 (explaining both contractual and public policy exceptions to the employment-at-will doctrine).

⁷⁰ Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment-At-Will Doctrine: Its's Inconsistencies in Application*, 68 TUL. L. REV. 1583, 1591 (1994).

⁷¹ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” *Id.*

a. *Express and implied contracts.* Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.

...

b. *Quasi-contracts.* Implied contracts are different from quasi-contracts, although in some cases the line between the two is indistinct. . . . Quasi-contracts have often been called implied contracts or contracts implied in law; but, unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice.

Id. at § 4.

⁷² See ROTHSTEIN ET AL., *supra* note 52, at 749-50. The “handbook exception” to the employment-at-will rule was generally not recognized before the 1980’s. *Id.* A majority of state courts have decided that under the right circumstances employee handbooks can create an implied contract. *Id.* at 750.

argument that an employee handbook creates an implied contract by using a disclaimer in the handbook that specifically negates any possibility that the handbook creates promises.⁷³ Employee handbooks, however, are not the only means by which courts identify implied contractual obligations.⁷⁴

Courts have also found oral assurances to be the basis of an implied contract for which the good faith and fair dealing exception applies.⁷⁵ The use of an implied contractual exception is extremely limited, and courts generally only allow its use in cases where an employee is unjustly discharged after many years of service, or if the discharge is an attempt to avoid paying an employee's wages or other benefits.⁷⁶ The limited applicability of this exception to the employment-at-will doctrine lessens the likelihood that bloggers could successfully bring a wrongful discharge claim using it.⁷⁷ Supplementary to the implied contract safeguards, the flexibility of the public policy exceptions to the employment-at-will doctrine afford protection in many areas that contract based exceptions do not.⁷⁸

⁷³ Kim, *supra* note 64, at 680; *see, e.g.*, Robinson v. Christopher Greater Area Rural Health Planning Corp., 566 N.E.2d 768, 772 (Ill. App. Ct. 1991); Federal Express Corp. v. Deutschmann, 846 S.W.2d 282, 283 (Tex. 1993).

Generally, courts require a disclaimer to be clear and unequivocal, conspicuously placed, and communicated to or acknowledged by the employee. Employers that require employees to sign an acknowledgement of the disclaimer usually have success defending against claims based on their handbooks, assuming the disclaimer language is clear and they do not make representations inconsistent with at-will status. Some of the most effective disclaimers have been contained in the employment application form, which applicants must sign, and not in an employee handbook. Similarly, courts generally accept disclaimers printed in large type of placed at the beginning of the handbook.

ROTHSTEIN ET AL., *supra* note 52, at 753.

⁷⁴ *See infra* notes 75-77 and accompanying text (discussing oral assurances as a basis of implied employment contract formation).

⁷⁵ Kim, *supra* note 65, at 678.

⁷⁶ Pennington, *supra* note 70, at 1593.

⁷⁷ Gutman, *supra* note 17, at 160. "One major caveat is inherent to this particular exception: any blogger claiming a violation of an implied contract must be certain to have clean hands." *Id.* Mr. Gutman, in analyzing this exception to the employment-at-will doctrine, predicts that "[i]t is fairly clear that as a blogger, an employee cannot successfully claim this exception." *Id.*

⁷⁸ *See infra* Part II.B.2 (discussing the various judicially created public policy exceptions to the employment-at-will doctrine).

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2. Public Policy Exceptions

A variety of public policy exceptions to the employment-at-will doctrine exist.⁷⁹ Generally, courts have granted public policy exceptions to the employment-at-will doctrine for employees discharged for refusing to participate in fraudulent practices such as, fraudulent submission of false documentation or claims, or participation in other unlawful criminal acts.⁸⁰ One of the first decisions establishing the public policy exception to the employment-at-will doctrine dealt with the wrongful termination of an employee who was fired for refusing to give false testimony at a legislative hearing.⁸¹

Contrary to an employee engaging in criminal conduct, courts initially grappled to come to a consensus for a public policy exception when an employee was discharged for performing a statutory or constitutional duty.⁸² Initially, some courts refrained from legislating from the bench in creating such an exception, absent statutory authority or legislative history that would support such an exception.⁸³ Employees

⁷⁹ Pennington, *supra* note 70, at 1596. Employees have also sued for wrongful discharge for refusing to engage in fraudulent bookkeeping or recordkeeping. *Id.*

⁸⁰ See Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employees Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355, 375 (2007) (noting that only five states have not permitted a public policy exception to the employment-at-will doctrine for employees who refuse to violate the law on behalf of their employers).

⁸¹ *Petermann v. Int'l Bhd. Of Teamsters*, 344 P.2d 25, 26 (Cal. Dist. Ct. App. 1959). In *Petermann*, the plaintiff was fired after he refused to commit perjury on behalf of his employer. *Id.* The court held:

to hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both employee and employer and would serve to contaminate the honest administration of public affairs. This is patently contrary to the public welfare.

Id. at 27.

⁸² Pennington, *supra* note 70, at 1602. Mr. Pennington points out that when courts were first faced with the issue of an employee being discharged for serving on a jury there were no statutes explicitly prohibiting such dismissals. *Id.*

The response taken by different courts, faced with the same issue, illustrates how judicial exception to the employment-at-will doctrine have created unequal rights for employees and confusion in the law. While some courts are willing to find employer liability when state statutes are silent regarding activity allegedly causing dismissal, other courts decline to utilize the public policy exception and dismiss wrongful discharge actions not identifying a clear legislative pronouncement of the public interest.

Id.

⁸³ *Id.* at 1603. In *Mallard v. Boring*, the California Court of Appeals refused to acknowledge a public policy exception to the employment-at-will doctrine for an employee

who are fired for performing the civic service of jury duty best illustrate a situation in which the public policy exception for performing a statutory duty is applied.⁸⁴ Courts now universally recognize a public policy exception for employees who have been terminated or sanctioned for taking time off work for jury duty, whether through a judicially created right or legislation that mandates such a result.⁸⁵

Turning to the issue of employer misconduct, as opposed to employee conduct, employees who report or expose their employer's illegal conduct are known as whistleblowers.⁸⁶ Courts and legislatures alike recognize a public interest in exposing illegal or unethical business practices.⁸⁷ A public policy exception to the employment-at-will doctrine for whistleblowing attempts to strike a balance between the public's interest in having employers follow the statutory law and the employer's

that had been discharged for taking time off work to serve on a jury. 6 Cal. Rptr. 171, 173 (Cal. Ct. App. 1960).

Although we may feel that this would be good public policy, to so hold would establish a rule which would apply in all instances where persons are discharged from their employment because they have made themselves available for jury service, regardless of the circumstances. If public policy requires that this protection should be afforded prospective jurors, we feel it should be done by the Legislature as they have done in the case of election officials.

Id. at 175.

⁸⁴ Pennington, *supra* note 70, at 1602. Other recognized statutory or constitutional duties include obeying a subpoena, testifying in a legal proceeding, and reporting abuse of children, the elderly, patients, and institutionalized individuals. Rothstein, *supra* note 52, at 784.

⁸⁵ See, e.g., *Call v. Scott Brass, Inc.*, 553 N.E.2d 1225 (Ind. Ct. App. 1990); *Makovi v. Sherwin-Williams Co.*, 561 A.2d 179 (Md. 1989); see also 28 U.S.C. § 1875 (2000) (providing federal protection of jurors' employment serving on federal juries). "No employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States." § 1875(a).

⁸⁶ Venessa F. Kunmann-Marco, Note, *Blowing the Whistle on the Employment At-Will Doctrine*, 41 *DRAKE L. REV.* 339 (1992); see also *Winters v. Houston Chronicle Publ'g Co.*, 795 S.W.2d 723, 727 (Tex. 1990) (explaining justification for whistleblower exception). The term whistleblower:

derived from the act of an English bobby blowing his whistle upon becoming aware of the commission of a crime to alert other law enforcement officers and the public within the zone of danger. . . . Like this corner law enforcement official, the whistleblower sounds the alarm when wrongdoing occurs on his or her "beat," which is usually within a large organization.

Winters, 795 S.W.2d at 727 (citations omitted).

⁸⁷ See Gutman, *supra* note 17, at 161.

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interest in control.⁸⁸ Thus, many states and the federal government have enacted legislation to protect whistleblowers who report their employers.⁸⁹

Several state and federal statutes, in addition to the whistleblower protections, specifically prohibit firing an employee for exercising existing state or federally granted constitutional or statutory rights.⁹⁰ This public policy exception applies most often in cases where an employee was fired for filing a workers compensation claim, which is a state created statutory right.⁹¹ Employees looking to federal or state constitutionally created rights are generally unsuccessful in asserting claims, unless government action is involved.⁹²

Notwithstanding the fact that one of the most fundamental constitutionally created rights is the First Amendment's freedom of speech protection, few courts have found a public policy exception in cases against private employers based on this constitutional provision, choosing instead to adhere to the general principle that the First Amendment protections are only applicable to government actions.⁹³

⁸⁸ Julie Jones, Comment, *Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-at-Will Doctrine*, 34 TEX. TECH. L. REV. 1133, 1148 (2003); see also Kunmann-Marco, *supra* note 86, at 347.

⁸⁹ Jones, *supra* note 88, at 1148 (2003). Almost all states and the federal government recognize the whistleblower exception, but the extent to which it is applied varies greatly. *Id.* One state, Virginia, does not recognize a whistleblower exception to the employment-at-will doctrine. *Id.* See also Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000) (discussing the various federal statutory provisions protecting whistleblowers as well as the vast differences among state statutory protections for whistleblowing).

⁹⁰ Kim, *supra* note 65, at 678. Other federal laws prohibit employers from dismissing employees for asserting certain statutory rights. See, e.g., National Labor Relations Act, 29 U.S.C. § 158 (2000) (stating that discrimination against or discharge of employee for exercising rights under the NLRA is an "unfair labor practice"); Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2000) (stating that it is unlawful to discharge an employee for filing a complaint under the FLSA); Occupational Safety and Health Act, 29 U.S.C. § 660(c) (2000) (forbidding the discharge of employee for filing complaint pursuant to OSHA); Employee Retirement Income Security Act, 29 U.S.C. § 1140 (2000) (forbidding the discharge of an employee for exercising ERISA rights); Family and Medical Leave Act, 29 U.S.C. § 2615(a) (2000) (prohibiting discharge of any individual for opposing any practice made unlawful by FMLA).

⁹¹ Pennington, *supra* note 70, at 1599.

⁹² ROTHSTEIN ET AL., *supra* note 52, at 775.

⁹³ *Id.* at 775-76; see, e.g., *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983). In *Novosel* the plaintiff was fired for refusing to participate in the lobbying effort of his employer. 721 F.2d at 896. The plaintiff had privately stated his opposition to his employer's political stand. *Id.* The suit was brought as a wrongful discharge claim and the plaintiff argued that his firing violated public policy. *Id.* The court, sitting in diversity

Many courts refuse to create a public policy exception to the employment-at-will doctrine for private sector employees who are fired for exercising their free speech rights.⁹⁴ For bloggers in the private

jurisdiction, interpreted Pennsylvania law and found that Pennsylvania recognized a public policy exception to the employment-at-will doctrine. *Id.* at 897-99. The court interpreted Pennsylvania case law to allow for the exception under the First Amendment of the United States Constitution, or the Pennsylvania Constitution. *Id.* at 899. Thus, the court held that there was “an important public policy is at stake . . . that Novosel’s allegations state a claim . . . that Novosel’s complaint discloses no plausible and legitimate reason for terminating his employment, and his discharge violates a clear mandate of public policy.” *Id.* at 900. Since *Novosel*, Pennsylvania courts have not followed *Novosel* and have not permitted a wrongful discharge cause of action under a constitutional provision absent a showing of state action. *See, e.g., Veno v. Meredith*, 515 A.2d 571 (Pa. Super. Ct. 1986); *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 843-44 (Pa. Super. Ct. 1986). In 1992, therefore, the Third Circuit found:

In light of the narrowness of the public policy exception and of the Pennsylvania courts’ continuing insistence upon the state action requirement, we predict that if faced with the issue, the Pennsylvania Supreme Court would not look to the First and Fourth Amendments as sources of public policy when there is no state action.

Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 620 (3d Cir.1992). While the First Amendment does protect the fundamental right of free speech, it only does so when a state actor is infringing upon those rights. *CHEMERINSKY*, *supra* note 36, at 1069. Moreover, in the employment context, public sector employees’ free speech rights are protected only when they are speaking out on a matter of public concern. *Id.* at 1070. There is a three step analysis for public employee’s free speech claims:

(1) The employee must prove that an adverse employment action was motivated by the employee’s speech; if the employee does this, the burden shifts to the employer to prove by a preponderance of the evidence that the same action would have been taken anyway; (2) the speech must be deemed to be a matter of public concern; (3) the court must balance the employee’s speech rights against the employer’s interest in the efficient functioning of the office.

Id. at 1071. The First Amendment has been applied to the states through the Fourteenth Amendment. *See generally Gitlow v. New York*, 268 U.S. 652 (1925). The Fourteenth Amendment states, in pertinent part, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV.

⁹⁴ *Gely & Bierman*, *supra* note 30, at 1096; *see, e.g., Wiegand v. Motiva Enter. LLC.*, 295 F. Supp. 2d 465, 474-75 (D.N.J. 2003). In *Wiegand*, the plaintiff was fired after his employer found out that he was selling racist, neo-nazi paraphernalia on his website. 295 F. Supp. 2d at 470, 472. The plaintiff urged the court to adopt the third circuits ruling in *Novosel v. Nationwide Ins.Co.*, 721 F.2d 894, 900 (3d Cir. 1983), where the court held that state statutory free speech rights could be used as a public policy exception to the employment-at-will doctrine. *Id.* Without reaching a direct decision whether or not to apply *Novosel*, the court held that:

[t]he First Amendment does not provide absolute protection for all speech . . . and three of its limitations are relevant in this case, namely the limitations based on commercial speech, on fighting words, and on speech in the employment context. The issue here is not whether

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sector, application of this exception to the employment-at-will doctrine requires demonstration that public policy is in favor of a blogger's free speech.⁹⁵ Courts consistently decline to extend such a public policy to free speech or interfere with a private employer's discretion in this area.⁹⁶ As a result of judicial hesitancy to extend a public policy exception to free speech, employees typically look to statutory mandates to have their wrongful termination claims prevail.⁹⁷ Several states have enacted employment protections by means of lifestyle discrimination statutes.⁹⁸

C. *Blogs and the Application of Legislative Employment Law: Lifestyle Discrimination Statutes*

Lifestyle discrimination statutes protect an employee's use of lawful products or participation in lawful off-duty activities, conduct, or speech.⁹⁹ Specifically, lifestyle discrimination statutes usually protect some form of lawful off-duty activity from intrusion by private sector employers.¹⁰⁰ For instance, statutes in thirty states and the District of Columbia protect smokers, or others who use other lawful consumable products from termination based solely on such activities.¹⁰¹ Although

plaintiff's speech could form the basis of a First Amendment claim, but is instead whether defendants' restrictions on plaintiff's speech violated a "clear mandate of public policy." This Court finds that it did not because the speech was not "clearly protected" by the First Amendment due to its nature as commercial hate speech regulated by an employer.

Id. at 474-75.

⁹⁵ Gutman, *supra* note 17, at 164.

⁹⁶ *Id.*

Thus, the "strongest" of public policies may prove to hold no power over private employers, unless the blogger can sufficiently demonstrate that the blog is supported by that public policy, which is problematic. Though there is a public policy in favor of free speech, it is not an unfettered policy, and as such, it may not be enough to shield the blogger's job.

Id.

⁹⁷ See *infra* Part II.C (discussing lifestyle discrimination statutes).

⁹⁸ See *infra* notes 99-105 and accompanying text (discussing the kinds of lifestyle discrimination statutes).

⁹⁹ FUNDAMENTALS OF EMPLOYMENT LAW 425 (Karen E. Ford et al. eds., 2d ed. 2000); see *infra* note 101 and accompanying text (listing the currently enacted lifestyle discrimination statutes).

¹⁰⁰ Ann L. Rives, Note, *You're Not the Boss of Me: A Call for Federal Lifestyle Discrimination Legislation*, 74 GEO. WASH. L. REV. 553, 558 (2006).

¹⁰¹ NAT'L WORKRIGHTS INST., LIFESTYLE DISCRIMINATION: EMPLOYER CONTROL OF LEGAL OFF DUTY EMPLOYEE ACTIVITIES 12-13, http://workrights.org/issue_lifestyle/dbrief2.pdf (last visited Aug. 9, 2007); see ARIZ. REV. STAT. ANN. § 36-601.02 (2006); CAL. LAB. CODE

protections among the various statutory provisions vary widely from state to state, there are two basic types of state statutes protecting employees' off-duty conduct.¹⁰² The first type of legislation protects lawful use of consumable products.¹⁰³ Quite distinctly, the second

§ 96(k) (West 2003); COLO. REV. STAT. § 24-34-402.5 (2001); CONN. GEN. STAT. § 31-40s (2003); D.C. CODE § 6-913.3 (2006); 820 ILL. COMP. STAT. 55/5; IND. CODE ANN. § 22-5-4-1 (West 2005); KY. REV. STAT. ANN. § 344.040(1) (West 2006); LA. REV. STAT. ANN. § 30:2027 (2000); ME. REV. STAT. ANN. tit. 22, § 1580-A (2004); ME. REV. STAT. ANN. tit. 26, § 597 (2007); MINN. STAT. ANN. § 181.938 (West 2006); MISS. CODE ANN. § 71-7-33 (2006); MO. ANN. STAT. § 290.145 (West 2005); MONT. CODE ANN. § 39-2-313 (2005); NEV. REV. STAT. § 613.333 (2006); N.H. REV. STAT. ANN. § 275:37-a (2006); N.J. STAT. ANN. § 34:6B-1 (West 2000); N.M. STAT. § 50-11-3 (2006); N.Y. LAB. LAW. § 201-d (McKinney 2002); N.C. GEN. STAT. § 95-28.2 (2005); N.D. CENT. CODE § 14-02.4-01 (2006); OKLA. STAT. ANN. tit. 40, § 500 (West 1999); OR. REV. STAT. ANN. § 659A.315 (West 2003); R.I. GEN. LAWS. § 23-20.10-14 (2006); S.C. CODE ANN. § 41-1-85 (2006); S.C. CODE ANN. § 44-95-60 (2006); S.D. CODIFIED LAWS § 60-4-11 (2006); TENN. CODE ANN. § 50-1-304 (2006); VT. STAT. ANN. tit. 18, § 1427 (2006); VA. CODE ANN. § 15.2-1504; W.V. CODE § 21-3-19 (2006); WIS. STAT. ANN. § 111.35 (West 2002); WYO. STAT. ANN. § 27-9-105 (2006).

¹⁰² 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, 640 (2004); Rives, *supra* note 100, at 556.

¹⁰³ Pagnattaro, *supra* note 102, at 640. Consumable product protection legislation came into existence in the late 1980's as a way of prohibiting employers from discriminating or terminating employees for using lawful products during off duty hours. FUNDAMENTALS OF EMPLOYMENT LAW, *supra* note 99, at 425. Early on, the tobacco industry began lobbying for laws to protect smokers from discrimination at work. Pagnattaro, *supra* note 102, at 641. Ms. Pagnattaro notes that the initial consumable products legislation gained support from many diverse groups. *Id.* In fact, strong support came from "the American Civil Liberties Union, organized labor, the National Association for the Advancement of Fat Acceptance, the American Motorcycle Association, and the tobacco industry." *Id.* The initial concern was that employers would discriminate against smokers in favor of nonsmokers based on their habits away from work, instead of their job qualifications or credentials. FUNDAMENTALS OF EMPLOYMENT LAW, *supra* note 99, at 425.

The Legislature finds and declares that regulation of smoking in the workplace is a matter of statewide interest and concern. It is the intent of the Legislature in enacting this section to prohibit the smoking of tobacco products in all (100 percent of) enclosed places of employment in this state, as covered by this section, thereby eliminating the need of local governments to enact workplace smoking restrictions within their respective jurisdictions. It is further the intent of the Legislature to create a uniform statewide standard to restrict and prohibit the smoking of tobacco products in enclosed places of employment, as specified in this section, in order to reduce employee exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees, and also to eliminate the confusion and hardship that can result from enactment or enforcement of disparate local workplace smoking restrictions.

CAL. LAB. CODE § 6404.5. North Carolina, the home state of tobacco company R.J. Reynolds, initially passed one of the most comprehensive consumable products laws.

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category protects other lawful off-duty conduct, activities, or speech.¹⁰⁴ While none of the most comprehensive lifestyle discrimination statutes specifically protect both at-will employees' blogging activities and their speech exercised within their blog, even when done off-duty, on personal computers, and without materially effecting their employer's interests, lifestyle discrimination statutes are the most likely source of protection.¹⁰⁵ This Section examines the lifestyle discrimination statutes that protect lawful off-duty activities, conduct, or speech.¹⁰⁶

1. Lawful Off-Duty Activity Protection

Broad lifestyle discrimination statutes that forbid discrimination based on lawful off-duty conduct are few and far between.¹⁰⁷ Five states, California, Colorado, Connecticut, New York, and North Dakota, provide the most comprehensive protection for an employee's lawful off-duty activities, conduct, or speech.¹⁰⁸ An overview of the existing

Pagnattaro, *supra* note 102, at 642. North Carolina's statute, protecting public and private employee's right to use lawful consumable products states:

(a) As used in this section, "employer" means the State and all political subdivisions of the State, public and quasi-public corporations, boards, bureaus, commissions, councils, and private employers with three or more regularly employed employees.

(b) It is an unlawful employment practice for an employer to fail or refuse to hire a prospective employee, or discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the prospective employee or the employee engages in or has engaged in the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours and does not adversely affect the employee's job performance or the person's ability to properly fulfill the responsibilities of the position in question or the safety of other employees.

N.C. GEN. STAT. § 95-28.2 (2005).

¹⁰⁴ See *infra* Part II.C.1.

¹⁰⁵ See *infra* Part II.C.1 (giving an overview of the most comprehensive lifestyle discrimination statutes that protect lawful off-duty activities, conduct, or speech).

¹⁰⁶ See *infra* notes 110-34 and accompanying text (discussing individual state's comprehensive lifestyle discrimination statutes that protect off-duty conduct, activities, or speech).

¹⁰⁷ Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377, 416 (2003).

¹⁰⁸ See *infra* notes 110-30 and accompanying text (explaining the comprehensive lifestyle discrimination statutes); see also Pagnattaro, *supra* note 102, at 640. Ms. Pagnattaro notes that this second category of lawful off-duty conduct statutes has a wide range of protections. Pagnattaro, *supra* note 102, at 640. The protections "range from California's very broad wording, to a narrower focus in Connecticut where private employees' First Amendment rights are protected against violations by their employers." *Id.* "California, New York, North Dakota and Colorado all have statutes that protect a broader range of

comprehensive lifestyle discrimination statutes that protect an employee's lawful off-duty activities, conduct, or speech reveals the expansive breadth some state legislatures have taken to protect an employee's life away from work.¹⁰⁹

i. California

California's statute, one of the most expansive in the nation, protects employee rights regarding off-duty conduct.¹¹⁰ California's lifestyle discrimination statute protects lawful off-duty conduct by giving both employees and job applicants the right to bring a claim through the state's Labor Commissioner against employers.¹¹¹ Based on a plain language reading of the law, it protects all lawful off-duty conduct without any exception and provides an expansive and comprehensive shield for an employee's off-duty rights.¹¹² This expansive, plain

activity.... Connecticut protects employees who exercise certain federal and state constitutional rights from adverse action by their employers." *Id.* at 646.

¹⁰⁹ See *infra* notes 110-30 and accompanying text (explaining state lifestyle discrimination statutes that protect employees' lawful off-duty activities, conduct, or speech).

¹¹⁰ See CAL. LAB. CODE § 96(k) (West 2003).

The Labor Commissioner and his or her deputies and representatives authorized by him or her in writing shall, upon the filing of a claim therefore by an employee, or an employee representative authorized in writing by an employee, with the Labor Commissioner, take assignments of:

(k) Claims 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.

§ 96(k).

¹¹¹ See CAL. LAB. CODE § 96(k) (West 2003); see also 1999 CAL. ADV. LEGIS. SERV. 692 (Deering). Section one states the findings of the California legislature in enacting the law:

The Legislature finds and declares that, absent the protections afforded to employees by the Labor Commissioner, an individual employee is ill-equipped and unduly disadvantaged in any effort to assert the civil rights otherwise guaranteed by Article I of the California Constitution. The Legislature further finds and declares that allowing any employer to deprive an employee of any constitutionally guaranteed civil liberties, regardless of the rationale offered, is not in the public interest. The Legislature further declares that this act is necessary to further the state interest in protecting the civil rights of individual employees who would not otherwise be able to protect themselves.

1999 CAL. ADV. LEGIS. SERV. 692 (Deering).

¹¹² See CAL. LAB. CODE § 96(k) (West 2003); Pagnattaro, *supra* note 102, at 647. Unlike other state's laws, California contains no exceptions to allow discrimination or termination if the lawful activity conflicts with the employer's business interest or creates a conflict of interest. Pagnattaro, *supra* note 102, at 647. "Not surprisingly, immediately after its enactment, concerns arose about the scope of the statute and the ramifications for employers in California." *Id.* But see COLO. REV. STAT. § 24-34-402.5(1) (2001); N.Y. LAB.

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language reading of the statute was short lived, however, as an early interpretation by California's Attorney General limited the scope to reach only independently recognized constitutional or statutory rights.¹¹³

ii. *Colorado*

Unlike California's expansive statute, Colorado's statutory protection for an employee's off-duty conduct only prohibits restrictions on non-work and off-duty activities.¹¹⁴ Colorado's lifestyle discrimination statute creates a right for employees to engage in lawful off-duty activities.¹¹⁵ The right is not absolute, as the statute creates exceptions that allow an employer to fire an employee for engaging in lawful activities that are related to an occupational requirement or create a conflict of interest.¹¹⁶ For instance, Colorado's statute has been interpreted to protect, and thus not to create a conflict of interest, when an employee writes a critical letter to the newspaper about his or her employer.¹¹⁷ However, Colorado's statute, while protecting off-duty

LAW § 201-d(2) (McKinney 2002); N.D. CENT. CODE § 14-02.4-01 (2005) (providing exceptions to the lawful off-duty conduct statutes).

¹¹³ 83 Op. Att'y Gen. Cal. 226 (2000). "[S]ection 96 did not create new substantive rights for employees. Rather, it established a procedural mechanism that allows the Commissioner to assert, on behalf of employees, their independently recognized constitutional rights." *Id.*

¹¹⁴ See COLO. REV. STAT. § 24-34-402.5(1) (2001).

(1) It shall be a 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.

§ 24-34-402.5(1).

¹¹⁵ See COLO. REV. STAT. § 24-34-402.5(1) (2001).

¹¹⁶ See COLO. REV. STAT. § 24-34-402.5(1) (2001); *supra* notes 112, 114 (noting the exceptions to the Colorado statute).

¹¹⁷ See *Marsh v. Delta Airlines Inc.*, 952 F. Supp. 1458, 1464 (D. Colo. 1997).

In interpreting the plain meaning of the statute, the term conflict of interest should be given its generally understood meaning; that is, that it relates to "fiduciaries and their relationship to matters of private interest or gain to them" or a "situation in which regard for one duty tends to lead to disregard of another."

Id. The court went on to find that despite the fact that the critical letter to the newspaper created no conflict of interest under the statute, the employer was still justified in firing the employee because the court found the letter breached an implied duty of loyalty because it had nothing to do with a matter of public safety. *Id.*

activities, still creates the possibility, using analogous case law, that an employer can get around the statute by claiming the employee did not address a matter of public concern.¹¹⁸

iii. *Connecticut*

Diverging from California and Colorado's protections for lawful off-duty activities, Connecticut provides broad protection for an employee exercising federal or state constitutional rights.¹¹⁹ 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.¹²⁰ The statute extends the same protection for free speech that the First Amendment gives public employees, with the exception

¹¹⁸ See *Marsh v. Delta Airlines Inc.*, 952 F. Supp. 1458 (D. Colo. 1997).

¹¹⁹ See CONN. GEN. STAT. § 31-51q (2003).

Any employer, including the state and any instrumentality or political subdivision thereof, who subjects 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 section 3, 4 or 14 of article first of the Constitution of the state, 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, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. If the court determines that such action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer.

§ 31-51q.

¹²⁰ Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1581 (1998); see also ROTHSTEIN ET AL., *supra* note 52, at 463 (discussing freedom of expression in employment law).

Public employee freedom of expression is protected by the First Amendment. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court established a three-party test to determine whether the discharge of a public employee was made on the basis of protected speech. First, the employee must be speaking on a matter of public concern. Second, the court must balance the interests of the employee, as a citizen, in commenting on matters of public concern against the government employer's interest in running an efficient operation. Third, the employee's protected conduct must be a motivating factor in the government employer's decision to discharge. The third element, causation, is a question for the trier of fact only if the court has resolved the first two elements in favor of the employee.

ROTHSTEIN ET AL., *supra* note 52, at 463-64.

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that the speech is not protected if it substantially or materially interferes with the employee's job.¹²¹

iv. New York

Contrasting Connecticut's Free Speech Act, New York's labor code provides employees with protection for off-duty activities in specific circumstances.¹²² New York 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.¹²³ 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

¹²¹ Eule & Varat, *supra* note 120, at 1581.

¹²² See N.Y. LAB. LAW § 201-d(2) (McKinney 2002).

2. Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

a. an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal, provided, however, that this paragraph shall not apply to persons whose employment is defined in paragraph six of subdivision (a) of section seventy-nine-h of the civil rights law, and provided further that this paragraph shall not apply to persons who would otherwise be prohibited from engaging in political activity pursuant to chapter 15 of title 5 and subchapter III of chapter 73 of title 5 of the USCA;

b. an individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property;

c. an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property; or

d. an individual's membership in a union or any exercise of rights granted under Title 29, USCA, Chapter 7 or under article fourteen of the civil service law.

Id.

¹²³ See N.Y. LAB. LAW § 201-d(2) (McKinney 2002) (listing protected conduct as political activities, use of legal consumable products, legal recreational activities, and union membership). Recreational activities are defines 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." *Id.* at § 201-d(1)(b).

information, or business interests.¹²⁴ Furthermore, only recreational activities are protected, rather than any lawful activity or conduct. Thus, the New York statute is narrower than those of other states by protecting only conduct categorized as recreational.¹²⁵

v. North Dakota

As opposed to only protecting recreational activities, North Dakota's statutory protection of lawful off-duty activities is part of the state's anti-discrimination and human rights statutory provisions.¹²⁶ North Dakota's

¹²⁴ See N.Y. LAB. LAW § 201-d(3)(a) (McKinney 2002) (stating "the provisions of subdivision two of this section shall not be deemed to protect activity which: creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest").

¹²⁵ Gely & Bierman, *supra* note 30, at 1100; see also CAL. LAB. CODE § 96(k) (West 2003) (protecting lawful conduct); COLO. REV. STAT. § 24-34-402.5(1) (2001) (protecting lawful activities); N.D. CENT CODE § 14-02.4-01 (2005) (protecting lawful participation in lawful activities).

¹²⁶ Pagnattaro, *supra* note 102, at 659; see N.D. CENT CODE § 14-02.4-01 (2005).

It is the policy of this state to prohibit discrimination on the basis of race, color, religion, sex, national origin, age, the presence of any mental or physical disability, status with regard to marriage or public assistance, or 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; to prevent and eliminate discrimination in employment relations, public accommodations, housing, state and local government services, and credit transactions; and to deter those who aid, abet, or induce discrimination or coerce others to discriminate.

§14-02.4-01; see also N.D. CENT. CODE § 14-02.4-03 (2005).

It is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal 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 race, color, religion, sex, national origin, age, physical or mental disability, status with respect to marriage or public assistance, or 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. It is a discriminatory practice for an employer to fail or refuse to make reasonable accommodations for an otherwise qualified person with a physical or mental disability or because of that person's religion. This chapter does not prohibit compulsory retirement of any employee who has attained sixty-five years of age, but not seventy years of age, and who, for the two-year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if the employee is entitled to an immediate nonforfeiture annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or

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broad lifestyle discrimination statute 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.¹²⁷ 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.¹²⁸ The requirement that the activity be in direct conflict with an essential business interest affords employees engaged in blogging activities 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.¹²⁹ In application, North Dakota courts do not give the statute an expansive definitional reading.¹³⁰

In sum, California, Colorado, Connecticut, New York, and North Dakota maintain legislation needed to provide employees with a better balance of bargaining power and to protect their off-duty conduct and privacy, yet more protection is needed in the case of at-will employee bloggers.¹³¹ Turning back to the issue of protecting lawful off-duty conduct, comprehensive lifestyle discrimination statutes are necessary to protect bloggers' online activities and free speech rights.¹³² Such protection is necessary because courts have been particularly unwilling to carve out a free speech public policy exception to the employment-at-will doctrine.¹³³ Furthermore, the current lifestyle discrimination statutes do not lend reliable protection to bloggers.¹³⁴ Bloggers must now turn to their state legislatures to pass or expand statutory protection

any combination of those plans, of the employer of the employee, which equal, in the aggregate, at least forty-four thousand dollars.

§ 14-02.4-03.

¹²⁷ See N.D. CENT CODE § 14-02.4-01 (2005); N.D. CENT CODE § 14-02.4-03 (2005).

¹²⁸ See N.D. CENT CODE § 14-02.4-03 (2005).

¹²⁹ Gely & Bierman, *supra* note 30, at 1101; see, e.g., COLO. REV. STAT. § 24-34-402.5(1) (2001).

¹³⁰ Pagnattaro, *supra* note 102, at 662.

¹³¹ Rives, *supra* note 100, at 568. Ms. Rives notes that employees are often left with no other choice but to allow their employer to control their off duty conduct or seek employment elsewhere. *Id.* The problem is that the job market has become more specialized, leaving many employees without job alternatives. *Id.*

¹³² See *infra* Part III.A (discussing why at-will employee bloggers' speech should be protected).

¹³³ See *supra* notes 90-97 and accompanying text (explaining judicial reluctance to acknowledge a public policy exception to the employment-at-will doctrine for free speech rights).

¹³⁴ See *infra* Part III.C (examining some states' lifestyle discrimination statutes).

for lawful off-duty activities or conduct and the speech that is associated with it.¹³⁵

III. ANALYSIS

Without statutory authority, courts are reluctant to carve out public policy exceptions to the employment-at-will doctrine.¹³⁶ Lifestyle discrimination statutes, which protect lawful off-duty activities, conduct, or speech are inadequate to protect at-will employee bloggers because the statutes lack protection for both the act of blogging and the speech that necessarily accompanies blogging.¹³⁷ This loophole in lifestyle discrimination statutes must be closed in order to proactively address the issues that blogging technology presents.¹³⁸ Furthermore, the public policies behind lifestyle discrimination statutes favor protecting both lawful off-duty employee activities or conduct and the speech associated with it. Thus, state legislatures should consider the benefits of protecting at-will employee bloggers' lawful off-duty activities and the online speech associated with their blogging activities.¹³⁹

First, this Part explains why at-will employee bloggers' online speech should be protected.¹⁴⁰ Second, this Part discusses why lifestyle discrimination statutes are the solution for protecting at-will employee bloggers' lawful off-duty blogging activities.¹⁴¹ Finally, this Part identifies the loopholes in the currently enacted lifestyle discrimination statutes.¹⁴²

¹³⁵ See *infra* Parts III.A-B (discussing why at-will employee bloggers' speech should be protected and the need for legislation to protect the speech).

¹³⁶ See *supra* notes 79-97 and accompanying text (discussing the employment-at-will doctrine and the narrow public policy exceptions courts currently recognize).

¹³⁷ See *infra* Part III.C (discussing weakness in individual state lifestyle discrimination statutes).

¹³⁸ Wendy N. Davis, *FEAR OF BLOGGING: As the Law Catches up to Technology, Bloggers Look for a Few Good Attorneys*, 91 A.B.A. J. 16 (2005).

¹³⁹ David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 49 (1998).

¹⁴⁰ See *infra* Part III.A (explaining the policy of lifestyle discrimination statutes is not furthered if the statutes are not applicable to employee bloggers); see also Terry Ann Halbert, *The First Amendment in the Workplace: An Analysis and Call for Reform*, 17 SETON HALL L. REV. 42, 70 (1987) (discussing why employees free speech should be protected).

¹⁴¹ See *infra* Part III.B (explaining why legislation is needed in light of the courts unwillingness to recognize a public policy exception to the employment at-will doctrine that would include free speech).

¹⁴² See *infra* Part III.C (explaining the loopholes that employee bloggers face under the current comprehensive lifestyles discrimination statutes).

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A. *Why Protect Bloggers' Online Speech?*

The employment-at-will doctrine, in *theory*, gives both the employer and employee the right to terminate the relationship without justification, at any time.¹⁴³ In *reality*, the employer controls the employment relationship because the employer, many times, can more easily afford the loss.¹⁴⁴ Consequently, employees' speech is chilled when there is no protection for their off-duty expression.¹⁴⁵ As applied to blogs, the ambiguities in most lifestyle discrimination statutes do not guarantee that the activity of blogging will be protected, much less the speech that necessarily accompanies the blogging activities.¹⁴⁶ First Amendment protections for employee bloggers are unclear because the protections seem dependant on varying standards associated with different tort actions or the employment-at-will doctrine.¹⁴⁷ With few employers enacting official blogging policies, many employees have no clear guidance to conform their conduct within the law, as the "law" is murky and unsettled.¹⁴⁸ To compensate for this legal ambiguity, consideration of public policy protections for at-will employee bloggers is necessary.¹⁴⁹

Protection should be afforded to at-will employee bloggers in order to promote the policies lifestyle discrimination statutes were originally intended to advance.¹⁵⁰ Furthermore, the policies that support

¹⁴³ Halbert, *supra* note 140, at 70.

¹⁴⁴ *Id.* Under the employment at-will doctrine, the employment relationship technically can be ended at will by either the employer or the employee; however, because an employee relies on the monetary and non-monetary benefits of having a job, the employer is able to exercise great power over the relationship. *Id.* Job loss is hard on employees particularly, because of the loss of wages but also because "loss of both seniority and pension benefits as well as the intangible hardships associated with obtaining another job." *Id.*

¹⁴⁵ Yamada, *supra* note 139, at 50. Mr. Yamada notes that employee's experience whose free speech is not protected "creates the kind of uncertainty and ambiguity that in some ways may inhibit free speech." *Id.*

¹⁴⁶ See *supra* Part II.1 (describing the protections of the currently enacted lifestyle discrimination statutes); Part III.C (describing the shortcomings of the currently enacted lifestyle discrimination statutes as applied to bloggers).

¹⁴⁷ See *supra* Parts II.A.2-3 (discussing First Amendment and state tort protections for wrongful discharge actions).

¹⁴⁸ See *supra* notes 55-61 and accompanying text (discussing the uncertainty bloggers face in employment law); see also note 58 and accompanying text (discussing Sun Microsystems and Yahoo's blogging policies).

¹⁴⁹ See *infra* notes 150-55 and accompanying text (identifying the public policy reasons lifestyle discrimination statutes were passed).

¹⁵⁰ See Yamada, *supra* note 139, at 49. The policies that support free speech serve an important function:

protecting an employee's lawful off-duty activities similarly support protecting an employee's blogging activities; however, blogging inherently has two components, the act of having and maintaining a blog and the speech written within the blog.¹⁵¹ The problem of potentially protecting only the lawful off-duty activity of blogging, while not protecting the blogger's speech, creates a loophole for employers who wish to discriminate against bloggers.¹⁵² The loophole must be closed in order for lifestyle discrimination statutes to satisfy their intended purpose: to keep employers from controlling employees' lawful off-duty activities.¹⁵³ Otherwise, without protecting a blogger's speech, the activity of blogging is left virtually without protection, which is counterintuitive of the policies supporting lifestyle discrimination statutes.¹⁵⁴ Courts have taken a deferential position to employers when it comes to carving out public policy exceptions to the employment-at-

it would encourage "discovering the truth, through exposure to all the facts, open discussion, and testing of opinions." Second, it would promote a participatory, democratic culture within the workplace. Third, the statute would help to strike a "balance between stability and movement" by allowing for a constructive, open discussion of employees' grievances and suggestions. Finally, it would nurture individual fulfillment by affirming the dignity of each worker. These basic functions would be reflected in two broad policy objectives: (1) encouraging free speech and empowering workers; and (2) building a more productive, participatory workforce.

Id.

¹⁵¹ See *infra* notes 168-95 and accompanying text (discussing lifestyle discrimination statutes and the loopholes as applied to bloggers). But see Eule & Varat, *supra* note 120, at 1602 (addressing the problems that courts may have in applying First Amendment principles to private actor fact situations).

The legislative adoption of a statute tethered to the First Amendment also leaves the judiciary strangely paralyzed in its interpretative role. These statutes require courts to apply the identical standard to private actors that is applied to public officials. Yet, the contours of the First Amendment were developed in the context of protecting private actors against the government. The government has no free speech rights of its own. While the all-or-nothing dichotomy between public and private that marks the state action doctrine may be conceptually flawed, it does not follow that there are no differences between public and private actors. The legislative leveling in these statutes denies the judiciary the opportunity to take account of unique redistributive effects.

Id.

¹⁵² See *infra* Part III.C (examining the various loopholes for employee bloggers in state lifestyle discrimination statutes).

¹⁵³ See *infra* Part III.B (discussing why legislation is needed to protect bloggers under lifestyle discrimination statutes).

¹⁵⁴ See *infra* Part III.C (discussing protections under current lifestyle discrimination statutes).

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will doctrine.¹⁵⁵ It is now up to the state legislatures and the political process to remedy and support the policies behind protecting lawful off-duty activities, such as blogging.¹⁵⁶

B. Legislation is the Answer to Protecting Bloggers' Online Speech

Courts for too long have enhanced the inherent bias of the employment-at-will doctrine.¹⁵⁷ In light of the blatant judicial decisions that do not recognize a public policy exception to the employment-at-will doctrine to protect free speech, state legislatures must step in and remedy what the courts have not.¹⁵⁸ A comprehensive lifestyle discrimination statute protecting both the act of blogging and the speech within the blog would adequately protect at-will employee bloggers from their employers' control while off-duty.¹⁵⁹

Looking back at the currently recognized public policy exceptions to the employment-at-will doctrine, it is unlikely that any of the public policy exceptions would provide protection for at-will employee bloggers.¹⁶⁰ The applicability of the exception for refusing to commit an illegal act is limited because of the few situations in which blogging would constitute refusal to commit an illegal or fraudulent act.¹⁶¹ Furthermore, bloggers have no statutorily or constitutionally created duties related to blogging, making the application of the public policy

¹⁵⁵ See *infra* notes 157-64 and accompanying text (discussing application of the public policy exceptions to the employment-at-will doctrine).

¹⁵⁶ See Halbert, *supra* note 140, at 55. There courts are uneven in interpreting public policy exceptions to the employment-at-will doctrine. *Id.* Legislature enactment is the remedy to this problem because "courts will look to statutory law in order to determine whether or not they are confronting a clearly mandated public policy." *Id.* at 56. At-will employee bloggers are specifically in need of protection because blogging necessarily has an activity component, which is the actual setting up and maintenance of a blog, and a speech component for the content of a blog. Without protecting both the activity component and the speech component, an at-will employee blogger is left without protection for at least one aspect of her blog.

¹⁵⁷ Halbert, *supra* note 140, at 72. "[T]he judicial response to the problem of first amendment rights in the workplace has been either to exacerbate it or to alleviate it tentatively and unevenly." *Id.*

¹⁵⁸ Yamada, *supra* note 139, at 35. Mr. Yamada discusses the importance of extending free speech protection to all employees through statutory rather than judicial opinions. *Id.* "The best forum for this discussion, however, is not the courtroom, but rather the legislature." *Id.*

¹⁵⁹ See *infra* Part IV (proposing a model lifestyle discrimination statute that would protect at-will employee bloggers).

¹⁶⁰ See *supra* Parts II.B.1-2.

¹⁶¹ See *supra* notes 79-81 and accompanying text (discussing the public policy exception to the employment-at-will doctrine for refusal to commit an illegal act).

exception for statutory and constitutional duties not likely to apply.¹⁶² While bloggers in some instances may expose corporate wrongdoing on their blogs, the whistleblower protections are not likely to cover bloggers who take no further steps to report the wrongdoing to officials.¹⁶³ At first glance, the public policy exception grounded in freedom of speech rights would seem to be the strongest argument for bloggers to make; however, courts consistently deny this public policy exception or interfere with a private employer's discretion in this area without a clear statutory mandate to the contrary.¹⁶⁴ Leaving behind the inadequacies of the public policy exceptions to the employment-at-will doctrine, other public policy arguments exist for taking proactive steps, such as enacting legislation to deal with issues that follow the popularity of new technology.¹⁶⁵

When new technology surfaces, such as the blog, the legislature should be proactive instead of reactive to the legal problems.¹⁶⁶ In order to be proactive in the case of at-will employee bloggers, the legislature must construct a lifestyle discrimination statute that would protect blogging as well as the speech associated with it.¹⁶⁷ Furthermore, the fact that many state legislatures have passed some form of a lifestyle discrimination statute demonstrates a commitment to policies of giving employees protection in their life away from work. However, there is a need to close the loopholes that fail to protect bloggers in many lifestyle discrimination statutes.¹⁶⁸ If the policy behind lifestyle discrimination statutes is to promote tolerance of lawful, off-duty behavior and prohibit discrimination based on that lawful, off-duty conduct, activity, or speech, then to effectively promote that policy the legislature must eliminate the ambiguity in statutes that arguably protect either the

¹⁶² See *supra* notes 82-85 and accompanying text (explaining the public policy exception to the employment-at-will doctrine for statutory and constitutional duties).

¹⁶³ See *notes* 86-89 and accompanying text (examining the whistleblower protections available to employees).

¹⁶⁴ See *supra* notes 90-97 and accompanying text (discussing the courts refusal to extend public policy exceptions for free speech).

¹⁶⁵ See *infra* notes 166-71 and accompanying text (discussing the public policies behind lifestyle discrimination statutes).

¹⁶⁶ See *supra* Part II.A.3 (discussing the growing problems blogs are causing in employment relationships and the uncertainty of employment rights).

¹⁶⁷ Davis, *supra* note 138, at 16. Ms. Davis notes that blogs have created a new set of legal issues and "[t]he legal community hasn't been swift to respond, but such is the way with new technologies: The law will be developed only after problems arise." *Id.*

¹⁶⁸ See *supra* notes 99-104 and accompanying text (defining what lifestyle discrimination statutes protect and stating that thirty states and the District of Columbia have some form of lifestyle discrimination statute).

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conduct of blogging, or the speech within a blog, but not both.¹⁶⁹ Legislation is needed to give employers and employees a clear mandate of what is required in this area of employment law.¹⁷⁰ Thus, an at-will employee blogger's online speech is protected, if at all, through the addition of a lifestyle discrimination statute that specifically protects lawful off-duty speech and activities.¹⁷¹

C. The Existing Lifestyle Discrimination Statutes Leave Loopholes for Bloggers

Of the few states that have enacted comprehensive lifestyle discrimination statutes that specifically protect lawful off-duty activities, conduct, or speech, none adequately protect both speech and conduct.¹⁷² Thus, an employee blogger is left in a statutory loophole that needs a remedy to support the policies that led the legislature to enact the statutes in the first place.¹⁷³ This Section compares the protections afforded for lawful off-duty activities, conduct, or speech among the various lifestyle discrimination statutes that are currently enacted.¹⁷⁴

1. California

The comprehensive lifestyle discrimination legislation in California has been narrowed through interpretation to only protect rights that are already constitutionally or statutorily recognized.¹⁷⁵ The strength of a law to protect an employee's lawful off-duty activities, in California, is overcome by its weakness of only providing a means of addressing rights that an employee already possesses.¹⁷⁶ As such, at-will employees,

¹⁶⁹ See Davis, *supra* note 138, at 16; see also *infra* Part III.C (analyzing weaknesses in state lifestyle discrimination statutes).

¹⁷⁰ Yamada, *supra* note 139, at 50. Furthermore, a lifestyle discrimination statute that protects conduct and speech "can provide a more favorable climate for both individual and collective employee activity." *Id.* at 51.

¹⁷¹ See *infra* Part IV (setting out a model lifestyle discrimination statute to close the loophole for at-will employee bloggers).

¹⁷² See *infra* Parts III.C.1-5 (analyzing individual state's lifestyle discrimination statutes).

¹⁷³ Yamada, *supra* note 139, at 49.

¹⁷⁴ See *infra* Parts III.C.1-5 (examining California, Colorado, Connecticut, New York, and North Dakota's lifestyle discrimination statutes and the loopholes in each as applied to at-will employee bloggers).

¹⁷⁵ See *supra* notes 110-13 and accompanying text (explaining California's lifestyle discrimination statute).

¹⁷⁶ Gely & Bierman, *supra* note 30, at 1103 (discussing the effectiveness of the statute with regard to lawfully blogging employees). The employees that are working at-will least benefit from a law that only protects established constitutional or statutory rights. Leaving them with very little, if any, established constitutional or statutory rights. See *supra* Part II.B (discussing the employment-at-will doctrine).

without constitutional or statutory protection for freedom of speech, are not adequately protected under California's law when engaging in lawful off-duty blogging.¹⁷⁷ Expanding the statute to include lawful off-duty activities that specifically include protection for off-duty speech would better support at-will employees who blog under California's statute.¹⁷⁸

2. Colorado

Likewise, Colorado's statutory protection for an employee's off-duty conduct has been narrowly interpreted.¹⁷⁹ For instance, this narrow interpretation leaves Colorado's lifestyle discrimination statute unable to protect an employee's letters to a newspaper editor if the employer is able to claim that the letter had nothing to do with a matter of public concern.¹⁸⁰ This interpretation would lend an analogy to bloggers engaged in the activity of lawful off-duty blogging on their own equipment, in which the employer is able to get around the statutory protection by claiming that the blog did not address matters of public concern.¹⁸¹ The drawback for bloggers under the Colorado law is two-fold.¹⁸² First, the law only protects current employees, thus applicants are not protected against discrimination.¹⁸³ Under the Colorado law, employers are presumably free to discriminate among applicants

¹⁷⁷ Gely & Bierman, *supra* note 30, at 1103 (noting "that the existing legal framework generally provides very little protection to those employees that seek to engage in conversations by means of blogging during their off-duty time"); *see also* William A. Clineburg, Jr. & Peter N. Hall, *Addressing Blogging By Employees*, NAT'L L.J., June 6, 2005, available at <http://www.kslaw.com/library/pdf/nlfblogging.pdf> (discussing private sector employees rights when blogging).

Unfortunately, the protection that immediately suggests itself to most bloggers—the First Amendment—is in actuality no protection at all for most of them. Employees of state and federal governments may be protected by the First Amendment if they are opining on a matter of public concern. But private-sector employees do not enjoy the same protection.

Clineburg & Hall, *supra*.

¹⁷⁸ *See supra* Part III.B (discussing the need for lifestyle discrimination legislation to protect employee bloggers).

¹⁷⁹ *See supra* notes 116-18 and accompanying text (discussing the narrow interpretation of Colorado's statute).

¹⁸⁰ *See Marsh v. Delta Airlines Inc.*, 952 F. Supp. 1458, 1464 (D. Colo. 1997); *supra* notes 114-18 and accompanying text (explaining Colorado's lifestyle discrimination statute).

¹⁸¹ *See Marsh v. Delta Airlines Inc.*, 952 F. Supp. 1458 (D. Colo. 1997).

¹⁸² *See supra* notes 114-18 and accompanying text (discussing Colorado's lifestyle discrimination statute).

¹⁸³ Gely & Bierman, *supra* note 30, at 1100; Rives, *supra* note 100, at 559.

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because of the applicant's blogging activities.¹⁸⁴ Second, while the law would likely protect the activity of blogging, it does not necessarily protect the blogger's online speech.¹⁸⁵ As such, under the Colorado law, in order to protect at-will employee bloggers' activity and speech, there is a need to expand the scope of the law to create specific protection for the activity of blogging, as well as the speech that necessarily accompanies it.¹⁸⁶

3. Connecticut

Unlike Colorado's statute which protects activities but not speech, Connecticut's lifestyle discrimination statute protects speech, but not activities.¹⁸⁷ Connecticut's statutory weakness is that it does not protect any lawful off-duty activities, including the activity of blogging.¹⁸⁸ An additional weakness lies in that the statute only grants protection to the same extent that public sector employees have protection under the First Amendment.¹⁸⁹ As such, only matters that deal with public concern would be protected, greatly narrowing the protected subject matter of a private sector, at-will employee's blog.¹⁹⁰ Thus, in order to better protect at-will employee bloggers, under the Connecticut statute, there is a need to expand the protections beyond the parallel protection of the First Amendment freedoms public sector employees enjoy, and to include protection for lawful, off-duty activities.¹⁹¹ Adding protection for lawful off-duty activities, as well as additional speech protections beyond First

¹⁸⁴ See COLO. REV. STAT. § 24-34-402.5(1) (2001) (defining the unlawful practice to only include "terminating the employment of any employee").

¹⁸⁵ Gely & Bierman, *supra* note 30, at 1103 (noting, "that the existing legal framework generally provides very little protection to those employees that seek to engage in conversations by means of blogging during their off-duty time"); see also Clineburg & Hall, *supra* note 177 (discussing private sector employees rights when blogging).

¹⁸⁶ See *supra* notes 157-67 and accompanying text (discussing the need for legislation to protect an employee blogger's online speech).

¹⁸⁷ See *supra* note 119 (quoting Connecticut's statute).

¹⁸⁸ See Pagnattaro, *supra* note 102, at 670 (summarizing the statute's protection "only where a private employee is expressing concern about a public matter will the Connecticut statute protect against adverse employment action").

¹⁸⁹ See *supra* notes 119-21 (discussing the protections of Connecticut's statute). Public sector employees are only protected if their speech reflects a matter of public concern. As such, at-will employee bloggers who blog about other issues are not protected if their blog is not deemed to be a matter of public concern.

¹⁹⁰ See *Connick v. Myers*, 461 U.S. 138, 146 (1983) (discussing a matter of public concern as, "relating to any matter of political, social, or other concern to the community"); *supra* note 120 and accompanying text (discussing the requirements for public employee's free speech protection).

¹⁹¹ See *supra* Part III.C (discussing the need to create legislation that would adequately protect employee bloggers).

Amendment freedoms would still, under the Connecticut law, protect the employer's interest when the subject matter substantially or materially interferes with the workplace.¹⁹²

4. New York

Under New York's lifestyle discrimination statutory scheme, protection is extended to lawful recreational activities, which would most likely cover off-duty blogging on the employee's own equipment as a recreational activity such as a hobby.¹⁹³ The weakness in the New York statute is the inherent vagueness and ambiguity in categorizing those activities that are recreational activities.¹⁹⁴ This ambiguity may give employers an argument that blogging should not be considered a recreational activity.¹⁹⁵ Additionally, New York courts have narrowly interpreted the definition of what is protected as a recreational activity, which may signal the likely acceptance of an argument not to protect blogging as a recreational activity.¹⁹⁶ The disagreement among people as to how to define a blog creates more uncertainty because there is little concrete guidance for the courts to look to in making a determination as to whether blogging is a recreational activity.¹⁹⁷ While a statute that protects all lawful off-duty activities and its accompanying speech would certainly protect bloggers, only protecting recreational activities without specific speech protections does not necessarily lead to that conclusion.¹⁹⁸ Even if bloggers were protected under New York's recreational activity definition, the speech aspect of blogging would not be protected.¹⁹⁹ In order to afford protection to New York's at-will

¹⁹² See *supra* notes 119-21 and accompanying text (explaining Connecticut's statute).

¹⁹³ Gely & Bierman, *supra* note 30, at 1102.

¹⁹⁴ See *supra* note 123 (defining recreational activities under New York's statute).

¹⁹⁵ Pagnattaro, *supra* note 102, at 654. Ms. Pagnattaro notes that political activity cases are straight forward and relatively clear to categorize, but recreational activities, of which the most litigation has been over personal relationships, created "an early division of opinion between the state and federal courts in New York." *Id.* See also *State v. Wal-Mart Stores, Inc.*, 621 N.Y.S.2d 158, 159 (N.Y. App. Div. 1995) (finding dating relationship was not a recreational activity). Thus, the ambiguity in defining a recreational activity "leaves a large hole in its protection of employee privacy." Rives, *supra* note 100, at 563.

¹⁹⁶ See, e.g., *State v. Wal-Mart Stores, Inc.*, 621 N.Y.S.2d 158, 160 (N.Y. App. Div. 1995) (limiting "the statutory protection to certain clearly defined categories of leisure-time activities").

¹⁹⁷ See *supra* notes 30-31 and accompanying text (discussing the disagreement among authors as to the definition and purpose a blog).

¹⁹⁸ See *supra* notes 123-25 and accompanying text (discussing New York's statute and the activities to which it applies).

¹⁹⁹ See N.Y. LAB. LAW § 201-d(2) (McKinney 2002); Gely & Bierman, *supra* note 30, at 1103 (noting "that the existing legal framework generally provides very little protection to those employees that seek to engage in conversations by means of blogging during their off-duty

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employee bloggers, there is a need to protect the speech within a blog and the activity of blogging within the purview of defined recreational activities or more generally within lawful, off-duty activities.²⁰⁰

5. North Dakota

North Dakota's effort to remedy discrimination of lawful off-duty activities was enacted as part of the state's anti-discrimination and human rights statutory provisions.²⁰¹ The weakness in this statute is the uncertainty as to exactly which lawful activities will be afforded protection and which will not because of an exception or narrow interpretation of the statute.²⁰² Assuming blogging is done off-duty, lawfully, and off the employer's premises, the North Dakota law would seemingly afford broad protection to at-will employee bloggers, unless the blogging was in direct conflict with an essential business related interest of the employer.²⁰³ However, an at-will employee's speech within the blog would not be adequately protected under the North Dakota law, primarily because the speech could be considered a separate aspect of the blogging activities.²⁰⁴

Employment law's jurisprudential future is best served with an eye toward anticipating the legal issues blogs present in this arena. Thus, protecting at-will employees' lawful, off-duty activities or conduct and the speech associated with it, would necessarily encompass blogging and provide certainty and uniformity within employment law where the public policy exceptions to the judicially enforced employment-at-will doctrine and the loopholes of the legislatively enacted lifestyle discrimination statutes have not.²⁰⁵

time"); *see also* Clineburg & Hall, *supra* note 177 (discussing private sector employees rights when blogging).

²⁰⁰ *See supra* notes 166-71 and accompanying text (explaining the need to proactively legislate to protect at-will employee bloggers under lifestyle discrimination statutes).

²⁰¹ *See supra* notes 126-30 and accompanying text (explaining North Dakota's lifestyle discrimination statute).

²⁰² Rives, *supra* note 100, at 561 (noting the ambiguous language of the statute gives employers little guidance as to what activities an employee can and cannot be fired for).

²⁰³ *See supra* notes 126-30 and accompanying text (explaining North Dakota's lifestyle discrimination statute).

²⁰⁴ Gely & Bierman, *supra* note 30, at 1103 (noting, "that the existing legal framework generally provides very little protection to those employees that seek to engage in conversations by means of blogging during their off-duty time"); *see also* Clineburg & Hall, *supra* note 177 (discussing private sector employees' rights when blogging).

²⁰⁵ *See supra* notes 166-71 and accompanying text (explaining the need for lifestyle discrimination statutes that protect speech as well as conduct or activities).

IV. CONTRIBUTION

Protecting at-will employee bloggers' online speech and the activity or conduct of having a blog is necessary to bring bloggers under the protection of lifestyle discrimination statutes that are aimed at protecting lawful off-duty activities, conduct, or speech.²⁰⁶ Language providing protection for the speech associated with lawful off-duty activities or conduct is the crucial element that the current lifestyle discrimination statutory language is lacking in order to protect at-will employee bloggers.²⁰⁷ Without protection for a blogger's speech, the activity of having and maintaining a blog is not adequately protected under the current lifestyle discrimination statutes aimed at protecting lawful off-duty activities or conduct.²⁰⁸ The policy of protecting an employee's lawful off-duty activities and conduct is advanced when legislatures protect the speech associated with the activities or conduct, such as protecting an employee blogger's speech.²⁰⁹ This Note proposes the following model lifestyle discrimination statute with the additional protections for speech associated with lawful off-duty activities or conduct.²¹⁰

A. *Proposed Model Comprehensive Lifestyle Discrimination Statute*²¹¹

The following model lifestyle discrimination statute proposes a way to advance the policies behind lifestyle discrimination legislation.²¹²

²⁰⁶ See *supra* Parts III.C.1-5 (examining lifestyle discrimination statutes that have a loophole in which at-will employee bloggers could slip through without protection).

²⁰⁷ See *supra* notes 166-71 and accompanying text (discussing the need to enact lifestyle discrimination legislation to protect lawful off-duty activities and conduct as well as the speech that is associated with such activities).

²⁰⁸ See *supra* Parts III.C.1-5 (discussing the loopholes in the current lifestyle discrimination statutes).

²⁰⁹ See *supra* notes 150-55 and accompanying text (discussing the policy reasons behind lifestyle discrimination statutes that protect lawful off duty activities).

²¹⁰ See *infra* Part IV.A (providing protection for lawful off-duty conduct, activities, or speech). By protecting the speech that is associated with the lawful off-duty conduct or activity an employee blogger's speech is adequately protected because a bloggers speech in necessarily associated with the activity of blogging.

²¹¹ This model lifestyle discrimination statute is based on COLO. REV. STAT. § 24-34-402.5 (2001) (defining as an unlawful employment practice the prohibition of legal activities as a condition of employment). The writing that is struck through indicates portions of the Colorado statute that the author would take out. The proposed additional protections are italicized and are the contributions of the author.

²¹² See *supra* Part III (explaining the need for the legislature to enact a comprehensive lifestyle discrimination statute in order to adequately protect at-will employees because of the deference courts give to employers and the courts' unwillingness to carve out additional public policy exceptions).

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Additionally, this proposed model statute would protect employee bloggers' lawful off-duty activities or the conduct of having and maintaining a blog and the speech associated with the blog.²¹³

- (1) It shall be a discriminatory or unfair employment practice for *any* employer to *refuse to hire an applicant, demote, or to terminate the employment of any employee, or to fail or refuse to promote or upgrade an employee*, due to that *applicant's or employee's* engaging in any lawful activity or conduct or speech associated with the protected activity or conduct when done 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 *bona fide and actual* conflict of interest with any responsibilities of the employer ~~or the appearance of such a conflict of interest.~~

Commentary

The proposed model comprehensive lifestyle discrimination statute makes clear that it is applicable to all employers.²¹⁴ Additionally, the proposed model statute protects applicants and employees.²¹⁵ This protection serves to protect applicants from discrimination for their lawful online blogging activities and the speech associated with those activities. Likewise, it also protects employees from discrimination for their lawful off-duty online blogging activities or speech associated with those activities. The statute extends protection to employees not only from adverse firings, but also from discrimination in promotions or upgrades.²¹⁶ The statute specifically protects only those activities that are done lawfully, off-duty, and away from the employer's premises.²¹⁷

²¹³ See *infra* text accompanying § (1) (expanding protection for lawful off-duty activities or conduct and the speech associated with such conduct).

²¹⁴ See *supra* text accompanying § 1 (extending statutory coverage to any employer).

²¹⁵ See *supra* text accompanying § 1 (extending statutory protection to applicants for hire).

²¹⁶ See *supra* text accompanying § 1 (protecting employees from adverse firings and failure to promote or upgrade).

²¹⁷ The reasoning behind having the statutory protection extend only to activities or conduct that is done off the employer's premises is to take potential claims out of the realm of being done on company time. Furthermore, other adequate protections govern activities

The amendment to the conflict of interest section takes the ambiguity out of what may create an “appearance of a conflict of interest” by only excluding from statutory protection actual, established conflicts of interest.²¹⁸ Employee bloggers will benefit from the actual conflict of interest requirement because it forces the employer to show an actual conflict of interest created by the employee’s blog.²¹⁹

- (2) *The rights defined in § (1) are the individual rights of the applicant or employee, and are independent of, and not dependant on any other rights of the applicant or employee.*

Commentary

Additionally, the proposed model statute makes clear that the rights protected under the statute are independent of any other rights already held by the applicant or employee.²²⁰ This statutory language is important to protect an at-will employee blogger’s speech because it discredits any argument that the speech protected is dependant on only that speech which would be protected by the federal or a state constitution.²²¹ Furthermore, this protection serves to eliminate the possibility that statutory interpretation would narrow the scope of protection to only those rights, if any, which are already substantively recognized for employee bloggers.²²²

done on the employer’s property and during company time like the federal Electronic Communications Privacy Act, which is outside the scope of this Note. The essence of lifestyle discrimination statutes is adherence to the limitation that the activity, conduct, or speech is done off-duty.

²¹⁸ See *supra* § (1)(b); see also *supra* notes 114-18 and accompanying text (discussing Colorado’s lifestyle discrimination statute).

²¹⁹ See *supra* § (1)(b) (creating the necessity for an employer to show an actual conflict of interest).

²²⁰ See *supra* § (2). This addition in the statute is intended to remedy the potential for judicial interpretation to characterize the statute as remedial protection for rights that an employee already has; see also *supra* notes 110-13 and accompanying text (discussing California’s lifestyle discrimination statute and its narrow interpretation).

²²¹ See *supra* § (2). This text alleviates the potential of having a narrow interpretation of the statute, like the narrow view adopted for California’s lifestyle discrimination statute. See *supra* note 113 and accompanying text (discussing California’s Attorney General opinion that narrowed the potential scope of the California lifestyle discrimination statute).

²²² See *supra* notes 110-13 and accompanying text (discussing the narrow scope of California’s lifestyle discrimination statute). By clearly indicating that the statute is creating new substantive rights for employees, the possibility that interpretation would narrow the use of the statute to only a procedural mechanism for protecting already existing rights is eliminated. There is a need for this clarity because the possibility of such an interpretation would leave blogging employees without protection for their speech

- (3) *The remedy for any person claiming to be aggrieved under § (1) by a discriminatory or unfair employment practice as defined in § (1) shall be as follows: He may bring a civil suit for damages in any state court of competent jurisdiction and may sue for all wages and benefits which would have been due him up to and including the date of judgment had the discriminatory or unfair employment practice not occurred; except that nothing in this section shall be construed as to relieve such person from the obligation to mitigate his damages.*²²³
- (4) *The court shall award ~~the prevailing party~~ any person claiming to be aggrieved under § (1) court costs and a reasonable attorney fee if that person prevails in his cause of action under § (1).*²²⁴

Commentary

The statute also provides an independent right of action for applicants and employees to enforce these rights for remedies under civil law.²²⁵ This protection serves to avoid litigation over whether the statute provides for a private right of action. Finally, only those persons claiming to be aggrieved as applicants or employees are permitted awards of attorney fees or court costs.²²⁶ Providing attorney's fees only to prevailing applicants or employees is designed to avoid the chilling effect from the possibility of paying the employer's attorneys fees.

B. The Untangling Legal Effect of the Model Lifestyle Discrimination Statute

The proposed model lifestyle discrimination statute adopts statutory language that is typical of many of the state statutes that protect lawful off-duty activities of employees.²²⁷ Like many of the existing comprehensive lifestyle discrimination statutes, the proposal provides

associated with lawful off-duty activities. *See also supra* Part III.C (discussing lifestyles discrimination statutory loopholes as applied to bloggers).

²²³ The non-italicized statutory wording in this section is based on COLO. REV. STAT. § 24-34-402.5(2)(a) (2001). The masculine is used here as it is in the Colorado statute; however, it applies equally to female and male applicants or employees.

²²⁴ The non-italicized statutory wording in this section is based on COLO. REV. STAT. § 24-34-402.5(2)(b) (2001).

²²⁵ *See supra* text accompanying § 3.

²²⁶ *See supra* text accompanying § 4. The provision only providing for the possibility of awarding attorney fees and court costs to aggrieved parties is to eliminate the possible chilling effect that allowing the "prevailing party" to collect may have on potential claimants.

²²⁷ *See supra* Part II.C (discussing the statutory text of the currently existing comprehensive lifestyle discrimination statutes).

protection for lawful off-duty activities and conduct, but goes further to provide protection for the speech that is associated with those activities or conduct.²²⁸ The loopholes found in many of the existing lifestyle discrimination statutes that could be used to prevent statutory protection for bloggers are closed by protecting the speech that is associated with the lawful off-duty activity or conduct.²²⁹ The proposed model comprehensive lifestyle discrimination statute not only proposes the additional protection for speech associated with the lawful off-duty activities or conduct, but also seeks to overcome other statutory weaknesses found in many of the existing state statutes.²³⁰

The proposed model lifestyle discrimination statute serves to create rights for all applicants and employees engaging in lawful off-duty activities or conduct and provides protection for the speech associated with the protected activities or conduct. The particular additional speech protection is important for all employees, but particularly at-will employee bloggers. Taken together, the provisions in the model statute serve to give at-will employee bloggers protection for having and maintaining a blog and the speech associated with their blog when it is done lawfully, on their own time, and away from the employer's premises. The off-duty and off-premises mandates allow employers to have the necessary, requisite control in the employment relationship during working hours, while giving employees the freedom to have a life away from work and the ability to participate in activities like blogging.

Protecting employee bloggers' speech associated with blogging is meant to remedy the loophole created in some state lifestyle discrimination statutes that already protect employees' lawful off-duty activities or conduct. It also serves to give clear guidance in this area of employment law jurisprudence. This proactive measure seeks to advance the policies behind lifestyle discrimination statutes, which recognize that the employment-at-will doctrine does not always adequately protect an employee's right to a life away from work. This model comprehensive lifestyle discrimination statute attempts to do away with the injustice created with the possibility that the dichotomy of

²²⁸ See *supra* § 1 and accompanying text (adding the additional protection for speech associated with lawful off-duty activities or conduct).

²²⁹ See *supra* Part III.C (discussing the loopholes in existing lifestyle discrimination statutes that leave at-will employee bloggers without protection).

²³⁰ See *supra* Parts III.C.1-5 (discussing the current lifestyle discrimination statutes' weaknesses and loopholes).

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a blogger's activity of having and maintaining a blog being treated differently than the blogger's speech within the blog.

V. CONCLUSION

Legislation that protects an employee's lawful off-duty activities and the speech that is associated with those activities bridges the gap in at-will employee protection where the judicial decisions of the employment-at-will doctrine and current lifestyle discrimination statutes fall short. Protecting employee's rights serves to counterbalance the employment-at-will doctrine's harsh effects. Currently, lifestyle discrimination statutes seek to provide protection for lawful off-duty conduct, activities or speech; however, no statutes adequately combine the protection in such a way as to bring at-will employee bloggers under the statutory protection. At-will employee bloggers escape protection under the current lifestyle discrimination statutes because either a statute only protects activity or conduct, but does not adequately protect the employee blogger's speech, or the statute only protects speech, but leaves the activity or conduct of blogging unprotected. This is not the correct outcome for legislation intended to further employee rights by creating a wall against which an employer's pervasive hand cannot reach. A comprehensive lifestyle discrimination statute protecting lawful off-duty conduct or activities and the speech associated with it provides clear guidance to the courts, employers, and employees as to employees' rights away from work, particularly while blogging. A comprehensive lifestyle discrimination statute that adequately protects bloggers will help reduce the number of unsuspecting dooced employees, because it gives certainty to at-will employee bloggers who are currently trapped in a world wide web of unresolved employment law legal issues.

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