WHAT DO YOU DO WHEN YOU ARE NOT AT WORK?: LIMITING THE USE OF OFF-DUTY CONDUCT AS THE BASIS FOR ADVERSE EMPLOYMENT DECISIONS

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The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

I. INTRODUCTION

The extent to which an employer can use an employee's off-duty conduct as the basis for an adverse employment decision varies widely in the United States. A consistent standard that will establish reasonable parameters to protect employees from unreasonable intrusions into their lives away from work, and that will provide employers with the limited information they need for legitimate business purposes, is long overdue. In their well-known essay "The Right to Privacy," Samuel D. Warren and Louis D. Brandeis may have expressed their concerns about the press "overstepping in every direction the obvious bounds of propriety and of decency." But the fundamental right they recognized was much broader—that "the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world...." As they acknowledged, from time to time it is necessary to "define anew the exact nature and extent" of the protection that the law provides. It took nearly a hundred years for both common law and state statutory law to begin addressing the privacy rights of off-duty workers in relation to the employer's infringement of those rights. Over the last decade those rights have become even more defined, yet large discrepancies in the law are creating many unsettling questions about employers' use of their employees' off-duty conduct in making employment decisions.

2. Id. at 196.
3. Id. at 213.
4. Id. at 193.
5. See generally John Edward Davidson, Reconciling the Tension Between Employer Liability and Employee Privacy, 8 GEO. MASON U. CIV. RTS. L.J. 145, 148-49 (1998) (proposing a return to the doctrine of respondeat superior to balance employer liability with worker privacy); Terry Morehead Dworkin, It's My Life—Leave Me Alone: Off-the-Job Employee Associational Privacy Rights, 35 AM. BUS. L.J. 47 (1997) (examining the statutory and common law protections of the associational rights of employees); Jason Bosch, Note, None of your Business (Interest): The Argument for Protecting All Employee Behavior with No Business Impact, 76 S. CAL. L. REV. 639, 640 (2003) (arguing that employers "should only be able to take employment actions against employees for behavior that sufficiently impacts legitimate business interests").
What information can a private employer legally obtain about an employee’s off-duty activities? What is a “reasonable expectation of privacy” in the context of an employee’s off-duty conduct? When should an employer be able to use off-duty conduct as the basis for an adverse employment decision? With these questions in mind, this article looks at trends in the law of privacy as it pertains to off-duty conduct. When employees leave work, it is reasonable that they want to be, in the words of a famous jurist, “let alone.” Arguably, as long as they are fulfilling their job responsibilities, they are off their employer’s moral, social and political clock. Employers, on the other hand, may be legitimately concerned about an employee’s off-the-job conduct to the extent that it adversely affects the company. Moreover, an employer may even be faced with liability for an employee’s off-duty conduct. In such circumstances, it is reasonable that employers would want to fully investigate the behavior and, if appropriate, take adverse action against an employee for his or her conduct. Consider these hypothetical examples:

- Bob, an attorney with a prestigious law firm is active in the Log Cabin Republicans. After he was seen marching in a Gay Pride parade celebrating the Supreme Court’s decision in Lawrence v. Texas, he was “counseled” by the managing partner not to participate in gay events. He was then removed from participating in a case with an influential client who is adamantly opposed to gay rights.

- Sara is a teller at a credit union and she is also a member of the credit union. After the credit union notes that Sara has overdrawn her personal checking account twice, it becomes concerned that she has problems managing her finances. Sara is then fired.

- Grace is a supervisor in a public relations firm where Sam works as an account manager. After it is discovered that Grace and Sam are dating, they are told that

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6. This article focuses on private sector employers. Public sector employers are subject to additional laws, including compliance with the Fourth Amendment of the United States Constitution and the federal Privacy Act of 1974, 5 U.S.C. § 552a (2000) (providing individuals with rights concerning personal information maintained in government record systems).


they can either quit dating or be faced with the fact that one of them must leave the company.

- Andrew is employed by a company whose official corporate purpose is "to glorify God by being a faithful steward of all that is entrusted to us." After his area manager discovers that Andrew is having an affair, he fires Andrew.

- Dwayne is a worker in an auto manufacturing plant. After he writes an inflammatory forum article in the local newspaper identifying himself as an auto worker and denouncing sport utility vehicle (SUV) owners, his supervisor rescheduled Dwayne for a very undesirable night shift.

To what extent has the employer in each scenario opened itself to legal liability? The rights of employers and employees in these situations can vary widely based upon the state in which the employee works.

As a result, employers are faced with the dilemma of developing policies that do not run afoul of their employees' privacy rights. This can be an especially vexing task for employers with employees in multiple states. To that end, this article looks at the current state of the law and proposes a set of guidelines that take into consideration the trends in privacy law for off-duty behavior. Part II focuses on the growing body of statutory and case law which defines a reasonable expectation of privacy for employees regarding their off-duty conduct. This section does this in three ways.

First, it analyzes cases brought by employees under common law tort theories for invasion of privacy by intruding upon their seclusion and publicizing private facts, again emphasizing recent cases establishing the parameters of employee off-duty privacy.

Second, Part II reviews state law protection for off-duty conduct, with particular emphasis on recent cases interpreting so-called "lifestyle discrimination" statutes.

Third, Part II surveys the protections for off-duty behavior set forth in federal statutes, with particular emphasis on the Immigration Reform and Control Act, the Fair Credit Reporting Act, Title VII of the Civil Rights Act of 1964, and the Employee Polygraph Protection Act. The confluence of these common law tort theories, state statutes and federal statutes creates a reasonable expectation of privacy for off-the-job behavior that does not affect an employer.

On the other hand, employer liability and effective business operations can undercut an employee's reasonable expectation of privacy. For this reason, Part III examines instances in which employers legitimately have
an interest in investigating off-duty conduct. Three contexts of liability are discussed to illustrate such circumstances. These include: negligent hiring or retention, discrimination, and sexual harassment.

Part IV then attempts to reconcile the tension between an employee’s legitimate expectation of privacy outside of the workplace with an employer’s potential liability, by setting forth a proposal that balances reasonable privacy rights of employees with the needs of employers.

II. "IT'S NONE OF YOUR BUSINESS:" EMPLOYEES’ REASONABLE EXPECTATION OF PRIVACY

Employees have a reasonable expectation of privacy for off-the-job conduct created by case law, state statutes and federal statutes that have carved out a common law right to privacy. Suffice it to say that this case law is undermining the concept of employment-at-will in the United States. Specific common law tort theories of privacy are becoming recognized as an effective countermeasure to an employer’s offending inquiries. For example, thirty states and the District of Columbia offer varying degrees of statutory protection for employees’ off-duty conduct. The statutes range from merely protecting the rights of smokers to protecting all off-duty conduct that does not affect an employer’s business. Federal statutes also ex-

9. See CAL. LAB. CODE § 96(k) (West 2003) (allowing claims for lost wages stemming from the employer’s disciplining of off-duty conduct); COLO. REV. STAT. § 24-34-402.5(1) (2003) (prohibiting action against an employee for lawful off-duty conduct, unless that conduct is a bona fide qualification for employment); CONN. GEN. STAT. ANN. §§ 31-40s, 31-51q (West 2003) (making it unlawful for an employer to discriminate against an employee for smoking or engaging in off-duty conduct protected by the U.S. Constitution); N.Y. LAB. LAW § 201-d(2) (McKinney 2003) (prohibiting employers from punishing employees for engaging in lawful off-duty activities); N.D. CENT. CODE § 14-02.4-01 (1997) (protecting the lawful off-duty conduct of employees that is not in direct conflict with important employer business interests); TENN. CODE ANN. § 50-1-304(e)(2) (2003) (stating that an employer may not discipline an employee for using tobacco or alcohol products outside of the workplace).


The following states make it unlawful for an employer to punish an employee for using lawful products off-duty: 820 ILL. COMP. STAT. ANN. 55/5 (West 1993); MINN. STAT. § 181.938 (2003); MONT. CODE ANN. § 39-2-313 (2003); NEV. REV. STAT. ANN. § 613.333
tend some specific protections to prevent employers from using an employee's off-duty behavior as the basis for decisions in the workplace.

A. Common Law Tort Theories for Invasion of Privacy

There is a growing body of case law that supports the common law tort for invasion of privacy in the context of the employer/employee relationship. The obvious limitation on such causes of action, however, is that the protected information must truly be "private." Thus, unlike the broad protection extended by the statutes in California, New York, North Dakota and Colorado which cover a wide range of off-duty conduct, such tort theories are inherently limited to non-public information. The RESTATEMENT (SECOND) OF TORTS section 652A states the general principles behind an invasion of privacy claim: that "[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." Four distinct categories of an invasion are articulated:

(a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or

(b) appropriation of another's name or likeness, as stated in § 652C; or

(c) unreasonable publicity given to the other's private life, as stated in § 652D; or

(d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

Although much has been written about the right to privacy generally


10. See infra Part II.B.2 (discussing the specific provisions governing off-duty conduct for each of the aforementioned states).


12. Id.

and the right to privacy in the workplace specifically,14 much less has been written about an employee’s common law right to privacy for off-duty conduct.15 In the context of off-duty employee activity, two tort causes of action are emerging as vehicles for recovery for aggrieved employees: 1) unreasonable intrusion upon the seclusion of another and; 2) unreasonable publicity given to another’s private life. Employment cases in both of these categories are discussed in detail below.

1. Intrusion Upon Seclusion

An increasing amount of employer-employee invasion of privacy cases involve claims for the tort of intrusion upon solitude. The general statement of this cause of action is found in the RESTATEMENT (SECOND) OF TORTS section 652B:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.16

Although employee claims for intrusion upon their seclusion can take many forms, four general categories of complaints are beginning to emerge: 1) sexual-related information; 2) general non-work-related personal information, such as medical and financial information; 3) issues related to the use of technology; and 4) investigations in connection with

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15. See generally Dworkin, supra note 5, at 48-49 (claiming that employee’s efforts to protect their associational rights will be slowed when society views their associations as immoral); Bosch, supra note 5, at 640 (discussing whether an employee should be punished for conduct that harms an employer’s business interest); Davidson, supra note 5, at 148 (arguing that the doctrine of respondeat superior encourages an employer to infringe upon employee privacy rights).

workers' compensation and disability claims.

Increasingly, beginning in the early 1980s, cases have been brought for intrusion upon solitude in connection with questions about employees' sexual activity and orientation. For example, in Phillips v. Smalley Maintenance Services, plaintiff-employee Brenda Phillips was subjected to repeated questioning by Ray Smalley, the president and principal owner of Smalley Maintenance Services, about her personal and intimate affairs. On multiple occasions, Smalley asked Phillips to respond to invasive questions, such as how often she had sex with her husband, what "positions" they used, and whether she had engaged in oral sex. Phillips sued, claiming that her employer wrongfully intruded into her private activities. The Supreme Court of Alabama disagreed with the employer's attempt to argue that there was no intrusion because Phillips "declined [Smalley's] invitation and did not answer his inquiries, so no information about [Phillips'] sexual experiences, practices, or inclinations was acquired or disclosed . . . so as to justify the allegations of 'wrongful intrusion.'" The court then held that there could be an intrusion upon seclusion "without any requirement that information be 'acquired.'" Moreover, the court held that there is no requirement under Section 652B that there be "publication" or "communication" of the information, and there is no requirement that the information be gathered "surreptitiously" or in a "clandestine" way. Accordingly, the court found that the facts of the case supported a claim for wrongful intrusion into Phillips' solitude.

Other cases have likewise upheld claims for invasion of solitude under similar circumstances. The context and nature of the inquiry, however, is important in determining if there is an invasion of privacy. The central question is whether the intrusion would be highly offensive to a reasonable person. For example, in one context a court found that a co-worker's isolated question, "Are you gay?" made in private, at a firm retreat, was "not . . . highly offensive to a reasonable person" given that it was asked in the context of determining plaintiff's "overall job satisfaction and comfort.

18. Id. at 707.
19. Id. at 709.
20. Id.
21. Id. at 709-10.
22. Id. at 711.
23. See, e.g., Cunningham v. Dabbs, 703 So. 2d 979, 981-82 (Ala. Civ. App. 1997) (involving a plaintiff who was subjected to sexual harassment, which included "improper inquiries into her personal sexual proclivities" and who was fired after her employer learned that she was getting married); Busby v. Truswal Sys. Corp., 551 So. 2d 322, 324 (Ala. 1989) (precluding summary judgment in favor of the employer on an invasion of privacy claim after finding that genuine issues of material fact existed as to whether a plant supervisor intruded into plaintiffs' sex lives in an offensive and objectionable manner).
of living in the south.”

A second context in which privacy claims for wrongful intrusion upon seclusion might be brought involves an employer gathering general non-work related information about employees. For example, in a rather unusual case, an employer used undercover investigative personnel to gather non-work related information. In *Johnson v. K Mart Corp.*, fifty-five current and former employees of K-Mart brought claims for invasion of privacy based upon unauthorized intrusion upon their seclusion. K Mart hired Confidential Investigative Consultants, Inc. (CIC) to provide security services at one of K Mart’s distribution centers, in response to problems with theft, vandalism, sabotage, and potential drug use. CIC placed two undercover workers at the center; one posed as a janitor and the other posed as an employee in the repack department. The investigators regularly submitted handwritten reports about events they observed and conversations they participated in or overheard both at work, and outside the workplace at social gatherings. The court found that “the means used by [the] defendant to induce plaintiffs to reveal this information were deceptive. . . . Plaintiffs had a reasonable expectation that their conversations with ‘co-workers’ would remain private, at least to the extent that intimate life details would not be published to their employer.” K Mart admitted that it had “no business purpose for gathering information about employees’ personal lives” and the court found that K Mart “never instructed the investigators to change their practices or to stop including the highly personal information in their reports.” Accordingly, the court found that a “material issue of fact exist[ed] regarding whether a reasonable person would have found [K Mart’s] actions to be an . . . objectionable intrusion.”

The *Johnson* case is somewhat unusual due to the clandestine means used by the employer to learn about its employees. If the information gathered is less invasive and the employer has some basis for assembling the information, then a court may find that there is no invasion of privacy. For

26. *Id.* at 1194.
27. *Id.*
28. *Id.*
29. *See id.* at 1194, 1196 (describing the investigation); *Id.* at 1194. The reports contained information about the employees’ off-duty activities and conduct including but not limited to: employee family matters (the criminal conduct of children, incidents of domestic violence and impending divorces); romantic interests/sex lives (sexual conduct of employees in terms of number/gender of sexual partners); and personal matters and private concerns (prostate problems, paternity issues, characterizations about other employees’ drinking).
30. *Id.* at 1196.
31. *Id.* at 1197.
32. *Id.*
example, in another case, the mere presence in an employee's personnel file of her bank statement and certain diary entries communicated to her psychiatrist were not sufficient to state a cause of action for invasion of privacy.  

Likewise, where an employer's investigation of an employee's conduct was limited to interviews of the full-time employees, examination of company records, and review of material voluntarily produced by the employee, there was no expectation of privacy to support a claim of intrusion upon seclusion.

A third employment-related context pertains to an employee's reasonable expectation of privacy with regard to technology. Several noteworthy cases have addressed this issue. One of the most well-known, Smyth v. Pillsbury Co., tangentially involves off-duty conduct. In this case, the plaintiff received certain e-mail communications on his home computer from his supervisor over the employer's e-mail system. Despite assurances that e-mails were confidential, the employer intercepted the plaintiff's private e-mail messages and terminated him for transmitting "inappropriate and unprofessional comments" over the e-mail system. The court stated that it did not find a "reasonable expectation of privacy in e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system notwithstanding any assurances that such communications would not be intercepted by management." The fact that Smyth was at home using his own computer was immaterial to the court. The company's interest in preventing employees from using its e-mail system in an inappropriate and unprofessional way outweighed any reasonable expectation of privacy, even though this was contrary to its assertions that e-mail would remain confidential and privileged.

Smyth seems to have set the general tone for subsequent cases; when an employee is using workplace systems—even if the use is off-site —
there is no reasonable expectation of privacy. If an employer has an announced policy that it may monitor electronic and telephone equipment, an employee is not likely to have an actionable claim for invasion of privacy. One court even went so far as to find that an employee who was in the privacy of her home using her own phone and engaged in a personal phone call, did not sufficiently state a claim for “intrusion” after her employer used information intercepted on a radio scanner. In that case, based on the intercepted information, the plaintiff-employee was accused of misconduct and received a warning that she should “limit her conversations regarding personal situations with [bank] personnel as well as customers.” Each of these cases indicate that employees who use electronic devices have a diminished expectation of privacy, especially when the use involves communications about the employer.

The other type of claims commonly brought against employers for intrusion upon seclusion concerns investigations of employees who are disabled or out of work because of some kind of illness or injury. In such cases, there seems to be a diminished right of privacy for employees. For example, in Saldana v. Kelsey-Hayes Co., the plaintiff alleged two counts of invasion upon seclusion or solitude after his employer hired a private investigator to determine the extent of the plaintiff’s injuries, based upon a suspicion of malingering. Although the plaintiff could show that the investigator’s act of entering his home under false pretenses and peering through his windows with a powerful camera lens did constitute an “intrusion,” the court found that the intrusions were not focused towards “matters which plaintiff had a right to keep private.” The employer had a “right... to engage in investigation of an employee” and the plaintiff’s privacy was “subject to the legitimate interest of his employer in investigating suspicions that plaintiff’s work-related disability was a pretext.” As such, the employee did not have a claim for intrusion upon solitude. A similar result was reached in Schmidt v. Ameritech Illinois, in which the plaintiff-employee Thomas Schmidt lied to Ameritech at least three times about going on a fishing trip while he was on disability

43. Id. at 769 (alteration in original).
45. Id. at 384.
46. Id.
leave for an injury unconnected with his employment.\textsuperscript{47} Suspicious about Schmidt’s activity while out on disability, Ameritech launched an investigation. Schmidt contended that his employer’s examination and use of his personal telephone records constituted an “‘unreasonable intrusion upon seclusion.’”\textsuperscript{48} After a jury returned a verdict in Schmidt’s favor, including the imposition of five million dollars in punitive damages, Ameritech appealed.\textsuperscript{49} The appeals court found that “to succeed in adequately pleading and proving a cause of action for unreasonable intrusion upon seclusion, a plaintiff must demonstrate that the intrusion is not only offensive, but highly offensive to a reasonable person.”\textsuperscript{50} Based on its assessment that Schmidt lost his job because he lied, not because Ameritech intruded upon his seclusion, the court found that the jury’s verdict was “against the manifest weight of the evidence.”\textsuperscript{51}

Likewise, in \textit{York v. General Electric Co.}, an employee receiving workers’ compensation benefits unsuccessfully claimed that his employer’s investigation constituted an invasion of privacy under section 652B of the Restatement of Torts Second.\textsuperscript{52} In that case, John York was videotaped from across the street going to the chiropractor’s office, visiting a lawn-mower repair shop, working in the yard, riding a motorcycle, and mowing the grass.\textsuperscript{53} After viewing the tape, York’s employer decided to contest the payment of chiropractor treatments.\textsuperscript{54} The court held that there was no invasion of privacy, because “[a]ll of the scenes on the video were outside and in public view.”\textsuperscript{55} Acknowledging that “the filing of a workers’ compensation claim does not justify an investigation that constitutes an invasion of privacy,” the court nonetheless underscored the fact that “[i]t is not unreasonable for an employer to conduct an investigation into a person’s injury while the person is receiving workers’ compensation benefits as long as the investigation does not amount to an invasion of workers privacy.”\textsuperscript{56}

\textsuperscript{47} Schmidt v. Ameritech Illinois, 768 N.E.2d 303, 306 (Ill. App. Ct. 2002). Ameritech had a disability policy which provided that “taking a vacation while also collecting disability is prohibited without written authorization.” \textit{Id.}

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} \textit{Id.} at 309.

\textsuperscript{50} \textit{Id.} at 312.

\textsuperscript{51} \textit{Id.} at 318.


\textsuperscript{53} \textit{Id.} at 866.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.} at 868.

\textsuperscript{56} \textit{Id.} (citing Sowards v. Norbar, Inc., 605 N.E.2d 468, 474 (Ohio Ct. App. 1992) (finding violation of privacy right where employer searched the hotel room of an employee even though the employer paid for the room) and Weimer v. Youngstown Steel Door Co., No.82 C.A. 81, 1983 WL 6718, at *2 (Ohio Ct. App. Sept. 26, 1983) (concluding that a reasonable investigation into injuries is expected when an employee files a workers’ compensation claim). \textit{Accord} ICU Investigations, Inc. v. Jones, 70 So. 2d 685, 689-90 (Ala. 2000) (holding that an employee did not state a cause of action for intrusion when a com-
Thus, if an employer is legitimately investigating the status of an employee who is out of work due to illness or injury, and that observation does not involve the use of any invasive equipment, courts are not inclined to allow invasion of privacy claims.

2. Publicizing Private Facts

In addition to claims for intrusions upon solitude, employees are also increasingly bringing tort invasion of privacy claims against their employers for publicizing private facts. Under the Restatement (Second) of Torts section 652D,

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
(a) would be highly offensive to a reasonable person, and
(b) is not of legitimate concern to the public.\(^{57}\)

As a threshold for determining actionable behavior, the disclosure must be of private matters. That is, matters concerning the "private, as distinguished from the public, life of the individual."\(^{58}\) Thus, "[t]here is no liability [when an employer] merely gives further publicity to information about the [employee] that is already public" or "for giving further publicity to what the [employee] himself leaves open to the public eye."\(^{59}\) Moreover, there must be "publicity" of the private fact, meaning "communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."\(^{60}\) Thus, the requirement of publicity is distinguished from "publication," which includes any communication to a third person, in to establishing defamation liability. Also, unlike a claim for defamation, tort liability under this section can attach even if the statements are true.\(^{61}\)

In the employment context, claims for intrusion upon seclusion and public disclosure of private facts often go hand-in-hand, as was the case in both Johnson v. K Mart Corp.\(^{62}\) and Karch v. BayBank FSB.\(^{63}\) In Johnson,
current and former employees of K Mart contended that their employer was liable for the publication of private facts when it deceptively gathered information about their family matters, health problems and sex lives. Concluding that such matters were "clearly private," the court then considered whether the publicity requirement of the tort was met, holding that "the public disclosure requirement may be satisfied by proof that the plaintiff has a special relationship with the 'public' to whom the information is disclosed." In other words, disclosure to a limited audience is actionable if there is a "special relationship . . . between the plaintiff and the "public" - such as employers or other employees - to whom the information is disclosed. Accordingly, the court found that "personal details about plaintiffs' private lives that were disclosed to their employer by the investigators" raised a genuine issue as to whether publicity was given to private facts, thereby precluding summary judgment.

A similar result was reached in *Karch*, where plaintiff's employer surreptitiously used a scanner to listen to her at-home phone conversation. With regard to the publicity requirement, it is important to note that a determination as to "whether a disclosure of a private matter has become one of 'public knowledge' does not . . . [necessarily] depend on the number of people told." The employer's disclosure to a few other employees can be sufficient to permit recovery for public disclosure of private facts. Thus, it is not necessary to have a wide audience for the disclosure to be actionable.

A growing area in the tort of publicizing private facts is in the context of sexual orientation. The "outing" of gay employees can clearly precipitate privacy-based law suits. One of the first such cases was *Greenwood v. Taft, Stettinius & Hollister*, involving an attorney, Scott Greenwood, who filed a lawsuit alleging that he was fired from the Taft,

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64. Johnson, 723 N.E.2d at 1197.
65. Id.
67. Johnson, 723 N.E.2d at 1197.
68. Karch, 794 A.2d at 768.
69. Id. at 774.
70. Id.
Stettinius & Hollister law firm (the Taft firm) because he is gay and did pro bono work in favor of the Human Rights Ordinance of the City of Cincinnati.\textsuperscript{72} Among other things, Greenwood alleged that his right to privacy was violated when the firm disseminated private information about his male partner.\textsuperscript{73} Specifically, he alleged that after he amended his employee benefit forms to list his male partner as a beneficiary, his employer shared this information ""with persons who had no responsibility for the administration of the benefits programs and no need to know the information.""\textsuperscript{74} Inasmuch as the Taft firm did not dispute the fact that sexual orientation is private information, the issue before the court was to determine if the disclosure was ""public.""\textsuperscript{75} Refusing to dismiss Greenwood's claim, the court concluded that Greenwood's allegations that the information was shared ""with persons who had no responsibility for the administration of the benefit programs and no need to know the information"" and that ""the Taft firm disclosed confidential information about him without privilege to do so"" were sufficient to state a claim.\textsuperscript{76} The Greenwood case is important because it recognizes that sexual orientation is a private fact and limited disclosure can be sufficient to trigger liability.

In another case, Robert C. Ozer, P.C. v. Borquez (heard en banc by the Supreme Court of Colorado) plaintiff Robert Borquez brought an action in tort based on the unreasonable publicity given to his sexual orientation.\textsuperscript{77} Similar to the Greenwood case, the court recognized the tort of unreasonable publicity in the context of outing a gay employee. When Borquez, who is homosexual, learned that his partner was diagnosed with AIDS, he telephoned his secretary attempting to arrange to have a colleague cover a deposition and an arbitration for him.\textsuperscript{78} In the course of making those arrangements, Borquez subsequently disclosed his situation to Robert Ozer, the president of the law firm.\textsuperscript{79} Ozer, in turn, disclosed the information to his wife, the law firm's office manager, and two secretaries.\textsuperscript{80} This case is important for its recognition of the tort of invasion of privacy based on unreasonable publicity given to one's private life and its articulation of the elements necessary to prove such a claim. Those elements include:

\begin{itemize}
\item 663 N.E.2d 1030, 1031 (Ohio Ct. App. 1995).
\item Id.
\item Id. at 1035.
\item Id.
\item Id. at 1035-36.
\item 940 P.2d 371, 373 (Colo. 1997) (en banc).
\item Id.
\item Id. at 374.
\item Id.
1) the fact or facts disclosed must be private in nature; 2) the disclosure must be made to the public; 3) the disclosure must be one which would be highly offensive to a reasonable person; 4) the facts or facts disclosed cannot be of legitimate concern to the public; and 5) the defendant acted with reckless disregard of the private nature of the fact or facts disclosed.\textsuperscript{81}

With regard to the first element, the court found that "facts related to an individual’s sexual relations, or ‘unpleasant or disgraceful’ illnesses, are considered private in nature and the disclosure of such facts constitutes an invasion of the individual’s right to privacy."\textsuperscript{82} Ostensibly, this element would include disclosures about sexual orientation, as well as AIDS. Unfortunately for the plaintiff, however, because the trial court erroneously instructed the jury regarding the term "publicity," confusing it with mere "publication,” the verdict in favor of Borquez was thrown out.\textsuperscript{83} Nevertheless, the Ozer case lays the ground work for similar suits that could be brought by gay employees for public disclosure of sexual orientation.

\textbf{B. State Statutory Protection of Off-Duty Conduct}

There are two basic types of state statutes pertaining to an employee’s off-duty conduct. The first category deals with the lawful use of consumable products, including tobacco. The second category pertains to other lawful off-duty conduct. The latter statutes run the 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. The provisions of these statutes and the cases interpreting their scope are discussed below. Although in most circumstances a person’s marital status is not considered to be a “private” fact, to the extent that marital status relates to off-duty behavior, it should also be mentioned that many state statutes protect marital status, preventing discrimination based on whether a person is married or unmarried.\textsuperscript{84}

\textsuperscript{81} Id. at 377.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 379.
\textsuperscript{84} The following statutes have declared marital status discrimination illegal. DEL. CODE. ANN. tit. 19, § 711 (1995); ME. REV. STAT. ANN. tit. 5, § 7051(2) (West 2003); MD. ANN. CODE art. 49B, § 16 (2002); MINN. STAT. ANN. § 363A.08 (West 2004); NEB. REV. STAT. § 48-1104 (2003); N.Y. EXEC. LAW § 296(1)(a) (2003); WISC. STAT. ANN. § 111.321 (West 2003). This list is not intended to be exhaustive; it is merely intended to illustrate examples of such statutes. One statute even disclosed that discrimination based on marital status is a threat to the state and its citizens. ALASKA STAT. § 18.80.200 (Michie 2002). See
1. Lawful Use of Consumable Products, Including Tobacco

The first wave of protection for employees off the job came in the early 1990s in the form of legislation primarily intended to protect smokers from discrimination at work. Some laws exclusively pertain to "tobacco products," but many contain broad wording to protect employees who use "lawful products." Such laws drew strong support from such diverse groups as the American Civil Liberties Union, organized labor, the National Association for the Advancement of Fat Acceptance, the American Motorcycle Association, and the tobacco industry. One of the first such statutes was appropriately enacted in Virginia, where in the seventeenth century colonist John Rolfe began a tobacco industry that continues to this day. The Virginia statute provides that no employee or applicant for employment with the Commonwealth "shall be required, as a condition of employment, to smoke or use tobacco products on the job, or to abstain from smoking or using tobacco products outside the course of his employment...." The statute does not apply to firefighters and members of police departments. This statute is distinguishable from other such statutes by its very limited scope, applying only to employees and applicants for positions with the Commonwealth of Virginia.

also Dworkin, supra note 5, at 56 (discussing discrimination on the basis of marital status in the context of associational privacy).

85. See Lewis L. Maltby & Bernard J. Dushman, Whose Life is it Anyway—Employer Control of Off-Duty Behavior, 13 ST. LOUIS U. PUB. L. REV. 645, 646 (1994) (arguing that legislation is necessary to prevent "unwarranted employer intrusion into the private lives and private choices of employees, especially regarding the decision whether to smoke.").


88. The original statute, VA. CODE ANN. § 15.1-29.18 (Michie 1989) was repealed in 1997 by VA. CODE ANN. § 15.2-1504 (Michie 2003). The provisions remain the same.

89. VA. CODE ANN. § 15.2-1504 (Michie 2003).

90. Id. Classes of employees excluded from the statute are located in VA. CODE ANN. § 27-40.1 and § 51.1-813 (Michie 2003).
An example of a much more comprehensive statute is the law enacted in North Carolina,91 the home state of tobacco company R. J. Reynolds. This statute, which applies to public and private employers with three or more regularly employed employees,92 reflects a compromise between the employees' rights to use lawful products and the employers' desire to control off-duty behavior that could affect their organizations. The North Carolina statute provides that 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. . . .93

The use of lawful products, however, is not wholly unfettered; the use of such products must "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."94 Moreover, it is not a violation for an employer to restrict the normal use of lawful products by employees during non-working hours "if the restriction relates to a bona fide occupational requirement and is reasonably related to the employment activities" or "if the restriction relates to the fundamental objectives of the organization."95 If an employee fails to comply with the requirements of the employer's substance abuse prevention program, the employer may discharge, discipline, or take any action against the employee as the result of that failure.96 The North Carolina statute also does not prohibit an employer from distinguishing between employees based on the use or nonuse of lawful products in connection with health, disability and life insurance policies.97 Lastly, the statute provides a private cause of action for aggrieved employees and prospective employees who are entitled to seek lost wages and benefits, as well as reinstatement or hiring.98 The prevailing party may also be awarded reasonable costs and attorneys' fees.99

92. See id. § 95-28.2(a).
93. See id. § 95-28.2(b).
94. Id.
95. See id. § 95-28.2(c)(1)-(2).
96. See id. § 95-28.2(c)(3).
97. See id. § 95-28.2(d).
98. See id. § 95-28.2(e)(1)-(3).
99. See id. § 95-28.2(f).
these provisions, the North Carolina statute protects employees who use lawful products when they are not at work, and it also protects employers from any use that could be detrimental to their business.

Most statutes prohibiting discrimination related to off-duty use of lawful products have been on the books for the last decade, yet there has been very little case law interpreting their language. In fact, a search of all of the statutes prohibiting discrimination for the use of tobacco and other lawful products produced only a few cases. The first involves Minnesota's law that prohibits employers from taking adverse employment action because an employee or applicant for employment "engages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during nonworking hours."\(^{100}\) The Minnesota statute specifically includes alcoholic beverages as a "lawful consumable product[]."\(^{101}\) In *Miners v. Cargill Communications, Inc.*, the plaintiff-employee attempted to argue that her employer violated Minnesota's non-work activities statute when it terminated her for consuming alcohol during non-working hours.\(^{102}\) The plaintiff, Miners, who worked as a promotions director for a radio station owned by Cargill, was responsible for organizing the radio station's promotional events at various locations, including nightclubs and bars.\(^{103}\) Suspicious that Miners was drinking alcohol prior to driving the company van, management hired a private investigator to follow her.\(^{104}\) Thereafter, the investigator observed Miners drinking alcoholic beverages at several bars, then driving away in the company van.\(^{105}\) Two days later, after the investigator observed Miners again consuming alcohol at several bars, he tipped off Miners's supervisor, who met Miners at the van and demanded the keys to prevent her from driving away.\(^{106}\) Miners, who was approximately 250 pounds, admitted that she drank five alcoholic beverages over the course of a six-hour period.\(^{107}\)

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101. Id.
102. *Miners v. Cargill Communications, Inc.*, No. C8-97-837, 1997 WL 757157, at * 3 (Minn. Ct. App. Dec. 9, 1997). Note the procedural history of this case. Miners originally filed both federal and state employment discrimination claims in federal district court, which granted summary judgment on the federal claim in favor of the employer and refused to authorize supplemental jurisdiction on the state claim. *Id.* at *1. Miners appealed the disposition of the state law claims in the Minnesota Court of Appeals and appealed the federal claims to the Eighth Circuit. *Id.* See also *Miners v. Cargill Communications, Inc.*, 113 F.3d 820,825 (8th Cir. 1997) (reversing the granting of summary judgment in favor of Cargill for both Miners's federal Americans with Disabilities Act claim and her state Minnesota Human Rights Act claim).
103. Miners, 113 F.3d at 821.
104. *Id.* at 822. It is unclear from the facts of the case whether Minor was "off-duty" when she was allegedly drinking and then driving the company van.
105. *Id.*
106. *Id.*
107. *Id.*
The next day Miners was fired. Miners claimed in her charges to federal and state employment discrimination agencies that Cargill told her “she was terminated for driving a company van while intoxicated.” Finding that the record contained no evidence to factually support Miners’ claim that her employer violated the statute, and that the statute “contains no prohibition against an employer terminating an employee for driving a company vehicle after consuming alcohol,” the court affirmed summary judgment dismissing the statutory claim. It should be noted that, even though the court did not point to it, the Minnesota statute contains provisions permitting an employer to restrict the use of lawful consumable products if it “is reasonably related to employment activities or responsibilities” of the employee. In this case, the employer could also have argued that its employee’s consumption of alcohol unreasonably interfered with her responsibilities to the company and, in fact, could have potentially subjected the company to liability. The fact that she was driving a company van essentially removed the plaintiff from the protection of the statute.

The second case, Wood v. South Dakota Cement Plant, tested the scope of South Dakota’s statute, which makes it a discriminatory or unfair employment practice for an employer to terminate an employee based on that employee’s use of tobacco products off the employer’s premises during non-working hours. Under the statute, the right to use tobacco products is subject to restrictions. An employer may restrict the use if: 1) the restriction “[r]elates to a bona fide occupational qualification and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees,” or 2) the restriction is “necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.” In the Wood case, Charles Wood was offered a position with South Dakota Cement Plant, but the offer was conditioned upon his agreement to stop smoking. This employment condition was prompted by a physical examination that revealed a mass in his lung. Based upon that report, Wood’s twenty years of smoking and the fact that the position would ex-

108. Id. Before firing her, Cargill apparently gave her the option of either entering a rehabilitation program or losing her job. Id. Upon refusing treatment, she was fired. Id.


110. Id. The court reversed summary judgment that dismissed the breach of contract claim. Id.

111. MINN. STAT. ANN. § 181.938(3)(1) (West 2003).

112. 588 N.W.2d 227 (S.D. 1999).

113. Id. at 230. See also S.D. CODIFIED LAWS § 60-4-11 (Michie 2003) (contains the actual statutory provision).

114. Id. at § 60-4-11.

115. Wood, 588 N.W.2d at 228.

116. Id.
pose him to dust, the employer insisted that Wood quit smoking. Wood agreed to quit smoking, but tests later revealed nicotine in his system, and he was fired. Wood claimed that his employer violated South Dakota's off-duty use of tobacco law and sought damages for lost wages. Rejecting his claim, the Supreme Court of South Dakota held that the smoking restriction placed on Wood was related to a bona fide occupational qualification and "was reasonably and rationally related" to the employment responsibilities of the position. This determination was based on medical testimony about the potential added hazard of dust in the job area which could ultimately subject the employer to liability for Wood's illness.

The third case, McGillen v. Plum Creek Timber Co., involved a rather novel attempt to seek refuge under a "lawful product" statute in Montana. Under Montana law, an employer "may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual legally uses a lawful product off the employer's premises during nonworking hours." Plaintiff Jerry McGillen, who worked at Plum Creek Manufacturing (Plum Creek) for approximately fifteen years, was reported by his supervisor, John DeReu, for sleeping on the job. After he was suspended, McGillen apparently decided to play a practical joke on DeReu by placing an ad in the Mountain Trader, a weekly trade publication. The ad indicated that persons interested in purchasing a certain truck should call DeRue late in the evening. After Plum Creek hired an investigator, McGillen admitted that he placed the ad, and was terminated. In his action for wrongful termination, McGillen argued that his use of a "lawful product" — the Mountain Trader — could not be a legitimate business reason for his discharge. In response, Plum Creek argued that because McGillen admitted that he had violated company policy, it had good cause to fire him. Denying both parties' motions for summary judgment, the court let the case be heard by a jury. In the context of jury instructions, the trial court noted that "lawful

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117. Id. at 229.
118. Id.
119. Id.
120. Id. at 231.
121. Id. at 230.
125. Id.
126. Id.
127. Id.
128. Id. at 23 (citing MONT. CODE ANN. § 39-2-903(5), which provides that "[t]he legal use of a lawful product by an individual off of the employer's premises during non-working hours is not a legitimate business reason" for dismissal of an employee unless the employer acts within the provisions of MONT. CODE ANN. § 39-2-313).
129. Id. at 21, 23.
product” as defined by section 39-2-213 of the Montana Code “means a product that is legally consumed, and includes food, beverages, and tobacco” – not placing an ad in a newspaper. The Supreme Court of Montana agreed with the trial court, underscoring that the purpose of the statute is to “protect an employee from discharge for the use of a legal product, such as alcohol or tobacco, off the employer’s premises.” In so doing, the court circumscribed the scope of “lawful product” to those products that can literally be consumed.

2. Other Lawful Off-Duty Conduct

Several states have adopted laws that are much more comprehensive. California, New York, North Dakota and Colorado all have statutes that protect a broader range of activity. Massachusetts also has a right to privacy statute that extends protection to employees for off-duty conduct, and Connecticut protects employees who exercise certain federal and state constitutional rights from adverse action by their employers. The relevant law in each of these states is discussed herein, including recent cases interpreting the scope of each.

a. California

In addition to the right to privacy contained in the state constitution, California has a separate law pertaining to a worker’s right to privacy for off-duty conduct. The plain language of California’s law governing an employer’s use of off-duty conduct has the potential to be the most extensive law in the nation. Under section 96(k) of California’s Labor Code, the Labor Commissioner is required to take assignment of “[c]laims for loss of wages as the result of demotion, suspension, or discharge from employ-
ment for lawful conduct occurring during nonworking hours away from the employer’s premises. This law, which became effective January 1, 2000, originally only applied to current employees; it now applies to both employees and job applicants. In 2001, the California legislature extended protection to applicants after it found and declared that

absent the protections by the Labor Commissioner, working men and women are ill-equipped and unduly disadvantaged in any effort to assert their individual rights otherwise protected by the Labor Code. The Legislature finds it necessary and appropriate to provide employees an inexpensive administrative remedy for their pursuit of their rights under the Labor Code. The Legislature further declares that this act is necessary to further the state interest in protecting the rights of individual employees and job applicants who could not otherwise afford to protect themselves.

Rather surprisingly, this section of the California Labor Code does not contain any exceptions, like those contained in similar statutes in New York, North Dakota and Colorado. For example, under the plain language of section 96(k), there is no exception to accommodate an employer’s business necessity or conflicts of interest. Not surprisingly, immediately after its enactment, concerns arose about the scope of the statute and the ramifications for employers in California.

136. CAL. LAB. CODE § 96(k) (West 2003).
137. CAL. LAB. CODE § 98.6 (West 2003) (stating that “[n]o person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or applicant engaged in any conduct . . . described in subdivision (k) of Section 96”).
138. CAL. LAB. CODE § 98.6 note (West 2003) (historical and statutory notes).
139. Compare CAL. LAB. CODE § 96(k) (West 2003) (broadly granting the Labor Commissioner authority to take assignments of claims for loss of wages as a result of discharge for “lawful conduct during nonworking hours away from employer’s premises”), with N.Y. LAB. LAW § 201-d(2) (McKinney 2003) (proscribing the off-duty conduct that an employer may not use as the basis for employment decisions and giving limited exceptions to that rule), and N.D. CENT. CODE § 14-02.4-01 (2003) (providing a business-related interest exception to the anti-discrimination law), and COLO. REV. STAT. § 24-34-402.5(1)(a)-(b) (2003) (providing exceptions to the law against termination of off-duty employee activities). The New York, North Dakota, and Colorado statutes are discussed in more depth infra in Part II.B.2.b-d.
140. See, e.g., CAL. LAB. CODE § 96(k) (West 2003) (failing to mention either of these exceptions).
With many questions raised about the breadth of section 96(k), the California Attorney General was asked to determine if the statute abrogated existing law that "permits the disciplining of peace officers for off-duty conduct occurring away from their place of employment that is otherwise lawful but conflicts with their duties as peace officers." The California Attorney General held that it did not abrogate existing law which prevented peace officers from participating in off-duty conduct that conflicted with their job duties. Although this opinion does not apply to private employers, it does contain language that has set the tone for subsequent interpretations. The opinion acknowledged that subsection (k) was added to section 96 "so that the Commissioner could 'assert the civil rights otherwise guaranteed by Article I of the California Constitution' for employees 'ill-equipped and unduly disadvantaged' to assert such rights." Importantly, the California Attorney General observed that the constitutional rights of peace officers "do not prevent [them] from being disciplined for off-duty incompatible activities." Moreover, throughout its history, section 96 "has not served as an original source of employee rights against employers, but has instead provided a supplemental procedure for asserting employee claims for which the legal basis already existed elsewhere in the law." This history of section 96 led to the conclusion that the addition of subsection (k) to section 96 "did not create new substantive rights for employees . . . . it established a procedural mechanism that allows the Commissioner to assert, on behalf of employees, their independently recognized constitutional rights." In so doing, the California Attorney General potentially limited the scope of off-duty behavior protected by section 96(k).

To date, two cases have been decided in California regarding the application of section 96(k) on employers' policies and practices; Section 96(k) of the California Labor Code: Implications for Employers Who Attempt to Regulate Lawful Employee Conduct During Non-Working Hours, THELEN REID REPORT NO. 63 (Thelen Reid & Priest LLP), June 18, 2002 at http://www.thelenreid.com/articles/report/rep63.htm (describing the potential problems that section 96(k) might cause employers). Both of these e-newsletters written by large management law firms express concern about the liability sections 96(k) and 98.6 create for employers in California.


143. Id.

144. Id. at *228 (quoting CAL. LAB. CODE § 96(k), ch. 4, 1999 Cal. Stats. ch. 92 § 1).

145. Id.

146. Id.

LIMITING THE USE OF OFF-DUTY CONDUCT

scope of section 96(k) in the context of private employment. Both of
these cases involve an employee's associational interests. In the first case,
Tavani v. Levi Strauss & Co., Vincent Tavani sued his former employer
for, inter alia, violating his rights protected by section 96(k). Tavani, a
high-ranking manager, was terminated as the result of his inappropriate
relationships with subordinate women at Levi Strauss & Co. (Levi), which
deteriorated confidence in his leadership and his "ability to manage effec-
tively." Prior to being terminated, Tavani received a written warning that
he "maintained an inappropriate personal relationship with a subordinate"
which "violated [Levi's] Conflict of Interest policy and exposed the com-
pany to a claim which had to be settled." Levi's policy requires its em-
ployees to avoid conflicts of interest or the appearance of conflicts of inter-
est, and admonishes employees that the "standards of policy application for
conflicts of interest are higher for employees at higher levels in the organi-
zation due to the scope of their responsibilities." Despite that warning,
Tavani engaged in a subsequent relationship with another Levi employee.

The court was not persuaded by Tavani's assertion that his behavior
should be protected by section 96(k). Instead of giving the statute a broad
interpretation, the court stated that California courts have "consistently
stressed" that "the right to privacy is not absolute." Tavani's alleged ro-
mantic relationships "may have occurred outside Levi's premises but [they]
diminished [his] credibility and effectiveness as a manager at Levi." The
court found that termination of Tavani's employment would only be "an
invasion of privacy if it were based on the 'misuse' of private informa-
tion." The court continued to explain why Tavani's off-duty conduct was
not protected by section 96(k):

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LEXIS 10794, at *52 (Ct. App. Nov. 21, 2002) (ruling that the employer could terminate
the employee for his relationships with subordinate female employees because it affected his
ability to be a good upper level manager); Agabao v. Delta Design, Inc., No. D039642, 2003
96(k) an employer's legitimate business interests could be used to relinquish employee
rights that would otherwise be protected by the statute).
150. Id. at *15.
151. Id. at *6-7 (alteration in original).
152. Id. at *32.
153. See id. at *12-13 (describing Tavani's second relationship with a subordinate
female employee).
154. Id. at *44.
155. Id. at *44-45.
156. Id. at 45.
Tavani had a diminished expectation of privacy regarding his relationships with female subordinate employees and his actions created a situation that required Levi to become concerned about his “inappropriate” relationships. Not only did his actions influence his effectiveness as an upper level manager in the company but, once Levi became aware that his staff and former employees were claiming his personal relationship affected his employment decisions, it had an obligation to both investigate and take proper remedial action.\textsuperscript{157}

The fact that Tavani’s effectiveness as a Levi employee was undermined by his relationships was a persuasive factor for the court. Thus, even though section 96(k) does not contain a conflicts of interest exception for employers, one was effectively read into the code by virtue of Levi’s clearly articulated policy, thereby suggesting that this section offers employees limited protection.

A similar result for the employer was reached in a second case, \textit{Agabao v. Delta Design, Inc.} where the employer, Delta Design, Inc. (Delta Design,) had a non-fraternization policy.\textsuperscript{158} The policy explicitly prohibited the employment of relatives (including co-habitation) when “‘one relative would be in a direct supervisory relationship to the other,’ or when ‘the relationship causes an actual or potential conflict of interest within the Company.’”\textsuperscript{159} During approximately a year and a half, Ronaldo Agabao cohabited with another Delta employee, Raquel Garong, and they had a child together.\textsuperscript{160} During that same time, Agabao prepared and signed Garong’s performance reviews and approved her promotion and raise — all in violation of the company policy.\textsuperscript{161} After his employer discovered the relationship, Agabao was terminated for violating the company’s policy, and Agabao then sued Delta for violating his right to privacy under section 96(k).\textsuperscript{162}

The court concluded that Agabao’s position lacked merit, stating that “when subdivision (k) was added to section 96 in 1999, it was established that as a condition of employment, and for legitimate business reasons, an employer may require an employee to relinquish the exercise of certain rights.”\textsuperscript{163} As an example, the court added, “[f]or instance, although news-

\begin{itemize}
\item \textsuperscript{157} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id. at *3.
\item \textsuperscript{163} Id.
\end{itemize}
paper reporters enjoy the constitutional right of free speech, their employment may be terminated for expressing views inconsistent with their employers' editorial policies.\textsuperscript{164} The court explained that an employer may be "legitimately concerned with appearances of favoritism, possible claims of sexual harassment and employee dissension, created by romantic relationships between management and nonmanagement employees."\textsuperscript{165} The Agabao court even went so far as to presume that when the California legislature added subsection k to section 96, "it knew of Crosier and other cases establishing an employer's right to curtail activities of employees when necessitated by legitimate business concerns."\textsuperscript{166} Acknowledging that Delta's policy "is to prevent actual and potential conflicts of interest and actual or apparent favoritism in the workplace, to maintain good employee morale and discipline and to maintain Company security and confidentiality of records," the court deemed it a "valid non-fraternization policy," thereby denying Agabao's claim.\textsuperscript{167}

In reaching the conclusion that section 96(k) was inapplicable, the court rejected Agabao's reliance on Rulon-Miller v. IBM Corp. "for the premise that termination based on a private sexual relationship may be improper."\textsuperscript{168} A critical distinction, however, is that IBM did not have a non-fraternization policy. To the contrary, IBM's policy was that it would be concerned "with an employee's off-the-job behavior only when it reduces his ability to perform regular job assignments, interferes with the job performance of other employees, or if his outside behavior affects the reputation of the company in a major way."\textsuperscript{169} The plaintiff-employee, Virginia Rulon-Miller, was terminated as the result of an accusation made by her supervisor regarding Rulon-Miller's romantic relationship with the manager of a rival office products firm.\textsuperscript{170} Because of the protection extended by IBM's policy, Rulon-Miller prevailed on her claims for wrongful discharge and for intentional infliction of emotional distress.\textsuperscript{171}

Although California has both a state constitutional right to privacy and a broadly worded statute protecting employees from invasions of privacy

\textsuperscript{164} Id. (citing Eisenberg v. Alameda Newspapers, Inc., 88 Cal. Rptr. 2d 802, 827 (Ct. App. 1999) (holding that a news reporter's First Amendment rights do not guarantee him employment)).


\textsuperscript{166} Agabao, 2003 WL 194950, at *4 (citations omitted).

\textsuperscript{167} Id.

\textsuperscript{168} Id. at *4 n.4 (citing Rulon-Miller v. IBM Corp., 208 Cal. Rptr. 524 (Ct. App. 1984), overruled on other grounds by Foley v. Interactive Data Corp., 765 P.2d 373, 392, 401 n.42 (Cal. 1988)).

\textsuperscript{169} Rulon-Miller, 208 Cal. Rptr. at 530.

\textsuperscript{170} Id. at 528.

\textsuperscript{171} Id. at 534-35.
by their employers, California courts tend to find that non-fraternization policies are permissible. Thus, these recent California cases indicate that employers who seek to restrict their employees' off-duty relationships should adopt anti-fraternization policies. To the extent that the employer can articulate a reasonable connection between the policy and a legitimate business reason for the policy, it is likely that such policies will be upheld, even in California.

b. New York

New York also offers protection to employees for their off-duty activities. More specific than the law in California, New York law provides that it is unlawful for an employer
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 [with certain exceptions]. . . ;

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 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 . . . the civil service law.\textsuperscript{172}

The law, however, specifically does not protect activity that "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest."\textsuperscript{173} This legislation was "designed to prevent discrimination against employees for

\textsuperscript{172} N.Y. LAB. LAW § 201-d(2)(b)-(d) (McKinney 2004).

\textsuperscript{173} See id. § 201-d(3)(a). The law also does not protect certain acts by employees of a state agency that conflict with their official duties and acts that these employees do which are in violation of a collective bargaining agreement. See id. § 201-d(3)(b)-(e).
their activities outside of working hours."\textsuperscript{174} Underscoring the purpose of the law and the bargaining that went into the drafting process, Governor Cuomo stated, upon signing the legislation, that "these bills . . . properly strike the difficult balance between the right to privacy in relation to non-working hours activities of individuals and the right of employers to regulate behavior which has an impact on the employee's performance or on the employer's business."\textsuperscript{175}

A number of cases have tested the bounds of this law after it became effective in 1992, including two cases involving political activities.\textsuperscript{176} The political activity cases discuss the scope of Labor Law section 201-d pertaining to subsection (a), which protects an individual's political activities outside of working hours. In the first case, \textit{Richardson v. City of Saratoga Springs}, plaintiff-employee Scott Richardson claimed that his job duties were modified and he was denied a promotion because he supported a political opponent to the Commissioner of Public Works.\textsuperscript{177} The court found that it was "reasonably inferable" that the changes were "prompted by the Commissioner's awareness, and disapproval, of [plaintiff's] opposing political activities. . . ."\textsuperscript{178} In short, the court held that Richardson "satisfied his burden of coming forth with legally admissible proof that he was treated detrimentally - by having his job duties adjusted in a way that was calculated to, and did, lead to his being denied a promotion and concomitant salary increase . . . because of his off-duty political activities."\textsuperscript{179}

In another case, \textit{Cavanaugh v. Doherty}, the court likewise found that the plaintiff stated a cause of action for a violation of Labor Law section 201-d.\textsuperscript{180} In this case, Cavanaugh was allegedly fired as the result of a political argument in a restaurant with Thomas Doherty, a high-ranking official in the Executive Department.\textsuperscript{181} The argument was allegedly "precipitated by Doherty's derogatory remarks concerning plaintiff's supervisors and their political affiliations," as the "verbal exchange culminated in plaintiff calling Doherty an 'asshole,' to which he allegedly responded that


176. \textit{See}, e.g., \textit{Richardson v. City of Saratoga Springs}, 667 N.Y.S.2d 995 (App. Div. 1998) (holding that where it is reasonably inferable that the modification of occupational duties were connected to political activities, the employer has violated the law); \textit{Cavanaugh v. Doherty}, 675 N.Y.S.2d 143 (App. Div. 1998) (holding that an employee may have a cause of action against an employer even where the political activity is defined as an argument with a political official).

177. Richardson, 667 N.Y.S.2d at 996.

178. \textit{Id.} at 997.

179. \textit{Id.}

180. Cavanaugh, 675 N.Y.S.2d at 149.

181. \textit{Id.} at 146.
'he would "have her job in the morning.”' The Richardson and Cavannah cases indicate a willingness on the part of New York courts to protect employees' political activities and related speech if there is a connection between the speech and adverse employment action.

The majority of the cases interpreting the scope of Labor Law section 201-d, however, pertain to adverse employment action based on the scope of "legal recreational activities." Of those cases, most pertain to an employee’s off-duty personal relationships, and in one case, the plaintiff attempted to extend "legal recreational activities" to include the installation of telephone equipment for personal profit. Under the statute, “recreational activities” is defined to include “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.” Unlike political activities cases which have been more straightforward, personal relationship association cases produced an early division of opinion between the state and federal courts in New York. The state court address this issue first in State of New York v. Wal-Mart Stores, Inc., which involved two Wal-Mart employees who were dating while the female employee was married but separated from her spouse. At that time, Wal-Mart’s non-fraternization policy prohibited a “dating relationship between a married associate and another associate other than his or her own spouse. . . .” The New York Attorney General commenced an

182. Id.


185. N.Y. LAB. LAW § 201-d(1)(b) (McKinney 2004).

186. See Wal-Mart, 1993 WL 649275, at *1 (finding that dating while married was included within the scope of "legal recreational activities" prohibited by the New York Labor Code), rev’d, 621 N.Y.S.2d 158 (App. Div. 1995).

action on behalf of the aggrieved employees against Wal-Mart, asserting that Wal-Mart's policy violated section 201-d(2)(c) of New York's Labor Code, which prohibits an employer from taking an adverse employment action based on an "individual's legal recreational activities."\textsuperscript{188} The trial court refused to dismiss this cause of action, stating that the "conduct alleged to have been the cause of the 'firing' - 'dating' while one was married, may well be 'recreational activities' within the meaning of the statute.\textsuperscript{189}

This early view of the scope of "legal recreational activities" was promptly struck down on appeal. The New York Appellate Division declined to "force" a "dating relationship" within the meaning of "recreational activities," stating:

To us, "dating" is entirely distinct from and, in fact, bears little resemblance to "recreational activity." Whether characterized as a relationship or an activity, an indispensable element of "dating," in fact its \textit{raison d'etre}, is romance, either pursued or realized. For that reason, although a dating couple may go bowling and under the circumstances call that activity a "date," when two individuals lacking amorous interest in one another go bowling or engage in any other kind of "legal recreational activity," they are not "dating."\textsuperscript{190}

In reaching its conclusion, the court also pointed to the "voluminous legislative history to the enactment."\textsuperscript{191} The court found it evidenced an "obvious intent to limit the statutory protection to certain clearly defined categories of leisure-time activities . . . personal relationships fall outside the scope of legislative intent."\textsuperscript{192} The majority's holding implies that section 201-d offers no protection to a relationship with a romantic - or potentially romantic - component.

Not all of the appellate judges hearing the case agreed with this limited view of recreational activity. In a dissenting opinion in the Wal-Mart case, Justice Yesawich expressed his disagreement with the premise that "dating" falls outside of the general definition of "recreational activities."\textsuperscript{193} In Justice Yesawich's view, the statute "by its terms, appears to encompass social activities, whether or not they have a romantic element, for it in-

\begin{itemize}
  \item[188.] \textit{Id.} (citing N.Y. LAB. LAW § 201-d(2)(c)).
  \item[189.] \textit{Id.} at *2.
  \item[190.] \textit{Id.} at 159-60.
  \item[191.] \textit{Id.}
  \item[192.] \textit{Id.} at 159-60.
  \item[193.] \textit{Id.} at 160 (Yesawich, J., dissenting).
\end{itemize}
cludes any lawful activity pursued for recreational purposes and undertaken during leisure time.2194 Contrary to the majority's narrow reading of the statute, Justice Yesawich stated:

the Legislature's primary intent in enacting Labor Law § 201-d was to curtail employers' ability to discriminate on the basis of activities that are pursued outside of work hours, and that have no bearing on one's ability to perform one's job, and concomitantly to guarantee employees a certain degree of freedom to conduct their lives as they please during nonworking hours. . . .2195

Similar to the sentiment expressed by Justice Yesawich, the federal district court in the Southern District of New York declined to follow the majority opinion in Wal-Mart. It reached a different conclusion in Pasch v. Katz Media Corp.,2196 another case involving a romantic relationship. Rejecting the Wal-Mart court's holding, the Pasch court concluded that "'cohabitation' that occurs off the employer's premises, without use of the employer's equipment and not on the employer's time, should be considered a protected activity for which an employer may not discriminate, absent some showing that such activity involves a material conflict of interest with the employer's business interests."2197

Rejecting the position taken by the majority in Wal-Mart, the Pasch court read the legislative history as "evidencing an intent to include cohabitation as a recreational activity protected by the statute."2198 In support of this position, the court quoted the bill's sponsor, Senator Lack, who stated that the statute is intended to remedy instances in which employers are trying to regulate an employee's off duty activities, contending that what employees do off-hours has an impact on the employer. But should an employer have a right to forbid a person from engaging in a legal activity, such as wearing a button for a particular candidate, simply because the employer does not agree with those political sentiments? . . . We have long since passed the days of company towns, where the com-

2194. Id.
2195. Id.
2196. See Pasch v. Katz Media Corp., No. 94 Civ 8554 (RPP), 1995 WL 469710, at *3 (S.D.N.Y. Aug. 8, 1995) (concluding that cohabitation which does not involve a "material conflict of interest" with the employer's business interests is protected activity within the scope of the New York Labor Code).
2197. Id.
2198. Id. at *4.
pany told you when to work, where to live and what to buy in their stores. This bill will ensure that employers do not tell us how to think and play on our own time.\textsuperscript{199}

The district court then held that the plaintiff alleged sufficient facts to make a prima facie case under Section 201-d(2)(c).\textsuperscript{200} Consistent with its broad interpretation of “recreational activity” under section 201-d, the Southern District of New York also held in a subsequent case that inasmuch as a “close personal friendship is analogous to cohabitation,” it should be considered protected activity under the statute.\textsuperscript{201} In so holding, the court did say, however, that if it could be determined that the employee’s relationship in question “involved a material conflict of interest,” the employer should prevail.\textsuperscript{202}

The differences between the federal court and state court interpretations of the scope of “legal recreational activity” came to an end with McCavitt v. Swiss Reinsurance America Corp.\textsuperscript{203} In this case, plaintiff-employee Jess McCavitt alleged that he was passed over for a promotion and then terminated largely because of his dating relationship with another officer of the company.\textsuperscript{204} Mr. McCavitt was terminated despite the fact that Swiss Reinsurance did not have a written non-fraternization policy, nor did it have an anti-nepotism policy, and the relationship allegedly did not have any “repercussions whatsoever for the professional responsibilities” of McCavitt.\textsuperscript{205} After considering the conflicting decisions in the Wal-Mart,\textsuperscript{206} Pasch\textsuperscript{207} and Aquilone\textsuperscript{208} cases, the Second Circuit held that “nothing in logic, the language of § 201-d, its legislative history, or New York state case law . . . leads us to conclude that the New York Court of Appeals would hold that romantic dating is a ‘recreational activity’ under New York Labor Law § 201-d(1)(b). . .”\textsuperscript{209} Two subsequent decisions likewise held that off-duty romantic relationships are not protected by this law as recrea-

\textsuperscript{199} Id. at *5 (citing NEW YORK STATE ASSEMB., SENATE MEMO, N.Y. State Assemb., 215th Sess., at 9 (1992)).
\textsuperscript{200} Id. at *6.
\textsuperscript{202} Id.
\textsuperscript{203} 237 F.3d 166 (2d Cir. 2001).
\textsuperscript{204} Id. at 167.
\textsuperscript{205} Id.
tional activities.\textsuperscript{210}

It is worth noting, however, the humorous and begrudging concurrence in the \textit{McCavitt} case, in which Judge McLaughlin encapsulated the reality of this series of decisions limiting the scope of section 201-d. "Sister Mary Lauretta, a Roman Catholic nun, once counseled: [T]o be successful, the first thing to do is fall in love with your work. She should, of course, now have to add: [J]ust don’t fall in love \textit{at} work."\textsuperscript{211} As Judge McLaughlin observed, the New York legislature,

should have extended protection to the pursuit of a romantic relationship with whomever an employee chooses — even a fellow, unmarried employee — outside the office, during non-working hours. This is compelling so in today’s society, where ostracizing anyone associated with one’s office from the acceptable dating pool would doom the majority of the population to the life of a Trappist monk.\textsuperscript{212}

He then lamented that it is "repugnant to our most basic ideals in a free society that an employer can destroy an individual's livelihood on the basis of whom he is courting, without first having to establish that the employee’s relationship is adversely affecting the employer’s business interests."\textsuperscript{213}

As it now stands, employees’ personal romantic relationships are not protected in New York. Furthermore, there is no indication that "recreational activity" will be broadly interpreted. The Southern District of New York thwarted another attempt by an employee to seek refuge under New York Labor Law section 201-d.\textsuperscript{214}

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\textsuperscript{210} See, \textit{e.g.}, Hudson v. Goldman Sachs & Co., 725 N.Y.S.2d 318, 319 (App. Div. 2001) (holding that a claim brought by an employee terminated for having an extramarital affair with a coworker, was properly dismissed for failure to state a claim under Labor Law \$ 201-d); Bilquin v. Roman Catholic Church, 729 N.Y.S.2d 519, 519 (App. Div. 2001) (finding that the lower court properly granted summary judgment in favor of employer on a \$ 201-d claim, where an employee was terminated because she lived with a man married to another woman).

\textsuperscript{211} McCavitt, 237 F.3d at 168-69 (McLaughlin, J., concurring) (emphasis in original).

\textsuperscript{212} Id. at 169-70.

\textsuperscript{213} Id. at 170.

\textsuperscript{214} See Cheng v. New York Tel. Co., 64 F. Supp. 2d 280, 285 n.2 (S.D.N.Y. 1999) (finding that the plaintiff’s claim that the installation of telephone equipment for profit was not included as a protected, legal "recreational activity" under the New York statute). The court found that the plaintiff’s claim was “patently frivolous.” \textit{Id.}
\end{flushleft}
c. North Dakota

As part of its general anti-discrimination statute, North Dakota prohibits discrimination on the basis of participation in lawful off-duty activity. Specifically, it is considered 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...
- [based on an employee's]... 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.

The broad provisions preventing employers from discriminating against employees for lawful activity taking place off of the employer's premises during non-working hours were originally enacted in 1991. The legislation was designed "to expand the law prohibiting employment discrimination and preclude employers from inquiring into an employee's non-work conduct, including an employee's weight and smoking, marital, or sexual habits." According to the court in Hougum v. Valley Memorial Homes, the North Dakota legislature added the conflict-of-interest language in 1993 to clarify conflicts between the employee's protected lawful off-duty activities and the employment-at-will doctrine. The court explained that the 1993 amendments were designed to give employers some assurance that off-duty conduct which is "‘deleterious to the well-being of the employer’s mission’" will not be protected. Consistent with this goal, it is also not

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215. N.D. CENT. CODE § 14-02.4-01 (1997). This statute also protects employees from discrimination based on race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance. See id. at § 14-02.4-01.

216. N.D. CENT. CODE § 14-02.4-03.


218. Id. For citations to the statute's session law testimonies, see id.; id. at ¶ 41.

219. Id. (quoting ch. 140, 1993 N.D. Sess. Laws (codified as amended at N.D. CENT. CODE § 14-02.4-03)).
a discriminatory practice for an employer to fail or refuse to hire and employ an individual for a position . . . or to discharge an individual from a position on the basis of that individual’s participation in a lawful activity that is off the employer’s premises and that takes place during non-working hours and which is not in direct conflict with the essential business-related interests of the employer, if that participation is contrary to a bona fide occupational qualification that reasonably and rationally relates to employment activities and the responsibilities of a particular employee or group of employees, rather than to all employees of that employer.221

Similar to the challenges brought in California and New York, the language of the North Dakota statute has sparked litigation.

In the first case, Fatland v. Quaker State Corp., the scope of the bona fide occupational qualification was at issue.222 Employee Wallace Fatland was terminated after he failed to divest himself of an ownership interest in a fast lube business which was a competitor of his employer, Quaker State Corporation (Quaker State).223 Quaker State had asked Fatland to liquidate his interest in accordance with its Conflict of Interest Policy (Policy) that was designed to prevent its employees from being involved with another entity “which is or has the potentiality of being at variance with the best interests of [Quaker State].”224 Fatland brought a claim for discrimination under the North Dakota statute, section 14-02.4.225 Quaker State argued “that the Policy sets forth a bona fide occupational qualification that reasonably and rationally relates only to employees, such as Fatland, whose involvement in an off-hours activity constitutes a conflict of interest with the employer because of the position of the employee within the company.”226 A Quaker State customer complained after he realized that information he divulged to Fatland could be used by Fatland in connection with his fast-lube business with which he was in direct competition.227

Based on these facts, the court found that Quaker State had a legitimate concern because prohibiting employees, such as Fatland

from operating off-hours businesses that would benefit from confidential information that the employees’ posi-

221. N.D. CENT. CODE § 14-02.4-08 (2003).
222. 62 F.3d 1070 (8th Cir. 1995).
223. Id.
224. Id. at 1071.
225. Id. at 1072.
226. Id.
227. Id. at 1072-03.
tions within the company would enable them to secure from competitors, resulting in resentment towards, and termination of business with, the employer is a bona fide occupational qualification that is reasonably and rationally related to a particular employee or group of employees within the meaning of section 14-02.4-08.228

Importantly, with regard to the scope of the bona fide occupational qualification requirement, the court in Fatland agreed with Quaker State that had Fatland been employed in a different capacity, such as a janitor, "his operation of a fast lube operation would not necessarily have had a deleterious effect on Quaker State's relationship with its other customers."229 In practice, Quaker State only required "key employees" to submit annually signed Policy compliance statements, which the court viewed as reasonable within the parameters of section 14-02.4-08.230

In another case, Hougum v. Valley Memorial Homes, the North Dakota Supreme Court was asked to consider the scope of "lawful activity."231 Under the unseemly set of facts in this case, plaintiff-employee Daniel Hougum was inadvertently observed "masturbating in an enclosed toilet stall in a men's public restroom at a Sears store..."232 After Hougum was charged with disorderly conduct, he was terminated by his employer from his position as staff chaplain.233 Hougum sued his former employer for discrimination under the North Dakota statutes, claiming that he was engaged in a "lawful activity" and thus was wrongfully terminated.234 When presented with the question of whether Hougum's conduct was "lawful," the court, however, declined to make a determination as a matter of law.235 In so doing, the court stated that Hougum "raised a disputed factual issue about whether [or not] his conduct was forbidden by law and therefore may fit within the protected status of lawful activity off the employer's premises."236

The court in Hougum likewise found that there was an issue of fact concerning the employer's claim that the offending behavior adversely affected its business.237 With regard to the employer's assertion that Hougum's conduct "undermined his effectiveness as a chaplain and there-

228. Id. at 1073.
229. Id.
230. Id.
231. 1998 ND 24, ¶ 1, 574 N.W.2d 812.
232. Id. at 815 ¶ 2.
233. Id. at ¶ 5. Hougum, who was an ordained minister, had worked for his employer since 1980. Id.
234. Id. at 820-21, ¶ 38.
235. Id. at 822, ¶ 45.
236. Id.
237. Id.
fore directly conflicted with its business-related interests," the court also declined to rule as a matter of law. Because the kind of conflicts raised in *Hougum* were "not the same type of business and economic conflicts of interest at stake in *Fatland*," the court ruled against the employer on its motion for summary judgment. While it seems reasonable in *Hougum* that genuine issues of fact existed as to whether the plaintiff's conduct was in "direct conflict" with the employer's business interests, it is less understandable that the court would decline to decide as a matter of law whether the conduct itself was lawful or unlawful.

In a third case, *Jose v. Norwest Bank North Dakota*, the North Dakota Supreme Court was asked to determine whether section 14-02.4-03 prohibits an employer from engaging in a retaliatory discharge against an employee who participates in an internal investigation. The plaintiff employees were terminated after they participated in an investigation of work performance issues involving their supervisor and another senior employee. The court refused to extend the scope of section 14-02.4-03 to include a clear public policy against retaliatory discharge for participating in an internal investigation of other employees' job performances where there was no evidence that the termination was the result of participation in lawful activity off the employer's premises during non-working hours. Thus far, these cases indicate that North Dakota is not inclined to give section 14-02.4-03 an expansive reading.

**d. Colorado**

The statute in Colorado limiting employers' use of off-duty conduct as the basis for adverse employment action is very similar to the North Dakota statute. Under Colorado law:

(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 non-working 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

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238. *Id.*
239. *Id.* at ¶ 46.
240. 1999 ND 175, ¶ 18, 599 N.W.2d 293, 298.
241. *Id.* at 295, ¶ 3, 5.
242. *Id.* at 298-299, ¶ 18.
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.243

The statute also explicitly provides that an aggrieved person claiming a violation of this law may bring a civil suit for damages and may sue for "all wages and benefits which would have been due him up to and including the date of the judgment had the discriminatory or unfair employment practice not occurred."244 All such actions are subject to a six-month statute of limitations.245

One of the first cases testing the bounds of section 24-34-402.5, Gwin v. Chesrown Chevrolet, Inc. (Chesrown), dealt with the question of whether an employer must adopt a specific restriction against lawful off-hours activity before being found in violation of the statute.246 David Gwin was a car salesman for Chesrown until he was fired after voluntarily participating in a sales seminar with a motivational speaker.247 Chesrown paid half of the seminar fee and the remainder was to be deducted from Gwin’s paycheck.248 Gwin was assured that he could get his money refunded if he was not satisfied with the speaker; after attempting to do so, he was fired.249 At trial and on appeal, Chesrown argued that Gwin failed to prove the exis-


244. COLO. REV. STAT. § 24-34-402.5(2)(a) (1988). The statute also provides that a plaintiff has an obligation to mitigate damages and that the court “shall award the prevailing party in such action court costs and a reasonable attorney fee.” Id. at § 24-34-402.5(2)(a)-(b).


247. Gwin, 931 P.2d at 468.

248. Id.

249. Id. Note that Gwin, who is African-American, was fired, but that three white employees who similarly requested refunds were not terminated. Id. This fact led to Gwin’s claim of race discrimination against Chesrow. Id.
tence of a "restriction" in violation of section 24-34-402.5(1). Under Chesrown's theory, in order for the statute to be applicable, "an employer must first restrict its employees' off-the-job activities;" under such an interpretation, "only when an employer imposes a restriction does the statute take effect to protect a worker's off-the-job privacy." Chesrown's argument was patently rejected by the court, which noted that under this approach "an employer could avoid the reach of the statute by simply not warning employees of any restriction, thus creating an absurd result." In an important point of clarification, the court stated that the "issue of restrictions of an employee's activities arises only as part of an employer's defense to an action... no specific restriction must be adopted by an employer as a predicate to violating the prohibition." This case effectively halted a potential inroad curbing the scope of privacy now afforded to employees.

Lastly, a comprehensive decision about the scope of the bona fide occupational requirement and conflict of interest provisions of section 24-34-402.5 is contained in Marsh v. Delta Air Lines. Michael Marsh, a baggage handler for Delta Airlines (Delta), wrote a letter critical of his employer that was published in the Denver Post, and he was subsequently terminated for engaging in "'conduct unbecoming [of] a Delta employee.'" Marsh sued for wrongful discharge, claiming that he engaged in legal off-duty activity which should be protected by Colorado law. The parties agreed that Marsh was engaged in lawful activity, so the issue before the court concerned only the exceptions to the general prohibition against adverse action based on such lawful activity. Inasmuch as there were no prior cases interpreting the substantive portions of section 24-34-402.5, and the legislative history was scant, the court endeavors to determine whether Delta was justified in firing Marsh under the exceptions to the statute.

In support of its position, Delta presented four arguments: 1) Marsh was terminated "for engaging in an activity related to a bona fide occupational requirement"; 2) the activity was "rationally related" to Marsh's job responsibilities; 3) publication of the letter led to a conflict of interest between Marsh and Delta; and 4) "a portion of the activity occurred on Delta

250. Id. at 470.
251. Id.
252. Id.
253. Id.
255. Id. at 1460-61.
256. Id. at 1461.
257. Id. at 1461-62.
258. Id. at 1462.
property." With regard to the first argument, the court articulated its understanding of the meaning of section 24-34-402.5:

[T]he law was meant to provide a shield to employees who engage in activities that are personally distasteful to their employer, but which activities are legal and unrelated to an employee’s job duties. In application, this statute should protect the job security of homosexuals who would otherwise be fired by an employer who discriminates against gay people, members of Ross Perot’s new political party who are employed by a fervent democrat, or even smokers who are employed by an employer with strong anti-tobacco feelings.

The “common thread” or critical issue is that the activity must be “unrelated” to the employee’s job duties for it to be truly “non-work related” activity. Moreover, the court acknowledged that the exceptions to the general rule are indicative of the fact that the legislature “did not intend this privacy statute to provide a sword to employees thereby allowing employees to strike indiscriminate public blows against the business reputation of their employer.”

On this premise, the court proceeded to elaborate on the protections offered to employers who take adverse employment action against employees based on off-duty conduct. First, the court found that the bona fide occupational requirement encompassed within the scope of the statute includes an “implied duty of loyalty, with regard to public communications, that employees owe to their employers.” If Marsh had been acting as a whistle blower, expressing concerns about public safety, he could have recourse under the Colorado privacy statute. The court, however, determined that the concerns raised were in the nature of “customer service,” and that Marsh was merely a “disgruntled worker venting his frustrations” publicly, instead of availing himself of the internal grievance procedures. Accordingly, the court held that Marsh’s termination did not violate the statute. Although this was sufficient to defeat Marsh’s section 24-34-402.5 claim, the court addressed Delta’s other arguments to add further clarification to the scope of the exceptions. In each instance, the court

259. Id. at 1461-62.
260. Id. at 1462.
261. Id. at 1462-63.
262. Id. at 1463.
263. Id.
264. Id.
265. Id.
266. Id.
chose to interpret the exceptions narrowly, against Delta.

First, the court considered the meaning of the portion of the statutory exception regarding the responsibilities of "'a particular employee or a particular group of employees,'" finding that "this portion of the statute was probably crafted to allow employers to require certain high profile members of their staff from foregoing involvement in activities that would call into question their competence."267 The court declined to extend this portion of the statute to an employer's entire workforce—including baggage handlers—who do not have a unique function of portraying a positive image for Delta.268 Under the court's interpretation, this exception is to be interpreted narrowly.

Second, with regard to Delta's conflict-of-interest argument, the court signaled that it was not interested in giving this statutory exception a broad reading. To the contrary, it found that "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.'"269 Under this standard, no conflict of interest was created when Marsh wrote the letter.270

Third, the court also defeated Delta's assertion that the statute should not apply to Marsh because some of the conduct took place on Delta's property.271 Although the court acknowledged that Marsh copied the letter in question on Delta's copy machine, this "de minimis act...[did] not, by itself, vitiate the applicability of the statute."272

In a third case, Robert C. Ozer, P.C. v. Borquez, already discussed herein in the context of unreasonable publicity, the Colorado Supreme Court overturned a jury verdict in favor of plaintiff-employee Robert Borquez on the ground that it was not supported by the lawful activities statute.273 In a resounding statement on the importance of jury instructions, the court held that the instruction given to the jury failed to include a charge regarding plaintiff's section 24-34-402.5 claim; it only addressed his sexual orientation claim under a Denver ordinance prohibiting discrimination based on sexual orientation.274 Even though the trial court recognized that evidence presented at the trial may have supported Borquez's claim that he was discharged based upon lawful activities that he did off his employer's

267. Id.
268. Id.
269. Id. at 1464 (quoting BLACK'S LAW DICTIONARY 299 (6th ed. 1990)).
270. Id.
271. Id.
272. Id.
See discussion supra Part II.A.2.
274. Id. at 375-76.
premises, the jury was not appropriately instructed on this claim, despite Borquez's specific request that such a charge be tailored to section 24-34-402.5. Therefore, the court in finding the verdict was not supported by the statute, ruled against Borquez.

e. Massachusetts

Although Massachusetts does not have a separate statute addressing an employee's off-duty activities, it does have a law generally providing a right to privacy for its citizens: "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." This statute has been interpreted to apply to employees who seek to protect their private lives from their employers, but it is not without limitations. The Massachusetts Privacy Act does not necessarily protect against the disclosure of "private facts" — meaning those that are "not public;" rather, it "proscribe[s] the disclosure of facts about an individual that are of a highly personal or intimate nature when there exists no legitimate, countervailing interest." In addition, the reasonableness of the disclosure "must be weighed against an employer's valid business interests." The Massachusetts Supreme Judicial Court has recognized that there are circumstances in which "an employer would always be liable for discharging an employee for his refusal to answer questions not relevant to its business purposes. In public policy terms, it is the degree of intrusion on the rights of the employee which is most important." In the employment context, an "employer's legitimate interest in determining [its] employees' effectiveness in their jobs should be balanced against the seriousness of the intrusion on the employees' privacy." If a company can articulate legitimate business reasons for seeking information about an off-duty incident, the intrusion is not actionable under the Massachusetts Privacy Act.

Such was the case in French v. United Parcel Service, Inc. In this case, a drinking incident involving United Parcel Service, Inc. (UPS) employees took place at the home of UPS employee, Christopher French. Several UPS employees, including French and his supervisor, Tom Clark, attended a beer festival and then went back to French's home. While

275. Id.
276. Id. at 376.
277. MASS. ANN. LAWS ch. 214, § 1B (Law Co-op 1999).
280. Cort, 431 N.E.2d at 913.
281. Bratt, 467 N.E.2d at 135.
283. Id. at 128.
284. Id. at 130.
285. Id.
they were there, UPS employee Daniel DeButts became intoxicated, and "emotionally volatile and uncontrollable," ultimately injuring himself.\textsuperscript{286} Clark wanted French to report the incident to UPS.\textsuperscript{287} After initially declining to do so, French succumbed to Clark's pressure and informed various superiors of the details of the incident.\textsuperscript{288} As a result, French was suspended pending an investigation, was allegedly "brow-beaten about the incident" and, ultimately, had to be treated for depression.\textsuperscript{289}

French brought a claim for invasion of privacy in violation of the Massachusetts statute, alleging that UPS violated his right to privacy by: "(a) insisting that he disclose details concerning an incident that occurred during off-work hours at his home; (b) repeatedly contacting his mental health providers without his consent; and (c) penalizing him, in the form of involuntary leave and demotion, for the incident."\textsuperscript{290} In considering the merits of French's claim, the court first found that the incident was not "private" and that the information was not "highly personal or intimate."\textsuperscript{291} Moreover, in weighing the privacy interest of French against UPS' interest in the information, the court found that, because UPS articulated "legitimate business reasons for seeking information about the DeButts incident, including concerns about the soundness of judgment exercised by its supervisory employees in regard to alcohol abuse generally as well as in a particular setting where all participants were UPS employees," at most there was a \textit{de minimis} invasion of privacy.\textsuperscript{292} Notwithstanding this fact, the invasion did not rise to the level of actionable conduct under the Massachusetts Privacy Act.\textsuperscript{293} The French case is indicative of Massachusetts' reluctance to protect employees against overzealous employers where an argument exists in favor of legitimate business interests.\textsuperscript{294}

\textsuperscript{286} Id.
\textsuperscript{287} Id.
\textsuperscript{288} French, 2 F. Supp. 2d at 130.
\textsuperscript{289} Id.
\textsuperscript{290} Id. at 131.
\textsuperscript{291} Id. (quoting Bratt v. IBM Corp., 467 N.E.2d 126, 133-34 (Mass. 1984)). The court noted, however, that it was "not necessary to decide whether [the information] would be 'highly personal or intimate' information about DeButts, rather than French." Id. at 131 n.1.
\textsuperscript{292} Id. at 131.
\textsuperscript{293} Id.
\textsuperscript{294} See, e.g., Bratt v. IBM Corp., 467 N.E.2d 126, 134-36 (Mass. 1984) (describing an employer's right to "seek certain personal information concerning an employee when the importance of the information in assessing the employee's efficacy in his work outweighs the employee's right to keep this information private"). \textit{See generally} Cort v. Bristol-Myers Co., 431 N.E.2d 908, 911-14 (Mass. 1982) (finding that public policy considerations did not justify imposition of liability on employer for discharging three employees for refusing to answer certain questions concerning family, home ownership, physical/medical data, and activities, because most of the questions were relevant to the employee's job qualifications and were not improperly intrusive); Petsch-Schmid v. Boston Edison Co., 914 F. Supp. 697, 707 (D. Mass. 1996) (noting that under a Massachusetts stat-
**f. Connecticut**

Unlike the broader state statutes addressing off-duty conduct discussed herein, Connecticut’s statute simply protects employees who exercise certain federal and state constitutional rights from adverse action by their employers. Under section 31-51q of the Connecticut statutes, any employer (both private and state):

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 [right of religious liberty], 4 [liberty of speech and the press] or 14 [right to assemble and petition] of article first of the Constitution of the state... 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.

A person bringing an action under section 31-51q also has a right to a jury trial. As is the case in New York, North Dakota, and Colorado, however, this right is not absolute. To be protected, the activity must not “substantially or materially interfere with the employee’s bona fide job performance or the working relationship between the employee and the employer...” Moreover, as a disincentive to a plaintiff tempted to bring a baseless claim, the statute provides that “[i]f 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.”

A key issue in cases brought pursuant to Connecticut section 31-51q seems to be whether the speech at issue regards a matter of “public concern.” Protected speech addressing matters of public concern include...
statements that can be "fairly considered as relating to any matter of political, social, or other concern to the community." To determine if the employee's speech is a matter of public concern, the "content, form, and context [of the speech], as revealed by the whole record," must be reviewed. Thus, a determination must be made as to whether the employee is making the statement as a "concerned citizen or as an employee set on airing a personal grievance." Speech that is not protected includes speaking out about perceived wrongdoings on the part of the employer's upper management, speech relating to the terms and conditions of one's employment, and a supervisor's off-duty off premises sexual contact with a new employee. In summary, only where a private employee is expressing concern about a public matter will the Connecticut statute protect against adverse employment action.

C. Federal Protection

Although there is no federal statute explicitly protecting employees from discipline for off-duty behavior, several statutes are designed to protect aspects of employees's personal lives from undue scrutiny. Four are of particular interest in the context of limiting the use of off-duty conduct in connection with adverse employment decisions: the Immigration Reform and Control Act; the Fair Credit Reporting Act; Title VII of the Civil Rights Act; and the Employee Polygraph Protection Act.

The Immigration Reform and Control Act is primarily designed to prevent the employment of unlawful aliens, but it also contains protections for potential employees who want to keep employers from prying into their background beyond that which is necessary to comply with the law. Likewise, whereas employers are permitted to use consumer reports in connection with employment decisions, the Fair Credit Reporting Act is designed to protect potential and current employees' private lives by re-

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301. Connick, 461 U.S. at 146.
302. Id. at 147-48. See, e.g., DiMartino v. Richens, 822 A.2d 205, 222 (Conn. 2003) (holding that an airport employee's speech expressing concerns about security was protected as "a matter of public and social concern to the community" under § 31-51q).
307. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(d)(2)(C), (D) (2000) (requiring that an employee's personal information can only be used for the purpose of verifying alienage and must be protected at all times).
quiring employers to comply with certain notice provisions of the Act. 308
Title VII offers some protection to employees in connection with the associational aspects of off-duty privacy. 309 The same is true for the Employee Polygraph Protection Act, which limits the use of polygraph tests to protect employees from unscrupulous employers who might seek information beyond the scope of one’s employment responsibilities. 310 Accordingly, a survey of the major provisions of each of these statutes is provided herein. In addition to these federal statutes, it should also be noted that the Electronic Communications Privacy Act of 1986 311 and the Stored Communications Act protect certain employee communications from intentional interception or access to stored communications. 312 Moreover, issues regarding off-duty conduct and privacy can also be raised under the Americans with Disabilities Act 313 and the Health Insurance Portability Accountability Act of 1996. 314

1. Immigration Reform and Control Act of 1986

Employers must comply with the requirements of the Immigration Reform and Control Act of 1986 (IRCA), 315 yet they must also not run afoul of that Act by being overly aggressive about investigating an individual’s status. The purpose of the IRCA is to make it unlawful to employ “unauthorized aliens.” 316 Within three days of hiring, an employer must complete

312. 18 U.S.C. § 2701 (2000). It is not unusual, however, for employers to have policies that allow them to monitor their employees’ electronic communications with their employees’ consent, which is provided for in an exception to the Electronic Communications Privacy Act. 18 U.S.C. § 2511(2)(d). To be effective, such consent should detail the scope of the employer’s monitoring to ensure that the employee’s consent is effective. See Rassoull v. Maximus, Inc., No. 03-1756, 2004 WL 515540, at *1 (per curiam) (D. Md. 2002) (finding that employee’s consent to interception of calls was enough to preclude employer violation of the Wiretap Act).
316. See id. § 1324a(h)(3) (defining the term “unauthorized alien” as an individual that is not at the time of employment either (a) an alien lawfully admitted for permanent residence, or (b) authorized to be employed by the IRCA or by the Attorney General).
a Form I-9 for that individual.\textsuperscript{317} To comply with the IRCA, the employer must swear that it physically examined the individual's documentation to verify the person's "identity and employment eligibility."\textsuperscript{318} The employer is in compliance with the requirements of the statute "if the document reasonably appears on its face to be genuine."\textsuperscript{319} For record-keeping purposes, an employer may copy the document presented\textsuperscript{320} but it should not single out certain nations of origin or citizenship, inasmuch as doing so would potentially violate IRCA as an "unfair immigration-related employment practice."\textsuperscript{321}

The provisions that proscribe unfair immigration practices protect employees' privacy by preventing potential employers from learning more about their background than is necessary to satisfy the requirements of IRCA. Section 1324b of IRCA sets forth unfair immigration practices, which provide that employers should not "discriminate against any individual (other than an unauthorized alien, as defined [by the act]) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of [an] individual from employment..." because of the individual's national origin or citizenship status.\textsuperscript{322} For example, an unfair immigration-related employment practice can occur if an employer has an intent to discriminate by requesting "'more or different documents than are required'" to verify employment eligibility, or if it refuses to honor documents that "'on their face [reasonably] appear to be genuine.'"\textsuperscript{323} Another problem can arise if an employer makes specific requests about the kinds of documents (which are, narrower in range than the kinds of documents required by the IRCA) that must be produced to verify employment authorization or identity, but the requests specially burden the applicant.\textsuperscript{324} Overall, as long as a prospective employee produces documents that comply with the IRCA, an employer is limited in making further requests regarding national origin and citizenship status.

\begin{itemize}
\item \textsuperscript{317} See id. 8 U.S.C. § 1324a(b)(1)(A) (2000) (requiring employer to attest that an employee is not an unauthorized alien); 8 C.F.R. § 274a.2(b)(1) (2002).
\item \textsuperscript{318} 8 C.F.R. § 274a.2(b)(1)(ii)(A) (2004).
\item \textsuperscript{319} 8 U.S.C. § 1324a(b)(1)(A) (2000).
\item \textsuperscript{320} 8 C.F.R. § 274a.2(b)(2)(iii)(B)(3) (2004).
\item \textsuperscript{321} 8 U.S.C. § 1324b(a)(1) (2000). Such action could also prompt litigation under Title VII.
\item \textsuperscript{322} § 1324b(a)(1).
\item \textsuperscript{324} See Robison Fruit Ranch, Inc. v. United States, 147 F.3d 798, 800-801 (9th Cir. 1998) (discussing the "document abuse" provision of IRCA in relation to employment verification requests).
\end{itemize}
2. Fair Credit Reporting Act

Having established an employee’s employment authorization and identity, an employer might want to investigate the background of a potential or current employee by using credit reports. Credit reports can give employers a window into the private lives of their employees, including the kind of debt they have, (e.g., credit card, mortgage, car loans, school loans) payment history on that debt (including any late payments), previous names and aliases, and information from court records (e.g., bankruptcy and divorce matters). There are limits, however, on employers’ obtaining and using such reports under the Fair Credit Reporting Act of 1996 (FCRA). The purpose of the FCRA is to ensure the procedures used to gather information about an individual’s credit worthiness are “fair and equitable to the consumer, with regard to... confidentiality, accuracy, [and] relevancy” and that the information is used in accordance with the provisions of the Act. If the user of a credit report leads the preparing agency to believe that the report is to be used for an employment purpose, the report is considered to be a “consumer report” within the meaning of the FCRA. The FCRA, however, excludes from consumer credit reporting any “report containing information solely as to transactions or experiences between the customer and the person making the report.”

325. See, e.g., Pettus v. TRW Consumer Credit Serv., 879 F. Supp. 695, 698-99 (W.D. Tex. 1994) (holding that the use of credit reports to evaluate applicants for employment is not a discriminatory employment practice); Russell v. Shelter Fin. Servs., 604 F. Supp. 201 (W.D. Mo. 1984) (holding that a consumer loan company’s request for a consumer report on a former employee could not be justified for “employment purposes” where the report was not requested until after the employee had announced his resignation).

326. See Fair Credit Reporting Act of 1996, 15 U.S.C.S. § 1681-1700 (1972) (enforcing strict usage and disclosure requirements for credit reports). See, e.g., Zamora v. Valley Fed. Sav. & Loan Ass’n of Grand Junction, 811 F.2d 1368 (10th Cir. 1987) (concluding that the FCRA does not permit an employer to obtain a credit report on an employee’s spouse). Note that the Fair Credit Reporting Act, which was originally enacted in 1970, is a part of the Consumer Credit Protection Act.


329. Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1274 (9th Cir. 1990); see also Hoke v. Retail Credit Corp., 521 F.2d 1079, 1082 (4th Cir. 1975) (holding that information furnished by a consumer reporting agency to a state board of medical examiners was furnished for “employment purposes” within the meaning of the statute).

Under the FCRA, an employer may request a consumer report in connection with making a decision about hiring, retention, or promotion of an employee.331 Prior to requesting such a report, however, the employer must comply with the requirements of the statute; a person may not procure a consumer report or cause a consumer report to be procured unless:

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing . . . the procurement of the report by that person. 332

An employer may use a consumer report in connection with taking adverse action against that employee.333 However, if after receiving the report the employer plans to take adverse action against an individual based on that report, the employer must comply with the requirements of the FCRA.

Specifically, before taking any adverse action based in whole or in part on the report, the employer must provide the employee or potential employee with a copy of the report and a written description of the consumer’s rights under the Act.334 The rights afforded consumers under such circumstances include the rights: to know if the information has been used adversely;335 to have access to the information provided to the reporting agency;336 to contest inaccuracies;337 and to sue for damages in federal court if an employer violates the Act.338 Additionally, after the employer takes adverse action on the basis of information contained in a consumer report, it must provide the individual with oral or written notice of the adverse action; contact information for the reporting agency; a statement that the reporting agency did not make the decision to take the adverse action and is unable to provide the consumer with the specific reason why the adverse action was taken; notice that the individual is entitled to a free copy of the

332. § 1681b(b)(2)(A).
335. § 1681m(a).
336. § 1681h.
337. § 1681i.
consumer report upon a request made within sixty days; and notice of the right to dispute the accuracy or completeness of the report.\textsuperscript{339} All of these FCRA requirements help to protect employees from unfair scrutiny by their employers.

3. Title VII of the Civil Rights Act of 1964

The Civil Rights Act of 1964 also protects employees and applicants against discrimination related to off-duty conduct.\textsuperscript{324} An employee might claim that he or she is the victim of race discrimination at work based on some race-related off-duty activity. For example, if an employer did not like its employee’s participation in a rally sponsored by Louis Farrakhan and the Nation of Islam, and took adverse action against that employee because of his participation, that employee could raise a claim for race discrimination under Title VII.

Another area of off-duty conduct protected by Title VII deals with the issue of interracial associations.\textsuperscript{341} The following are examples of such actionable behavior: discrimination against a white woman because of her relationship with a black man;\textsuperscript{342} firing a white man because of his marriage to a black woman;\textsuperscript{343} and firing a white worker because of her non-marital relationship with a minority co-worker.\textsuperscript{344} The right to interracial association was also protected under Title VII in a case involving discrimination against a white employee because he was the father of a biracial child.\textsuperscript{345}

4. Employee Polygraph Protection Act

Most of the federal and state statutes discussed herein attempt to strike

\textsuperscript{339} 15 U.S.C. § 1681m.


\textsuperscript{341} The same argument could be made under state anti-discrimination laws. \textit{See} O'\textquoteright{}Lone v. N.J. Dep't of Corrections, 712 A.2d 1177, 1180 (N.J. Super. Ct. 1998) (ruling that the state anti-discrimination law protected a white employee who suffered discrimination for dating a black woman); Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 993 (6th Cir. 1999) (analyzing a claim for a racially discriminatory employment practice under the Tennessee anti-discrimination act similar to the analysis used by federal Title VII claims).

\textsuperscript{342} Diffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 586 (5th Cir. 1998), \textit{vacated and reinstated on rehearing}, 182 F.3d 333.


\textsuperscript{345} Tetro. 173 F.3d at 994.
a balance between the employees' privacy and the employers' legitimate business interests. The Employee Polygraph Protection Act (EPPA), however, is tipped decidedly in favor of employees, placing stringent restrictions on an employer's use of lie detector tests. This high degree of restriction is likely due to questions about the reliability of such tests, as well as the inherent potential for abuse by overzealous employers. The potential for eliciting a wide range of information wholly unrelated to one's employment is thwarted by the provisions of the EPPA. As defined by the Act, a "lie detector" includes a "polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used...for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual." The EPPA prohibits employers from directly or indirectly requiring, requesting, or causing any employee or prospective employee to take or submit to any lie detector test. Moreover, the rights granted to employees under the EPPA "may not be waived by contract or otherwise."

The major exception to the EPPA is used in the context of an "ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage." In such a context, a lie detector test may be administered: 1) to an employee who "had access to the property that is the subject of the investigation"; 2) when the employer has a "reasonable suspicion that the employee was involved in the incident or activity under investigation"; and 3) if the employer has signed a statement describing the specific incident or activity being investigated and the basis for testing the particular employees. After an employer complies with all of these requirements, there are other procedural safeguards which must be followed before, during, and after the polygraph exam. In terms of protecting an employee's privacy, it is important to note that throughout all phases of the test, the employee is not to be asked any questions regarding:

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347. § 2001(3).
348. § 2002(1). There are, however, exemptions for certain narrowly tailored categories of employment, such as national defense, security services, or drug enforcement officials. See 29 U.S.C. § 2006(b), (f) (2004) (providing exemptions for lie detector testing for these categories of employment).
349 But see id. § 2005(d) (creating an exception to the waiver rule if "such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this Act.").
350. § 2006(d)(1).
351. Id. § 2006(d)(2)-(4).
352. See id. §§ 2007-2008 (describing exam qualifications and exemption restrictions, as well as disclosure requirements).
"(i) religious beliefs or affiliations; (ii) beliefs or opinions regarding racial matters, (iii) political beliefs or affiliations, (iv) any matter relating to sexual behavior, and (v) beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations." Lastly, there are restrictions placed on disclosure of information obtained during the examination.

III. "IT IS OUR BUSINESS WHEN IT AFFECTS OUR BUSINESS:" EMPLOYER LIABILITY FOR OFF-DUTY CONDUCT

Much has been detailed in this article about situations in which employees have successfully and unsuccessfully asserted privacy-based claims. At this point, much of the jurisprudence in this area seems to suggest that an employer's legitimate, business-related reason to know the information outweighs an employee's right to privacy. Moreover, another compelling reason for employers to have access to information about certain kinds of off-duty conduct is that such behavior can subject them to liability. There are a number of contexts in which employers can be held liable for the behavior of their employees outside of work, which arguably gives employers a right to certain kinds of information.

Because they are faced with a potential mine field of liability, employers may want to delve into an employee's personal life. One of the most fundamental claims that can be brought against an employer is for negligent hiring and retention. Such claims can arise in a variety of contexts, including an incident of workplace violence. One example is the recent shooting at a Lockheed Martin (Lockheed) plant in Mississippi in which six workers were killed. Lockheed employee Doug Williams allegedly made racist threats to workers in the workplace prior to the incident and wore a bootee on his head that looked like a Ku Klux Klan hood. One of the victims apparently expressed her concern about Williams' behavior, stating, "'[t]hey keep letting him come back in, but he's going to kill us.'" In most states, an employer could be faced with lawsuits that include negligent hiring and negligent retention claims. Had Lockheed

354. See id. § 2008(a).
355. See, e.g., Yunker v. Honeywell, Inc., 496 N.W.2d 419, 424 (Minn. Ct. App. 1993) (finding that a claim for negligent retention could be brought after an employee shot and killed another employee outside of the employer's premises, since the employer knew of the employee's propensity for abuse and violence towards other employees, and against the victim in particular).
357. Adrian Campo-Flores, A Nightmare on the Job, NEWSWEEK, Jul. 21, 2003, at 42.
358. Id.
359. There are limitations, however, on such claims in Mississippi where em-
investigated Williams’s behavior both in the workplace and off-duty, it may have averted the attack. Of course, had it done so, it could have also faced a potential invasion of privacy lawsuit brought by the employee. As a way of avoiding this problem, employers should implement an anti-violence policy, including a statement “informing employees that if threats of violence are made, the employer’s response may include an investigation of the individual’s home and family life, substance abuse habits, weapons ownership, criminal record, work history, statements to co-workers and previous episodes of violent behavior.”

To date, the effectiveness of such an anti-violence policy has not been challenged in the context of an invasion of privacy claim.

Another context in which an employer can be held liable for off-duty behavior is for discrimination. For example, off-duty comments made by a supervisor may become admissible in a discrimination case. In Cooley v. Carmike Cinemas, Inc., an employee sued an employer for age discrimination. Two off-duty statements made by Michael Patrick, the president, CEO, and principal stockholder of Carmike, became an issue in the case. The first comment involved Patrick’s displeasure about spending Thanksgiving with his parents and grandmother, because he did not “‘like to be around old people.’” The second statement was made when Patrick was eighteen years old, after he saw the movie “Wild in the Streets.” He allegedly said “‘[e]verybody over 30 years old needs to be put in a pen. Yeah, if they don’t want to be put in a pen . . . they should be confined to a concentration camp.’” Affirming a jury verdict in favor of the employee, the Sixth Circuit found that the error, if any, on the part of the trial court in letting the jury hear the two statements was “harmless,” since there was employees must look to workers’ compensation laws as a remedy. See, e.g., Campbell v. Jackson Bus. Forms Co., 841 F. Supp. 772, 774 (S.D. Miss. 1994) (noting how a negligent supervision of employees claim is barred by the exclusive remedy provision of Mississippi workers’ compensation law). Lockheed could be held liable for intentionally endangering its workers.


361. Given various courts’ receptiveness to non-fraternization policies, see supra Part II.B.2 (discussing various employer non-fraternization policy cases), there is a reasonable likelihood that such a policy would be upheld and could be used to defeat an invasion of privacy cause of action.

362. 25 F.3d 1325, 1327 (6th Cir. 1994).
363. Id. at 1327, 1329.
364. Id. at 1329.
365. Id.
366. Id.
other sufficient evidence to support the jury's verdict. Similarly, in *Hardin v. S.C. Johnson & Son, Inc.*, the plaintiff attempted to use a co-worker's off-duty racist statements about African-American women to support her race discrimination claim. Ultimately, the plaintiff's attempt was unsuccessful, but it certainly created an issue in the case, probably because the statements were so derogatory.

A third context of employer liability for off-duty conduct involves sexual harassment. Often, one of the justifications for non-fraternization policies is the desire to avoid behavior that could ultimately result in a sexual harassment claim. Such policies have been repeatedly upheld as reasonable and not in violation of public policy. Work-related sexual harassment that occurs off-site may be actionable if there is a "legally sufficient nexus between the employment relationship and the act of harassment." In the course of determining if an employer should be held liable for off-site sexual harassment, evidence revealing what transpired may be required to be produced during discovery. For example, in one case a videotape depicting a party attended by employees, strippers, and prostitutes was required to be produced. Likewise, evidence that an employer

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367. Id. at 1332.
368. 167 F.3d 340, 343 (7th Cir. 1999).
369. Id. at 344-45.
370. See, e.g., Sanguinetti v. United Parcel Serv., Inc., 114 F. Supp. 2d 1313, 1314-15 (S.D. Fla. 2000) (describing how the plaintiff was terminated after violating a company no-dating rule designed to encourage supervisors to maintain "‘professional relationships’" with other employees and to discourage "relationships which might create any perceived favoritism or liability"); Watkins v. United Parcel Serv., Inc., 797 F. Supp. 1349, 1351 (S.D. Miss. 1992) (quoting an employer’s anti-fraternization policy, which stated, "'[f]raternization which includes a supervisory or management employee may be perceived as favoritism or sexual harassment’").
371. But see *supra* Part II C.3 (discussing the disapproval of such policies in interracial associational cases).
373. Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 130 (Cal. Ct. App. 1996). If there is not a sufficient connection between the acts and the workplace, the employer will not be held liable for the off-site sexual harassment. Id. See, e.g., Minnis v. Or. Mut. Ins. Co., 48 P.3d 137, 138 (Or. 2002) (holding employer was not vicariously liable for an off-duty supervisor’s alleged sexual assault of an employee); Capitol City Foods, Inc. v. Super. Ct. of Sacramento County, 7 Cal. Rptr. 2d 418, 422-23 (Ct. App. 1992) (concluding that although work-related sexual harassment occurring off-site may be actionable, such was not the case here); Santa Rosa City Employees' Ass'n v. City of Santa Rosa, No. C-97-2249 VRW, 1997 U.S. Dist. LEXIS 18569, at *10-12 (N.D. Cal. Nov. 13, 1997) (dismissing the plaintiff’s claim of unwanted sexual advances after work by a supervisor for failure to state a claim).
has knowledge of an employee’s sexual misconduct outside of work can be discoverable and potentially used as evidence against the employer in a sexual harassment case.\textsuperscript{375} Off-site behavior can also become an issue in hostile environment cases.\textsuperscript{376}

All of these contexts create situations in which it may be reasonable for an employer to investigate an employee’s off-duty behavior in an attempt to prevent claims and to maintain a safe, professional working environment.

\textbf{IV. PROPOSAL: BALANCING REASONABLE PRIVACY RIGHTS OF EMPLOYEES WITH THE NEEDS OF EMPLOYERS}

Taking into consideration the common law jurisprudence, state statutory law, and the very specific and limited protections under federal law, it is clear that there are significant differences across the United States regarding the protection of an employee’s right to privacy for off-duty conduct. The following proposed legislation would address many of the contexts in which employee privacy issues arise. The proposal is designed to reconcile the tension between an employee’s legitimate expectation of privacy with an employer’s potential liability.

Such a statute, balancing reasonable rights of privacy with the needs of employers, could contain the following provisions:

1. Unless otherwise provided by law, it shall be unlawful for an employer to take adverse employment action by refusing to hire, demoting, discharging, or otherwise discriminating against an individual with regard to terms, conditions, compensation, or privileges of employment because of any of the following that take place outside of working hours, off of the employer’s premises, and without use of the employer’s equipment or property:

   a. an individual’s legal political activities outside of working hours, including, but not limited to, running for public office, campaigning for a candidate for political office, or participating in fund-raising activities for the benefit of a candidate, political party, or political

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advocacy group;

b. an individual's lawful use of legal consumable products, including tobacco products;

c. an individual's legal recreational activities for which the employee receives no compensation, including, but not limited to, sports, games, hobbies, exercise, reading, or the viewing of television and movies;

d. an individual's speech about a matter of public concern; or

e. an individual's social, personal, professional, and romantic relationships.

2. The provisions of subdivision one of this section shall not be deemed to protect activity or information which:

a. creates a material conflict of interest related to the employer's trade secrets, proprietary information, or business interest;

b. creates a material conflict between the individual and the employer regarding a bona fide occupational requirement;

c. conflicts with reasonable non-fraternization policies, including those which prohibit one relative from working in a direct supervisory relationship to the other and those that prohibit an employee from continuing in a relationship that causes an actual or potential conflict of interest within the employer's business; or

d. subjects the employer to liability for the individual's actions.

3. The provisions of this section do not abrogate existing law regarding an employer's right to regulate off-duty conduct for peace officers and teachers.

377. See Marcum v. McWhorter, 308 F.3d 635, 637 (6th Cir. 2002) (holding that a former deputy sheriff's adulterous affair was not constitutionally protected); Wieland v. City of Arnold, 100 F. Supp. 2d 984, 987, 989 (E.D. Mo. 2000) (upholding the employer's
4. Individuals claiming to be aggrieved by a discriminatory or unfair employment practice as defined in this section may bring a civil suit for damages and may sue for all wages and benefits due up to and including the day of judgment had the discriminatory action not occurred; reinstatement/hiring; punitive damages for intentional conduct; and court costs and reasonable attorney’s fees. Nothing in this section, however, shall be construed to relieve an individual seeking damages from the obligation to mitigate his or her damages.

5. The court may award the prevailing party in such an action court costs and reasonable attorney’s fees.

This proposal is intended to address many of the contexts in which privacy has been made an issue regarding an employee’s off-duty conduct. Analogous to the framework set forth in *McDonnell Douglas Corp. v. Green* 379 for discrimination cases, a plaintiff who brings an off-duty conduct right to privacy claim could establish a prima facie case by showing that: 1) the conduct at issue is protected by the statute; 2) he or she was qualified for the position; and 3) there was an adverse employment action causally related to the protected conduct. If the plaintiff meets these requirements,

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378. A number of states have laws regulating the conduct of teachers, including prohibiting off-duty behavior that is considered “immoral.” See, e.g., ALASKA STAT. § 14.20.170(2) (Michie 2003) (defining immorality as “the commission of an act that, under the laws of the state, constitutes a crime involving moral turpitude”); CAL. EDUC. CODE § 44434 (West 2003) (citing “immoral and unprofessional conduct, profanity, intemperance, or evident unfitness for teaching” as grounds for recommendation for revocation); GA. CODE ANN. § 20-2-940(a)(4) (2001) (listing immorality as grounds for termination or suspension of a teacher); MO. STAT. § 168.114(2) (West 2000) (dictating that the board may dismiss a teacher for “immoral conduct” without more of a definition); N.C. GEN. STAT. § 115C-325(e)(1)(b) (2003) (listing immorality as grounds for dismissal or demotion); TENN. CODE ANN. § 49-5-501 (2003) (listing immorality as “[c]onduct unbecoming to a member of the teaching profession’’’); W. VA. CODE ANN. § 18A-2-8 (Michie 2003) (declaring that a board may suspend or dismiss any teacher for immorality). For a discussion about the off-duty conduct of teachers, see generally, Ruth L. Davidson, John L. Strope, Jr., & Donald F. Verling, *The Personal Lives and Professional Responsibilities of P-12 Educators: Off-Duty Conduct as Grounds for Adverse Employment Actions*, 171 West’s Ed. Law Rep. 691 (2003).

379. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (outlining the plaintiff’s prima facie case for Title VII racial discrimination claims).
then the burden should shift to the employer to articulate some legitimate, nondiscriminatory reason for the alleged adverse action. If the employer meets this burden, then the plaintiff should have the opportunity to show that the employer’s stated reason for the adverse action was in fact pretext.

V. CONCLUSION

When there is no legitimate business-related reason for an employer to use an employee’s off-duty conduct as the basis for an adverse employment decision, the employer should not be allowed metaphorically to “open wide the back door” of an employee’s reasonable expectation of privacy. As it stands now, there is no uniform standard in the United States to determine when an employer can use an employee’s off-duty conduct as the basis for an adverse employment decision. Common law tort theories offer some protection against the disclosure of “private” information, yet there is a whole range of personal non-private information that many employers can currently use against employees. State law varies widely from offering no protection for off-duty activities, to protecting specific categories of behavior, such as the lawful use of consumable products, engaging in political activities, and participating in legal recreational activities. Moreover, there is no federal statute explicitly protecting employees from adverse employment action based on off-duty behavior. Although several laws are designed to protect aspects of employees’ personal lives, they are very limited in scope. Thus, even though an employee’s right to privacy regarding off-duty conduct has become more defined, employers lack clear benchmarks for determining what information they can legally use.

This lack of definition is particularly problematic for employers with workers in multiple states, because state statutory protection for off-duty conduct varies so widely. From an employee’s perspective, it may seem inherently unfair for an employer to make an adverse employment decision based on information that may be irrelevant to job performance and does not expose the employer to potential liability. The proposal set forth in this article is designed to protect employees from adverse action based on off-duty conduct when that activity is not detrimental to the employer. Building on the evolving standard for reasonable expectation of privacy for employees, the proposal would codify a standard that balances employee rights with employer liability. Returning to the opening hypothetical scenarios involving adverse employment action illustrates the necessity for such a standard. In most states, the employees in the hypotheticals could be fired or have other adverse action taken against them with little or no le-

380. Id.
381. Id. at 804.
gal recourse. Under the proposal, however, each employee's situation would be balanced with the employer's interests to determine the degree of protection. For example, if Bob's pro-gay political and social activities create a material conflict with his employer regarding a bona fide occupational requirement, then his firm acted appropriately in removing him from the case. Yet, if his activities do not interfere with his ability to carry out the responsibilities of his position then, under the proposal, he has been wrongfully discriminated against. Similarly, Sara's financial mismanagement of her personal checking account should not be material to her employer's business as long as she is able to carry out her duties as a teller competently.

In the context of associational privacy, if Grace and Sam's employer has a reasonable non-fraternization policy, the policy should be honored if Grace and Sam's relationship causes an actual or potential conflict of interest with the employer. For example, it would be inappropriate for Grace to be in a direct supervisory role where she would be responsible for Sam's performance evaluations. A relationship that does not create any actual or potential conflict of interest, however, should not subject an employee to adverse employment action. Accordingly, to the extent that Andrew's affair takes place completely outside of his workplace and he fully carries out his employment duties, this off-duty conduct should not be the basis for termination.

A more nebulous situation is presented by Dwayne, the vocal auto worker who wrote an inflammatory editorial denouncing SUV owners. It would need to be determined whether his speech related to a matter of public concern and, if so, the speech may be protected. Even if the speech at issue does pertain to a matter of political, social, or other concern to the community, however, it still may not be protected under the proposal if it creates a material conflict with the business interest of his employer. This standard balances an employee's right to speak out, yet also protects employers from gratuitous speech by employees that could hurt the employer's business.

These hypothetical scenarios are designed to depict off-duty behavior that is largely unprotected under current law and to show that such behavior should only subject the employee to adverse employment action if the activity has some effect on the employer. Overall, the proposed statutory language would protect employees' reasonable expectation of privacy for their off-duty conduct and also protect employers' business interests, as well as their ability to avoid liability.

382. See supra pgs. 629-630.