FIRED FOR BLOGGING: ARE THERE LEGAL PROTECTIONS FOR EMPLOYEES WHO BLOG?

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I. INTRODUCTION

One of the Internet-related phenomena of the early twenty-first century has been the exponential rise in the number of Web logs (referred to generally and hereinafter as "blogs"). Millions of people have begun chronicling their lives through online diaries and social networks. Sometimes they disclose too much information: describing past drug use, allowing pictures of themselves drunk at parties to be displayed, and griping about work. More and more of these "bloggers" are being fired because of what they publish online.

This article reviews current employment law in light of the rising popularity of blogs. In particular, the application of the employment-at-will doctrine and its evolving exceptions is examined in the context of employees who blog. While individuals may believe that they have the right to say what they want to on their own time while using their own resources, the employment-at-will doctrine remains a powerful tool for employers to discharge their employees without legal backlash. However, the employment-at-will doctrine is not an absolute shield for employers and this article discusses those few circumstances in which an employer faces some potential liability.

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1. This article addresses employment laws related to private employers; it does not address the gamut of laws which may apply to public employers. In addition, this article addresses activities by employees (including former employees), not employment applicants. This article does not address the growing phenomenon of individuals publishing potentially embarrassing information on the Internet which is later accessed by potential employers. For a discussion of the latter phenomenon, see Michelle Conlin, You Are What You Post, Bus. Wk., Mar. 27, 2006, at 52 (explaining that employers may use Google for background checks).
II. THE GROWTH AND CONSEQUENCES OF EMPLOYEES WHO BLOG

The number of blogs is in the tens of millions, with tens of thousands of new blogs started every day. These Internet-based "diaries" involve a wide range of subjects, including politics, technology-related issues, any imaginable hobbies, as well as recitations of personal thoughts and experiences, and work-related subjects.

While originally blogs were used by the technically savvy, blogs are now being used by the masses as a type of electronic diary where people can post their thoughts on everything from politics and life in general, to comments (sometimes unfavorable) about your . . . business. The difference between a blog and a diary, however, is that anyone with access to the Internet can read, copy, e-mail or print the blog entries.

It is estimated that as much as five percent of American workers maintain a personal blog. As individuals have blogged about their favorite new musical group or their favorite television show, they occasionally do what most of us have done at one time or another—gripped about their boss,

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2. See Memorandum from Lee Rainie, Director, The Pew Internet & American Life Project (Jan. 2, 2005), available at http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf (estimating the existence of more than eight million blogs at the end of 2004); Posting of Dave Sifry to Technorati Weblog, http://www.technorati.com/weblog/2006/02/81.html (Feb. 6, 2006) (showing that Technorati, a blog tracking service, reported in early 2006 that it was tracking 27.2 million blogs, with nearly 75,000 new blogs being tracked every day).

3. See Scott Rosenberg, Fear of Links, SALON.COM (May 28, 1999), http://www.salon.com/tech/col/rose/1999/05/28/weblogs (describing blogs as "personal Web sites operated by individuals who compile chronological lists of links to stuff [on the Internet] that interests them, interspersed with information, editorializing and personal asides"). It appears attorneys are one of the categories of professionals that most frequently use blogs. See Cameron Stracher, After (Billable) Hours, WALL ST. J., Mar. 24, 2006, at W19 (referring to a survey indicating that "lawyers ranked fourth among both readers and posters to blogs"). Personal blogs are very easy to establish, with services that allow individuals to start a blog in a matter of minutes. See, e.g., Blogger, http://www.blogger.com (last visited Nov. 5, 2006) (providing an easy way for people to create a blog for free); Technocrati, http://www.technorati.com (last visited Nov. 5, 2006) (illustrating the number and types of different blogs by displaying an index of blogs as well as providing a search function for them). The world of blogs (known as the "blogosphere") contains its own vernacular: blog authors are referred to as "bloggers" and information published on a blog is "posted" as a "message." See, e.g., Blog - Wikipedia, The Free Encyclopedia, http://en.wikipedia.org/wiki/Blog (last visited Nov. 5, 2006) (providing an introduction to web logs and the jargon used in the associated community). The activity of posting messages on a blog is referred to as "blogging." Id.


5. See Amy Joyce, Blogged Out of a Job, WASH. POST, Feb. 19, 2006, at F06 ("[The Employment Law Alliance] conducted a telephone poll of 1,000 [sic] adults . . . that found about 5 percent of American workers maintain a personal blog.").
talked about what a lousy job they have, or even bragged about what they do at work. For a growing number of these bloggers, this has resulted in their being fired. Consider the following examples which have received public exposure:

- Heather Armstrong, a Web designer, was fired after posting comments about her workplace on her personal blog, including her comments regarding the office Christmas party;

- A Delta Airlines flight attendant was fired after publishing pictures of herself (in relatively risqué poses) in her uniform aboard a Delta plane;

- Mark Jen started his own blog soon after starting work for Google, and a few weeks later was fired by Google after he posted his impressions of a Google sales meeting;

- Joyce Park, a Web developer for Friendster, a company “known for breaking new ground in online social networking and promoting self-expression among peers,” was fired as a result of her postings on her blog, Troutgirl;

- Rachel Mosteller was fired by the Durham Herald-Sun of North Carolina one day after she posted comments on her blog critical of her employer (including the statement “I really hate my place of employment.”) even though Mosteller used a pseudonym, did not name her company or where it was based, and did not name her co-workers;
• Nadine Haobsh, an associate beauty editor at Ladies' Home Journal, who was about to resign and take a job at Seventeen, was asked to leave Ladies' Home Journal and had her Seventeen job offer rescinded after the magazines discovered she was blogging about work;\(^\text{11}\)

• A contractor working for Microsoft lost his job after he took pictures of Apple G5 computers being delivered to the Microsoft campus and posted the pictures on his blog;\(^\text{12}\)

• Wells Fargo dismissed an employee after managers learned of the employee’s blog, which made fun of some of his co-workers;\(^\text{13}\)

• A reporter at the Houston Chronicle was fired as a result of postings on his personal blog;\(^\text{14}\)

• A professor at DeVry University was dismissed after criticizing the school on her blog;\(^\text{15}\) and

• The Automobile Club of Southern California fired twenty-seven employees after another employee complained about messages posted by the workers on the online social network MySpace.com.\(^\text{16}\)

The immediate reaction to these anecdotes is to ask whether an employer can legally discharge an employee simply because the employee was publishing a “diary” on the Internet.\(^\text{17}\) Many employees would probably be surprised to learn that simple “water cooler” griping about work could lead to their legally being fired.\(^\text{18}\) Just as an employer may wish to terminate an employee when it “perceives the content of employee e-mail as disloyal, distracting, or counterproductive to the employer’s mission,” so too may an employer wish to terminate an employee who is


\(^{13}\) Armour, supra note 6.


\(^{15}\) Jennifer Brown, Prof’s Firing Stirs Blog Debate, DENVER POST, Jan. 8, 2006, at C-01.


\(^{17}\) Discharge represents the most extreme of disciplines. As the blogging phenomenon grows, so does the potential for employee discipline. See Joyce, supra note 5 (showing that three percent of 278 human resource professionals responding to a 2005 Society for Human Resource Management survey indicated they had disciplined employees for blogs).

\(^{18}\) See Cynthia L. Estlund, How Wrong Are Employees About Their Rights, and Why Does It Matter?, 77 N.Y.U. L. REV. 6, 7, 9 (2002) (discussing studies that indicate most employees believe that they can only be fired for “just cause”); cf. Joyce, supra note 5 (describing a poll by the Employment Law Alliance which found that “[twenty-three] percent of employees would support a fellow worker who criticizes or jokes about employers, co-workers, supervisors, customers or clients”).

publicly commenting about work,\textsuperscript{19} since "the employer may perceive it to be in the best interest of the business to cut loose such negative actors."\textsuperscript{20}

The employment-at-will doctrine permits an employer to terminate an employee at any time, with or without cause. This does not mean, however, that employers have blanket immunity from liability. While the employment-at-will doctrine is fairly straightforward, exceptions to the doctrine have been evolving in the past few decades, both at common law and through state legislation. This Article examines the employment-at-will doctrine and its evolving exceptions and provides an analysis of whether there may be potential liability for an employer that fires an employee based on the content of that employee’s personal blog.

III. EMPLOYMENT-AT-WILL, ITS EVOLVING EXCEPTIONS, AND WRONGFUL DISCHARGE

As a general matter, the relationship between an employer and an employee is contractual. Where there is a contract, an employer’s ability to legally terminate an employment relationship with an employee will be dependent upon the terms of the employment agreement between the employer and the employee. In most employment relationships, however, there is no express agreement as to the length of employment or the terms under which the employment may continue or may be terminated.\textsuperscript{21} In such situations, the employment-at-will doctrine controls.

The employment-at-will doctrine provides that, for an employment relationship of an indefinite term, both the employer and the employee may terminate the relationship at any time, with or without cause, as long as the termination does not violate a contract or employment-related statute.\textsuperscript{22}


\textsuperscript{20.} Id. at 575.

\textsuperscript{21.} See Kenneth A. Sprang, Beware the Toothless Tiger: A Critique of the Model Employment Termination Act, 43 AM. U. L. REV. 849, 850 (1994) (citing statistics indicating that two-thirds of private-sector employees are subject to the employment-at-will doctrine, i.e., are “at-will” employees).

\textsuperscript{22.} Edwin Robert Cottone, Employee Protection from Unjust Discharge: A Proposal for Judicial Reversal of the Terminable-at-Will Doctrine, 42 SANTA CLARA L. REV. 1259, 1259 (2002); see David J. Walsh & Joshua L. Schwarz, State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales, 33. AM. Bus. L.J. 645, 646 (1996) (“[I]n the absence of an employment contract of specified term, the employment relationship is terminable at any time by either party and for any reason not specifically proscribed by statute.”); see also Guz v. Bechtel Nat’l, Inc., 8 P.3d 1089, 1100 (Cal. 2000) (“An at-will employment may be ended by either party ‘at any time without cause,’ for any or no reason, and subject to no procedure except the statutory requirement of notice.” (quoting Foley v. Interactive Data Corp., 765 P.2d 373, 387 (Cal. 1988))); Lobosco v. N.Y.
The employment-at-will doctrine is generally considered to have emerged from judicial opinions in the period after the Civil War, and "was widely followed throughout the late-nineteenth century and the first part of the twentieth century." The U.S. Supreme Court recognized the employers' basic right to discharge employees in *Adair v. United States* early in the twentieth century. All states and the District of Columbia, except Montana, have adopted the employment-at-will doctrine. Montana has, by statute, limited employers' ability to discharge employees and preempted common law employment-at-will actions. Three other states—Arizona, California, and Georgia—have codified the employment-at-will doctrine.

23. Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine,* 37 AM. BUS. L.J. 653, 654 (2000). Ballam discusses one of the earliest employment-at-will cases, *Payne v. Western & Atlantic R.R.,* 81 Tenn. 507 (1884), *overruled by Hutton v. Watters,* 179 S.W. 134 (Tenn. 1915), showing that employers "may dismiss their employees [sic] at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." *Id.* at 653 n.4 (quoting *Payne,* 81 Tenn. at 519-20).

24. 208 U.S. 161, 166-69, 172, 180 (1908) (striking down as unconstitutional a federal statute's section prohibiting carriers engaged in interstate commerce from discharging employees who become members of a labor organization), *overruled by Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 186-87 (1941) (finding that the federal statute under review left an employer "as free to hire as he is to discharge employees" and did "not touch 'the normal exercise of the right of the employer to select its employees or to discharge them.'” (quoting *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45 (1936))).

In our opinion that section . . . is an invasion of the personal liberty, as well as of the right of property, guaranteed by . . . [the Fifth] Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good.

*Adair,* 208 U.S. at 172.

25. Montana adopts the public policy exception to the employment-at-will doctrine, discussed *infra* notes 110-149 and accompanying text. The state also requires a showing of "good cause" for the majority of employment discharges. *See MONT. CODE ANN § 39-2-904(1) (2005) (declaring discharge to be wrongful only if done in retaliation for employees refusal to violate or to report a violation of public policy; there was no "good cause" for discharging the employee; or if the employer fired an employee in violation of its own written policies). Montana's statute preempts common claims for wrongful discharge. *MONT. CODE ANN § 39-2-9013 (2005).*

26. Arizona has codified the employment at will doctrine in *ARIZ. REV. STAT. ANN. § 23-1501.2 (2006):*

The employment relationship is severable at the pleasure of either the employee or the employer unless both the employee and the employer have signed a written contract to the contrary setting forth that the employment relationship
Taken to its extreme, the employment-at-will doctrine means that employers can dismiss employees for arbitrary or irrational reasons: "because of office politics, nepotism, preference for left-handedness, astrological sign, or their choice of favorite sports team."\(^\text{27}\) Over time, however, courts have fashioned limits to the application of the employment-at-will doctrine. The most common exceptions are based on implied contract\(^\text{28}\) and public policy, with public policy being the justification behind recent statutory expansions in common law.\(^\text{29}\) In addition, some courts have recognized exceptions based on promissory estoppel,\(^\text{30}\) the covenant of good faith and fair dealing,\(^\text{31}\) intentional infliction of emotional distress,\(^\text{32}\) and privacy.\(^\text{33}\) Each of these exceptions is discussed below.

First, though, potential employer liabilities related to conduct outside the employment-at-will doctrine—i.e. termination in violation of employment-related statutes and termination in violation of an express contract—are discussed. Overall, employer liability for wrongful employee discharge may occur if the employee was terminated in violation of a contract, an applicable employment-related statutory provision, or an exception to the employment-at-will doctrine.\(^\text{34}\)

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28. See infra notes 82-96 and accompanying text.

29. See infra notes 110-149 and accompanying text.

30. See infra notes 97-99 and accompanying text.

31. See infra notes 100-103 and accompanying text.

32. See infra notes 104-109 and accompanying text.

33. See infra notes 150-171 and accompanying text.

34. See Bird, *supra* note 27, at 519 ("Wrongful discharge is a term that defines various conditions under which an employee may challenge her dismissal even though the employment relationship is governed by employment at will."). See also Ballam, *supra* note
A. Termination in Violation of Applicable Employment-Related Statutory Provisions

An employer can be civilly liable for wrongful discharge if an employee is dismissed in violation of an applicable employment-related statutory provision. The most obvious example of this type of wrongful discharge is when an employee is discharged (or forced to resign) in violation of Title VII of the Civil Rights Act of 1964, as well as any of its applicable state-law equivalents. Additional federal employment-related statutes include the Age Discrimination in Employment Act (ADEA), the Pregnancy Discrimination Act (PDA), the Worker Adjustment and Retraining Notification Act (WARN Act), and the Americans with Disabilities Act (ADA).

Although an employee could be discharged ostensibly because of her off-duty blogging, an employer may be held liable for violating an employment-related statute applicable to circumstances surrounding the discharge. For example, if the discharged blogger can establish she was treated differently because of her membership in a protected class (e.g., gender), the employer could potentially face a discrimination claim.

This scenario occurred at Delta Air Lines. Ellen Simonetti, a Delta employee, was fired shortly after she posted pictures of herself in her Delta uniform on a Delta plane on her personal blog: http://www.queenofsky.net. Initially, Simonetti was suspended after the pictures were posted. During her own investigation, Simonetti determined that male Delta employees had posted pictures of themselves in Delta uniforms on Web sites and blogs, and had not been disciplined. Thereafter, Simonetti filed a gender-based discrimination complaint with the Equal Employment Opportunity Commission. Three weeks later, Delta fired Simonetti, and she filed suit in federal court alleging discrimination.

23, at 654 (describing the development of the tort of wrongful discharge). But see Sprang, supra note 21, at 851 (defining wrongful discharge as a "termination [that] is not justified by some nondiscriminatory business reason that would meet the standard of 'just cause' or 'good cause.'") (footnote omitted).

40. Simonetti, supra note 7 and accompanying text.
41. Complaint at *1, Ellen Simonetti v. Delta Air Lines, Inc., 2005 WL 2897844 (N.D. Ga. Sept. 7, 2005) (No. 05-2321). Simonetti also alleged that her dismissal was in retaliation for her union activities. Id. at *5. As of the date of this article, Simonetti’s complaint has been dismissed without prejudice due to Delta’s bankruptcy filing. Simonetti v. Delta Air Lines, Inc., No. 05-2321 (N.D. Ga. Oct. 28, 2005) (administratively terminating this action, without prejudice to the right of any party to reopen the proceedings within 30
1. Private Blogs

Although, as discussed below, the typical blogger will most likely not be able to claim invasion of privacy for the simple reason that most blogs are open and available to anyone with Internet access, some may rationally make said claim because not all blogs are public. Some blogs are configured so that only those who have been granted specific access are allowed to read the blog. Employers may face liability if they improperly access these private blogs. An employer may also face liability for violation of the federal Stored Communications Act ("SCA") for improperly accessing a private blog. In general, the SCA provides privacy protection for communications stored by Internet Web sites. The act prohibits unauthorized access to stored communications. The act exempts from liability, though, access authorized by a Web site user.

Konop v. Hawaiian Airlines, Inc. demonstrates an application of the SCA where an employer faces potential liability for accessing an employee's private blog. The plaintiff, a pilot employed by the defendant, maintained a Web site that contained critical commentary about the defendant’s management practices. Konop’s Web site required users to have an assigned username and password in order to access the site, and Konop maintained a list of authorized users, which consisted primarily of other Hawaiian Airline employees. In addition, users who were allowed access to the website were required to accept the site’s terms and conditions of use, which included the prohibition of “any member of Hawaiian’s management from viewing the website [sic] and prohibited users from disclosing the website’s [sic] contents to anyone else.” A Hawaiian Airlines senior manager (a vice president who did not have authorized access to the Web site) used other pilots’ usernames and passwords (with their permission) to access the Web site.
The Ninth Circuit and the parties agreed that the SCA applied to Konop's Web site. In the case, the critical issue was whether the vice president's access to the Web site was unauthorized. Section 2701(c)(2) of the SCA "allows a person to authorize a third party's access to an electronic communication if the person is 1) a 'user' of the 'service' and 2) the communication is 'of or intended for that user.'" There was no question that the pilots who allowed the vice president to access the Web site were authorized users, and they gave the vice president permission to use their usernames and passwords to access the Web site. At this point, therefore, it would seem as if the vice president did not violate the SCA when he accessed Konop's Web site. As such, an employer may believe it too would not be liable (at least under the SCA) if it used a pre-authorized user's account to access an employee's private blog.

However, the Ninth Circuit found the Hawaiian Airlines' vice president was guilty of violating the SCA. There was no record of the pilots whose accounts were used ever accessing the Web site (even though they were authorized to do so). As such, they were not actual "users" within the plain language of the statute. As a result, the vice president's access was not exempt from the act. To date, Konop appears to be the only authority on this issue. Therefore, if an employer wishes to use someone else's authorized access to read an employee's private blog, the employer must make sure that the "someone else" has actually previously "used" or accessed the private blog.

B. Concerted Activities

An employer may also run afoul of the National Labor Relations Act ("NLRA") if an employee's blog is devoted to work-related issues rather than to personal items with the occasional work-related gripe. For example, an anonymous Microsoft Corporation employee has created a blog, called "Mini-Microsoft," which contains comments critical of Microsoft management. The blog also reportedly contains earnest suggestions for fixing Microsoft, and the blogger has become somewhat of a folk hero; some believe he is "the employee most likely to save Microsoft—and the most likely to be fired."
Section 7 of the NLRA\(^{52}\) "guarantees employees the right to engage in 'concerted activities' not only for self-organization but also 'for the purpose of . . . mutual aid or protection . . .'."\(^{53}\) Fundamentally, Section 7 protects workers who are trying to improve their working conditions.\(^{54}\) In contrast, Section 7 does not protect an employee airing her own individual complaints about management.\(^{55}\)

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.\(^{56}\) "[A]n employer violates Section 8(a)(1) by discharging an employee for engaging in concerted activities protected by the Act."\(^{57}\) For example, an employee who was fired after sending an e-mail message to management complaining about a new incentive compensation plan, indicating that he was speaking on behalf of fellow employees, was discharged in violation of the NLRA.\(^{58}\)

The activities of Konop, the Hawaiian Airlines pilot who maintained a private Web site used to criticize management, were considered protected activities under the Railway Labor Act (because he was a member of a union representing carrier employees).\(^{59}\) Had he not been a member of a union, his activities would have clearly fallen within the language of Section 7 of the NLRA.\(^{60}\) Indeed, the Konop court, in discussing one of Hawaiian Airlines' defenses, turned to the NLRA for guidance in applying the Railway Labor Act.\(^{61}\) In addition, Hawaiian Airlines claimed that Konop's activities were not protected because he made defamatory


\(^{53}\) Citizens Inv. Servs. Corp. v. N.L.R.B., 430 F.3d 1195, 1197 (D.C. Cir. 2005). In particular, Section 7 applies to non-unionized workers because since they have no bargaining representative, they must speak for themselves. Id.

\(^{54}\) See, e.g., N.L.R.B. v. Mount Desert Island Hosp., 695 F.2d 634, 637 (1st Cir. 1982) ("One of the chief rights protected is the right to engage in concerted activities for the purpose of improving working conditions.") (citation omitted).

\(^{55}\) See Nancy J. King, Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces, 40 AM. BUS. L.J. 827, 833 (2003) (discussing why personal grievances are not given the same protection as concerted activity).


\(^{57}\) Citizens, 430 F.3d at 1197 (citation omitted).

\(^{58}\) Id. at 1199 (rejecting the Company's defense that the employee was discharged because he was a "troublemaker" and "not a team player"). See also Timekeeping Systems, Inc., 323 N.L.R.B. 244 (1997) (explaining that an e-mail message sent by employee to fellow employees criticizing new vacation policy was protected concerted activity).


\(^{60}\) Id. at 882.

\(^{61}\) Id. at 882 n.10 ("While employers covered under the [Railway Labor Act] are not subject to the provisions of the NLRA, courts look to the NLRA and the cases interpreting it for guidance.") (citation omitted).
comments directed toward Hawaiian Airlines' management on his website. As a general proposition—employees can use fairly inflammatory language in their criticisms of management and still retain NLRA protection, as long as their statements do not rise to the level of actual malice. Employees may also lose the protection of Section 7 when they post an employer's confidential business information on the Internet.

One protection for employee bloggers, though, derives from the fact that they are presumably blogging off-site, on their own time, and not using employer resources. The protection for employees to engage in discussions relating to wages, hours, and working conditions assumes that the discussions do not violate a legitimate employer policy regarding use of work time or work equipment.

Section 7 will not, however, protect an employee who engages in insubordination. Merely complaining about a supervisor is not protected because the selection and retention of a supervisor has been traditionally viewed as a management prerogative, not a matter of concern for subordinates. Further, criticizing a supervisor in an attempt to have the supervisor removed or discharged will be considered insubordination that is not protected by Section 7. An open issue is whether an anonymous employee who calls for the resignation of top management on a public blog is being insubordinate. One distinguishing factor of an employee blog criticizing management, such as the Mini-Microsoft blog, versus e-mail messages sent by one employee to a supervisor or fellow employees, is that the employee blog will most likely be available for reading to the general public. This, alone, should not defeat Section 7 protection.

What is critical, however, is that any public appeal concern primarily working

62. Konop had allegedly published statements on his Web site to the effect that management performed “dirty work” like the Nazis in World War II and conducted Soviet-style negotiations. Id. at 882-83.
63. Id. at 883 (“Federal labor law protects even false and defamatory statements unless such statements are made with actual malice . . .”).
64. King, supra note 55, at 854-55.
65. See O’Brien, supra note 19, at 576.
66. King, supra note 55, at 852.
69. King, supra note 55, at 851-52. See also N.L.R.B. v. Mount Desert Island Hosp., 695 F.2d 634, 639-40 (1st Cir. 1982) (holding that a letter to a newspaper was a direct overture for further concerted efforts to improve working conditions).
conditions and avoid needlessly tarnishing the employer's image. However, not only is the author of the Mini-Microsoft blog anonymous, current employees, former employees, and even the general public read and comment on the blogger’s messages. It may therefore be difficult for the blogger to claim that the purpose of his comments were for the mutual aid and protection of himself and fellow Microsoft employees.

C. Termination in Compliance With the Terms of an Express Contract

The employment relationship may be governed by an express contract. In such a case, if the employer complies with the contract’s stated reasons permitting dismissal, and follows the specified dismissal procedures, there is no wrongful discharge. Dismissals under an express contract are also closely tied to dismissals for “just” or “good” cause, on the basis that the discharged employee has failed to meet performance standards.

While the employment-at-will doctrine allows termination of the employment relationship with or without cause, “just cause” provides an employer a defense against a wrongful discharge claim. Generally, courts consider the employer to have met the just cause requirements when the termination occurs in good faith due to a reduction in workforce, the employee’s failure to meet performance standards, or when the employee engages in conduct that injures the employer’s reputation or interests.

Employers may have a substantial interest in the content of blogs written by employees. First and foremost, employers may be concerned that employees may either intentionally or unintentionally reveal trade secrets or critical strategies. Commenting on corporate blogs, William

70. See id. at 640.

71. Bird, supra note 27, at 531-32. See id. at 533 (“Employers only need to articulate a good faith belief that a just cause to terminate exists.”); Parrish v. Worldwide Travel Serv., Inc., 512 S.E.2d 818, 820 (Va. 1999) (citation omitted) (“An employee’s duty of loyalty to his employer includes the duty to follow the employer’s reasonable instructions . . . even though there may be differences of opinion as to the probability of success in carrying out those instructions.”). See also Guz, 8 P.3d 1089, at 1100 (describing “good cause” as “a fair and honest cause or reason, regulated by good faith . . . as opposed to one that is ‘trivial, capricious, unrelated to business needs or goals, or pretextual . . . ’”) (internal citations omitted).

Gates, Chairman of Microsoft Corporation, likened the situation as going from just a few spokespeople to thousands of spokespeople, “[s]o you’ll get into issues.”

The Automobile Club of Southern California fired twenty-seven employees because of messages they posted online after another employee had “complained to management about feeling harassed by the comments.” The messages allegedly included comments on other workers’ weight and sexual orientation.

Though the one worker’s complaint may have alerted the Automobile Club to the existence of the messages, it was other online comments which directly led to the dismissals: the employees discussed how they planned to slow down roadside assistance at work, something “[t]hat hits at our basic service,” according to an Automobile Club spokesperson. Such comments would relate directly to insubordination, conduct which can supply a just cause for discharge. Similarly, public comments by one employee regarding the failings of management or co-workers could disrupt interpersonal relationships that could hinder workplace productivity.

The Mini-Microsoft blog, discussed above, is one employee blog that may test the limits of when an employee’s anonymous comments critical of management are merely no more than “water cooler” griping versus just cause for dismissal. The anonymous Mini-Microsoft blogger has posted comments that have referred to Microsoft as a “passionless, process-ridden, lumbering idiot.”

The blog, however, also reportedly contains earnest suggestions for fixing Microsoft. A major question in this particular case is whether or not public criticism that may embarrass or annoy a major corporation constitutes just cause for dismissal. To put it another way, does the public embarrassment or annoyance constitute a legitimate business concern? In a possibly analogous case, a Colorado district court upheld the discharge of an employee whose letter that was critical of management at his workplace was published in a newspaper. The employer justified its decision to discharge the employee on the basis that the employee had breached an implied duty of loyalty to the employer. As such, griping about work, and particularly, criticizing management may constitute just cause for discharge.

employer liabilities for employee conduct, such as off-duty comments by a supervisor that may be discriminatory).

74. Auto Club Fires 27 in Message Board Crackdown, supra note 16.
75. Id.
76. Id.
77. Green, supra note 50.
78. Id.
79. Id.
81. See infra notes 139-143 and accompanying text.
D. Termination in Violation of the Terms of an Implied Contract

The issues are more complex when the dismissal is purportedly in violation of an implied-in-fact contract. It must first be determined whether an enforceable implied contract exists and, if so, what its exact terms are. Whether the firing of an employee complies with or violates the terms of an implied-in-fact contract depends on applicable state law as well as the conduct of the parties.

"[E]mployer representations regarding the job security of employees and/or the manner in which termination decisions are to be made . . . [can be] treated by courts as enforceable, contractual provisions, even though an express contract is absent and employment would otherwise be at will." 82 These implied contract terms can arise from "[w]ritten statements by employers contained in employee handbooks and performance evaluations, oral statements made by supervisors or interviewers attempting to attract employees, and the history of a company's practices with respect to retaining employees." 83 The general rationale courts have used to enforce implied contract terms is "the fundamental unfairness that inheres when employers can derive benefits from extending promises of job security to employees, only to disregard those pledges when it becomes convenient to do so." 84

In Continental Air Lines, Inc. v. Keenan, the Colorado Supreme Court reviewed the three basic theories followed by courts where an employee manual sets forth termination procedures: (1) the procedures are not contractually binding on the employer; (2) the procedures are a unilateral offer of employment for which continued service by the employee may constitute consideration and acceptance; and (3) the procedures may be binding on the employer not on the theory of contract but on the basis of the employee's reasonable and detrimental reliance on the terms of the manual. 85 The Colorado Supreme Court rejected the first two alternatives, 86

82. Walsh & Schwarz, supra note 22, at 646-47.
83. Id. at 647. Of course, employees have to be aware of the contents of the handbooks in order to rely upon their terms. See, e.g., Prysak v. R.L. Polk Co., 483 N.W.2d 629, 632 (Mich. App. 1992) (stating that while "[a]n employee’s legitimate expectations may be based on the employer’s written policy statements set forth in an employee manual or handbook[,]" the employee cannot rely on those expectations if he never saw the handbook, nor was told of its contents.) (citation omitted).
84. Walsh & Schwarz, supra note 22, at 667 (footnote omitted).
86. Id. at 711.

We adopt neither the categorical rule that an employee manual automatically becomes part of the employment contract and that an employee can be terminated only in accordance with its terms, nor do we adopt the contrary rule that such manuals are no more than unilateral expressions of general company policies which have no bearing on the employee's contractual rights.
adopting a middle ground requiring a showing that the handbook terms were offered to the employee and the employee's initial or continued employment constituted an acceptance and consideration of these procedures.\(^\text{87}\)

Only the state of New York expressly rejects implied contracts as possibly limiting the employment-at-will doctrine,\(^\text{88}\) although additional states have adopted some very limited (if at all) implied contract exceptions to the employment-at-will doctrine.\(^\text{89}\) In Guz v. Bechtel Nat'l, Inc., the California Supreme Court elaborated on a more expansive view of whether the parties' conduct can alter the employee's status of employment at will: "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' (Evid. Code, § 210) to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment."\(^\text{90}\)

\(^{87}\) Id. In addition, the Colorado Supreme Court adopted the third alternative as a final recourse for the employee to avoid injustice. Id. at 712.


\(^{89}\) See, e.g., Peterson v. Beebe Med. Ctr., Inc., 623 A.2d 1142 (Del.Supr. 1993) (Table) (unpublished decision) (finding that employee classified in personnel records as "Full Time, Permanent," and who was terminated and whose termination did not follow procedures specified in employee handbook, was not wrongfully discharged even though handbook did not did not expressly reserve the right to terminate without cause). "Under well settled Delaware law, an at-will employment relationship is subject to termination with or without cause. This means that absent bad faith, an employer has the freedom to terminate an at-will employment relationship for its own legitimate business, or even highly subjective, reasons." Id. at *2 (citations omitted); McConnell v. E. Air Lines, Inc., 499 So.2d 68 (Fla. Dist. Ct. App. 1986) (finding that the subject employment contract has no definite term of duration and thus was terminable at the will of either party, despite allegedly issued various letters, executive memoranda, and employee handbooks assuring employees that they would not be terminated without just cause—as such unilateral policy statements cannot, without more, give rise to enforceable contract rights); Orr v. Westminster Village N., Inc., 689 N.E.2d 712 (Ind. 1997) (finding that an employee handbook cannot constitute a valid unilateral contract in the absence of adequate independent consideration); Williams v. Delta Haven, Inc., 416 So.2d 637, 638 (La. Ct. App. 1982) ("Plaintiff's allegation that the defendant failed to comply with its own personnel policy requiring three warnings to an employee prior to discharge does not amount to an allegation that defendant was contractually obligated to her as part of an employment contract to give her the warnings prior to discharge."); and Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 662 (Mo. 1988) ("Given the general language of the handbook and the employer's reservation of power to alter the handbook, a reasonable at will employee could not interpret its distribution as an offer to modify his at will status.") (citations omitted). See also Walsh & Schwarz, supra note 22 (discussing the development of the implied contract limitation to the employment-at-will doctrine).

\(^{90}\) Guz, 8 P.3d, at 1101 (holding that the employer's written personnel documents set forth implied contractual limits on the circumstances under which employees would be terminated). See also, McDonald v. Mobil Coal Producing, Inc., 820 P.2d 986, 988 (Wyo. 1991) (stating that statements in employee handbook that contents of handbook do not
Employers can avoid possible express or implied contract restrictions by conspicuously stating in all written statements relating to the employment relationship, including employment contracts and employee handbooks, that the employment relationship is “at-will.”

As the number of employee blogs has grown, employers are beginning, as well as being advised, to adopt “blog” policies. If an employer has adopted a “blog policy,” the employer may defend against a possible wrongful discharge claim on the basis that the blogger has violated that policy, and therefore has violated the terms of an implied employment contract. As discussed previously, employees must at least establish “the existence of an actual mutual understanding on particular terms and conditions of employment[,]” and so too must the employer. Vague assurances or general guidelines will not suffice to establish enforceable contract terms. In addition, merely notifying employees, particularly by e-mail, of a new or modified policy most likely will not constitute enforceable terms. The courts are likely to conclude “there is a constitute terms of a contract must be conspicuous to be effective).

91. See, e.g., Bagwell v. Peninsula Reg’l Med. Ctr., 665 A.2d 297 (Md. Ct. Spec. App. 1995) (stating that employee handbook that expressly stated that it should not be treated as a contract in any way, reserved the right to change any of the terms of the handbook at any time, as well as the right to discharge any employee at any time, did not change the at-will nature of the employment relationship), and Trabing v. Kinko’s, Inc., 57 P.3d 1248, 1252-53 (Wyo. 2002) (stating that contents of handbook did not establish implied contract because written employment agreement conspicuously stated that employment was at will).

92. See, e.g., Schlossberg & Malerba, supra note 4 (“[A] prudent way to avoid claims of discrimination and accusations that an action was taken arbitrarily is to have a written policy in place.”); and William E. Hartsfield, 1 INVESTIG. EMPLOYEE CONDUCT § 6:11.50. Blogs (Nov. 2005), which includes suggested blog policy statements. However, few companies have adopted formal blog policies. See Joyce, supra note 5 (referencing a Society for Human Resource Management survey indicating that 8% of companies “have a written policy that provides employees with guidelines on what is acceptable to write about in a personal blog”).

93. Guz, 8 P.3d at 1101. See also McDonald, 820 P.2d at 988 (finding that disclaimers in employment contracts must be conspicuous).

94. See, e.g., Marsh v. Delta Air Lines, Inc., 952 F.Supp. 1458, 1466-67 (D. Colo. 1997) (holding that general statements in airline documents were insufficient to overcome presumption of at-will employment); Guz, 8 P.3d at 1107 (“This brief and vague statement, by a single Betchel official, that Betchel sought to avoid arbitrary firings is insufficient as a matter of law to permit a finding that the company, by an unwritten practice or policy on which employees reasonably relied, had contracted away its right to discharge Guz at will.”); and Orr, 689 N.E.2d at 720-21 (finding that employee handbook does not change employment at-will).

95. See, e.g., Campbell v. General Dynamics Gov’t Sys. Corp., 407 F.3d 546 (1st Cir. 2005) (affirming lower court ruling that e-mail announcement regarding new dispute resolution policy was insufficient to put employee on notice that the policy was a contract that extinguished the right to access a judicial forum for resolution of federal employment discrimination claims). “[T]he sufficiency of the notice turns on whether, under the totality of the circumstances, the employer’s communication would have provided a reasonably
A qualitative difference between . . . [a contractual] term and a policy that informs the employment relationship but imposes no enforceable obligations upon either party.\textsuperscript{96}

E. Promissory Estoppel

Closely related to the implied contract exception to the employment-at-will doctrine is the possible application of promissory estoppel, which prevents "an employer from discharging an employee when the employer made an assurance to hire for a specified period, or not to fire without cause, and the employee reasonably relied on these assurances to his detriment."\textsuperscript{97} Promissory estoppel claims generally arise in relation to an employee justifiably relying to his detriment on disciplinary or termination procedures contained in an employee handbook.\textsuperscript{98} Similar to an implied contract claim, an employee discharged due to his or her blogging activities would not have a claim directly associated with the blogging activities; the employee's claim would be dependent upon detrimental reliance on promises made by the employer in the workplace. However, if the employer has adopted a blogging policy, then the employee who complied with the policy but was nonetheless discharged may be able to assert that his discharge occurred in spite of his (detrimental) reliance upon the policy.

prudent employee notice . . . ." that continued employment would effect a waiver of the right to pursue a claim in a judicial forum. \textit{Id.} at 555 (citation omitted).

\textsuperscript{96} \textit{Id.} at 556.

If a reasonable employee of General Dynamics would have known, given prior dealings between the company and its work force, that personnel handbooks operated as the functional equivalents of contracts, the introduction of a new policy and the fact of its promulgation in a reissued handbook might have sufficed to alert such an employee that the handbook contained legally binding terms. Here, however, General Dynamics has produced no evidence that any historical use of personnel handbooks in the workplace would have suggested that the reissued handbook carried contractual significance. Therefore, we conclude that the company's promulgation of a new handbook, without more, does not support a finding of adequate notice. \textit{Id.} at 559.

\textsuperscript{97} Christopher L. Pennington, \textit{The Public Policy Exception to the Employment-At-Will Doctrine: Its Inconsistencies in Application}, 68 Tul. L. Rev. 1583, 1592 (1994). See also, Ballam, \textit{supra} note 23, at 681 (noting that promissory estoppel can be used when an employee relies on a promise not to discharge).

\textsuperscript{98} See, e.g., \textit{Trabing}, 57 P.3d at 1255 ("In the employment context, promissory estoppel works to prevent injustice to employees who in good faith detrimentally rely upon an employer's actions, in turn binding the employer to fulfill a promise to an employee despite the lack of an employment contract." (quoting \textit{Worley} v. \textit{Wyo. Bottling Co., Inc.}, 1 P.3d 615, 623 (Wyo. 2000))). See also, \textit{Orr}, 689 N.E.2d at 712 (denying discharged employees' promissory estoppel claims because there was no evidence they relied to their detriment upon the handbook or any other statements by the employer).

\textsuperscript{96} \textit{Id.} at 556.
In such a circumstance, though, as exemplified by the position taken by the Supreme Court of Colorado, the employee may still have a heavy burden to establish a promissory estoppel claim:

(E)ven if the requisites for formation of a contract are not found, the employee would be entitled to enforce the termination procedures under a theory of promissory estoppel if he can demonstrate that the employer should reasonably have expected the employee to consider the employee manual as a commitment from the employer to follow the termination procedures, that the employee reasonably relied on the termination procedures to his detriment, and that injustice can be avoided only by enforcement of the termination procedures.99

F. Good Faith and Fair Dealing

Underlying every transaction is an implied covenant of good faith and fair dealing.100 However, in regard to employer-employee relationships, most states do not recognize this covenant, and of the few states that do recognize it, these states do so in a limited fashion.101 In particular, there first must be an underlying contract. "[T]he implied covenant [of good faith and fair dealing] does no more than protect the right to enjoy the benefits of the contract. An at-will employee cannot use the implied covenant to create a for cause employment contract where none exists."102

The corollary to the covenant, and the manner in which courts have applied the covenant in an employment relationship, occurs when the employer acts in bad faith. A common example is when the employer discharges an employee in order to avoid paying already-earned benefits.103

99. Continental Air Lines, 731 P.2d at 712 (internal citations omitted).
101. See id. at 219. See also Walsh & Schwarz, supra note 22, at 653 (noting that, regarding the covenant of good faith and fair dealing, "systematic criteria differentiating the approaches of states" have been difficult to identify).
103. See, e.g., Kelly v. City of Mesa, 873 F.Supp. 320, 329 (D. Ariz. 1994) ("Although . . . [the covenant of good faith and fair dealing] does not create a duty for the employer to terminate the employee only for good cause, it does protect an employee from discharge based on an employer's desire to avoid the payment of benefits already earned by the employee.") (citation omitted). Bad faith in the employment context is generally defined as
An employee fired for blogging claiming an exception under the covenant of good faith and fair dealing must demonstrate there was an underlying agreement that was breached by the employer, or that the employer was acting in bad faith, i.e., using the blogging activity as a pretext for trying to avoid paying the employee already-earned benefits.

G. Intentional Infliction of Emotional Distress

The tort claim of intentional infliction of emotional distress requires outrageous behavior by the employer. It relates more to the conduct of the employer related to the discharge, rather than the reasons for the discharge itself. While many discharged employees raise this tort claim, it is not commonly granted. Agis v. Howard Johnson, Inc. provides a good example of the type of behavior required to establish a claim for intentional infliction of emotional distress. In Agis, the plaintiff’s supervisor, as part of an investigation into employee theft, stated that if he did not discover who was responsible he would begin firing employees alphabetically. Plaintiff Agis was the first employee fired. The Agis court concluded that the fired employee had established the basis for a claim—that the “defendant’s conduct was extreme and outrageous, having a severe and traumatic effect upon plaintiff’s emotional tranquility.” The conduct must be, however, socially intolerable, not merely rude or boorish. An employee fired for blogging, therefore, would not have a claim for

“depriving the employee of the benefit of her agreed upon employment bargain. This ‘benefit of the bargain’ requirement means that neither party will act in a way to deprive or impair the other party from receiving the agreed upon benefits of the employment relationship.” Bird, supra note 27, at 544 (footnote omitted).

104. See, e.g., Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 90 (N.Y. 1983) (“‘One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress’ . . . .” (citing Fischer v. Maloney, 373 N.E.2d 1215 (N.Y. 1978))). “‘Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’” Id. (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1977)).


107. Id. at 317.
108. Id. at 319 (quoting Alcorn v. Anbro Eng’r, Inc., 2 Cal. 3d 493, 498 (1970)).
109. See, e.g., Watte v. Maeyens, 828 P.2d 479, 481 (Or. Ct. App. 1992) (denying plaintiff’s claim for intentional infliction of emotional distress where the employer called employees liars and fired them without explanation); and Loya v. Wyo. Partners of Jackson Hole, Inc., 35 P.3d 1246 (Wyo. 2001) (discharging an employee while he is caring for his mother on her deathbed did not constitute a claim for intentional infliction of emotional distress).
intentional infliction of emotional distress unless there was some additional extreme, socially unacceptable conduct associated with the discharge.

H. Public Policy

The public policy exception to the employment-at-will doctrine prohibits employers from discharging at will employees who refuse to violate the law on behalf of the employer;\footnote{See, e.g., Petermann v. Int'l Bhd. of Teamsters Local 396, 344 P.2d 25 (Cal. 1959) (recognizing that the dismissal of an employee who refused to commit perjury for his employer violated public policy). See also Ballam, supra note 23, at 656-59 (discussing Petermann in more detail).} comply with a law in some way that displeases the employer;\footnote{See, e.g., Lins v. Children's Discovery Ctrs. of Am., Inc., 976 P.2d 168 (Wash. Ct. App. 1999) (discharging a supervisor who refused to fire other employees who had filed workers' compensation claims against the employer violated public policy).} or perform an act that promotes the public good, particularly by revealing bad conduct by the employer (also referred to as "whistleblower" cases).\footnote{Ballam notes that due to the fact that the early cases involving the public policy exception involved terminations for exercising job-related statutory rights, the "meaning of public policy was closely circumscribed."\footnote{For example, in Barr v. Kelso-Burnett Co., the Illinois Supreme Court noted that a discharge that violates a clearly mandated public policy would be exempt from the state's employment-at-will doctrine, giving as examples discharging employees for filing workers' compensation claims or for reporting crimes to the police—actions mandated by respective state legislation.\footnote{Five states (Florida, Louisiana, Maine, New York, and Rhode Island) have refused to adopt a public policy exception.\footnote{See, e.g., Ali v. L.A. Focus Publ'n, 5 Cal. Rptr. 3d 791, 798 (Ct. App. 2003) (“To prevail on a claim for wrongful termination in violation of public policy, the employee must identify a policy allegedly violated that is both substantial and fundamental and rooted in constitutional or statutory law.”) (internal quotations omitted).} \footnote{See, e.g., DeMarco v. Publix Super Mkts., Inc., 360 So. 2d 134 (Fla. Ct. App. 1978), aff'd, 384 So. 2d 1253 (Fla. 1980); Guilory v. St. Landry Parish Police Jury, 802 F.2d 822 (5th Cir. 1986), cert. denied, 482 U.S. 916 (1987); MacDonald v. E. Fine Paper, Inc., 485 A.2d 228 (Me. 1984); Murphy v. Am. Home Prods., 448 N.E.2d 86 (N.Y. 1983); Pacheco v. Raytheon Co., 623 A.2d 464 (R.I. 1993) (each describing the lack of a public policy exception in the respective jurisdiction). In addition, Arizona’s public policy exception has been superseded by statute. Ariz. Rev. Stat. Ann. § 23-1501.3(c) (2006).} \footnote{478 N.E.2d 1354, 1356 (Ill. 1985).} \footnote{See, e.g., Pennington, supra note 97, at 1604-19 (discussing public policy exceptions related to contesting employer activity contrary to public policy).} \footnote{Ballam, supra note 23, at 661-62. See, e.g., Ali v. L.A. Focus Publ’n, 5 Cal. Rptr. 3d 791, 798 (Ct. App. 2003) (“To prevail on a claim for wrongful termination in violation of public policy, the employee must identify a policy allegedly violated that is both substantial and fundamental and rooted in constitutional or statutory law.”) (internal quotations omitted).} \footnote{478 N.E.2d 1354, 1356 (Ill. 1985).} \footnote{478 N.E.2d 1354, 1356 (Ill. 1985).} \footnote{478 N.E.2d 1354, 1356 (Ill. 1985).} \footnote{478 N.E.2d 1354, 1356 (Ill. 1985).}}

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I. Codification of the Public Policy Exception

Recently, the public policy exception has been codified by a number of states through legislation that specifically protects employees from discharge for consuming lawful products or engaging in lawful activities. The judicial interpretation of one state’s statute may be illustrative of whether such statutes could apply to employee blogs. Montana’s “lawful product” statute is similar to most other statutes in that it provides that an employer “may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual legally uses a lawful product off the employer’s premises during nonworking hours.” In McGillen v. Plum Creek Timber Co., the plaintiff, who was employed by the defendant, was fired after he decided to play a practical joke on his supervisor, who had reported the plaintiff for sleeping on the job, by placing a classified ad in a local paper for the sale of a truck, indicating that interested parties should call the supervisor’s home number late at night. The plaintiff argued that his taking out the ad was a “use of a lawful product off the employer’s premises during nonworking hours.” In a jurisdiction with a similarly-worded statute, an employee fired for the contents of a personal blog may argue that she was fired based on the “use of a lawful product off the employer’s premises during nonworking hours.” This argument would not, however, be successful in Montana, or in any state that followed the Montana Supreme Court’s interpretation of the statute. In McGillen, the Montana Supreme Court noted that in defining “lawful product,” the statute “means a product that is legally consumed, and includes food, beverages, and tobacco” (i.e., something that can be literally consumed).

Six states (California, Colorado, Connecticut, Massachusetts, New York, and North Dakota), however, have passed broader laws protecting employee off-site, off-duty conduct. Section 96(k) of the California Labor...
Code authorizes the Labor Commissioner to take assignments of "[c]laims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises." A plain reading of California's "lawful conduct" statute indicates there is no limitation to the type of lawful conduct protected. However, in interpreting section 96(k) in Barbee v. Household Automotive Finance Corp., the California Court of Appeal ruled that section 96(k) "does not set forth an independent public policy that provides employees with any substantive rights, but rather, merely establishes a procedure by which the Labor Commissioner may assert, on behalf of employees, recognized constitutional rights." In other words, section 96(k) appears to merely codify a public policy exception to the employment-at-will doctrine, requiring a discharged employee to prove:

that he was terminated in violation of a policy that is "(1) delineated in either constitutional or statutory provisions; (2) 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental."124

One public policy argument an employee who is fired due to blogging may try to argue is that she was fired for exercising her First Amendment free speech rights. This issue was raised in Grinzi v. San Diego Hospice Corp. to determine whether section 96(k) protected an employee who was fired, allegedly in violation of her state First Amendment rights, as a result of her involvement with an investment program her employer considered to be a pyramid scheme.125 In Grinzi, the California Court of Appeal ruled that an employee dismissed by a private employer cannot raise a public policy issue under section 96(k) because California's First Amendment free speech provision (like the First Amendment of the U.S. Constitution) protects only against governmental, not private intrusions. As a result, it does not establish a public policy forbidding free-speech-based terminations by private employers, and, as such, is not subject to section 96(k).126 The majority of courts that have addressed whether there is a First

122. CAL. LAB. CODE § 96(k) (West 2003). As Pagnattaro points out, section 96(k) has been extended to both employees and job applicants. Pagnattaro, supra note 72, at 647 (citing CAL. LAB. CODE § 98.6 (West 2003)).

123. 6 Cal. Rptr. 3d 406, 412 (Ct. App. 2003) (reporting that the plaintiff argued that a consensual relationship with a fellow employee that was conducted during nonworking hours away from the workplace should be considered "lawful conduct" under section 96(k)).

124. Id. (quoting Stevenson v. Superior Court, 941 P.2d 1157, 1165 (Cal. 1997)). See also Pagnattaro, supra note 72, at 646-52 (discussing in detail applications and interpretations of California's section 96(k)).

125. 14 Cal. Rptr. 3d 893 (Ct. App. 2004).

126. Id. at 898-99.
Amendment free speech public policy exception to the employment-at-will doctrine have ruled there is none, on essentially the same rationale as Grinzi—the First Amendment protects against governmental actions, not those of private employers.\textsuperscript{127}

However, there may be some protection for a retaliatory discharge due to an employee exercising free speech. In \textit{Novosel v. Nationwide Insurance Co.}, the Court of Appeals for the Third Circuit, applying Pennsylvania law, concluded that protection of free speech rights was a significant enough public policy concern to prohibit a private employer from discharging an employee on the basis of the employee exercising his First Amendment free speech rights.\textsuperscript{128} However, \textit{Novosel} has been criticized, in particular, by the Pennsylvania Supreme Court, and generally not followed.\textsuperscript{129} That does not mean there is absolutely no free-speech protection against discharge of an at-will employee of a private employer. Connecticut has passed legislation which specifically provides a cause of action against a private employer for discharges based on an employee's exercise of First Amendment free speech rights.\textsuperscript{130}

\textsuperscript{127} \textit{See, e.g., Barr v. Kelso-Burnett Co.}, 478 N.E.2d 1354, 1356 (Ill. 1985) ("It is well established that the constitutional guarantee of free speech is only a guarantee against abridgement by the government, Federal or State; the Constitution does not provide protection or redress against private individuals or corporations which seek to abridge the free expression of others.") (citations omitted); \textit{Prysak v. R.L. Polk Co.}, 483 N.W.2d 629, 634 (Mich. App. 1992) ("[A] private employer . . . is not bound by the constitutional provisions guaranteeing freedom of speech.") (footnote omitted); \textit{Johnson v. Mayo Yarns, Inc.}, 484 S.E.2d 840, 843 (N.C. App. 1997) ("[T]he refusal to remove a confederate flag decal from his toolbox while in private employment is not constitutionally protected activity."); \textit{Tiernan v. Charleston Area Med. Ctr.}, Inc. 506 S.E.2d 578, 591 (W. Va. 1998) ("[T]he Free Speech Clause of the state constitution is not applicable to a private sector employer . . . [absent] a statute expressly imposing public policy emanating from the state constitutional Free Speech Clause upon private sector employers."); \textit{Manson v. Little Rock Newspapers, Inc.}, 200 F.3d 1172, 1173 (8th Cir. 2000) ("[T]he defendant is a private entity, not a governmental entity, and thus is legally incapable of violating anyone's First Amendment rights."); \textit{Edmondson v. Shearer Lumber Prods.}, 75 P.3d 733, 738 (Idaho 2003) ("The prevailing view . . . is that state or federal constitutional free speech cannot, in the absence of state action, be the basis of a public policy exception in wrongful discharge claims [in the private sector].") (citation omitted).

\textsuperscript{128} 721 F.2d 894, 900 (3rd Cir. 1983) (discussing an employee discharged for refusing to participate in his employer's lobbying effort and for his privately stated opposition to his employer's political stand).

\textsuperscript{129} \textit{See, e.g., Shovelin Cent. N.M. Elec. Co-op,} 850 P.2d 996, 1010 (N.M. 1993) (declaring to follow, in \textit{Novosell}, the Third Circuit's broad interpretation of Pennsylvania law regarding retaliatory discharge); and \textit{Tiernan}, 506 S.E.2d at 588-89 (finding that courts have retreated from \textit{Novosell}'s expansive interpretation of the Pennsylvania constitution as applying constitutional policy to a private employer).

\textsuperscript{130} \textit{Conn. Gen. Stat. Ann.} § 31-51q (West 2003), which provides:

\begin{quote}
Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first
\end{quote}
However, the approach taken by the courts when applying Connecticut's statute is that the speech in question, to be protected, must be related to a matter of public concern, and cannot merely be related to personal matters. For example, in Daley v. Aetna Life & Cas. Co., the plaintiff, who was dismissed after writing an internal office memorandum critical of management, claimed she was dismissed for exercising her free-speech rights. The Connecticut Supreme Court first noted that Connecticut's statute "applies to constitutionally protected speech, that is to say, speech that addresses a matter of public concern." The court therefore examined the motives of the plaintiff in drafting the memorandum (which criticized the implementation of the defendant's "family-friendly" workplace policy). According to the Connecticut Supreme Court:

"If it is determined that an employee spoke "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," the statement is not protected, and courts generally will not second guess the propriety of a personnel decision made by an employer allegedly in reaction to the employee's behavior . . . ."

The court concluded that "[i]t is well settled that internal employment policies are not a matter of public concern" and upheld the trial court's determination that the plaintiff had not met "the burden of establishing that she was motivated to champion the rights of others, rather than to air her own personal grievance with Aetna management." Therefore, a blogger

amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. If the court determines that such action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer.

131. 734 A.2d 112, 112 (Conn. 1999).
132. Id. at 120.
133. Id. at 122 (internal citations omitted).
134. Id. at 123 ("[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." (citing Connick v. Myers, 461 U.S. 138, 147 (1983))).
135. Id. at 124. Accord, Emerick v. Kuhn, 737 A.2d 456, 468 (Conn. App. 1999) (denying free-speech protection to a discharged at-will employee because when he criticized management at an employee forum, "he was not exercising a right enjoyed by the general citizenry but was exercising a privilege granted him by his employer."); Lowe v. Amerigas, Inc., 52 F.Supp.2d 349, 359 (D. Conn. 1999) (holding that “[p]laintiff’s opinions on
who is fired after griping about work on her blog cannot claim protection under Connecticut's statute unless she can show that she was expressing a matter of public concern, rather than just complaining about management inadequacies or unfairness. While the Connecticut District Court has noted that merely because the speech is made in private, rather than publicly, free-speech protection is not denied, the opposite is not necessarily true. In other words, publicly discussing employment issues does not automatically make the speech a matter of public concern, as exemplified in the discussion below regarding application of Colorado's "lawful activity" statutory protection.

Colorado has enacted legislation that also prohibits an employer from terminating "the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours . . ." However, Colorado's "lawful activity" restriction does not apply if the activity "[r]elates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee . . . ." Assuming a fired blogging employee was engaged in a lawful activity, the question arises whether that activity was related to her employment.

In a case substantially analogous to an employee blogging about work, the U.S. District Court applied Colorado's "lawful activity" statute in Marsh v. Delta Air Lines, Inc., a case in which an airline employee had customer service, employee attitudes, racial remarks by other employees, inventory control problems, and training clearly related to matters between plaintiff and AmeriGas and were not matters of public concern whereas "[p]laintiff's complaints about safety concerns regarding the improper storage of a hazardous substance such as propane . . . implicate matters of public concern and, thus, constitute protected speech."); MacKay v. Rayonier, Inc., 75 F.Supp.2d 22, 30 (D. Conn. 1999) ("[A]n employee's statements are not constitutionally protected . . . when they relate exclusively to matters concerning the employee's personal interests, as opposed to matters of public concern."); Urashka v. Griffin Hosp., 841 F.Supp. 468, 474 (D. Conn. 1994) (affording "protection to the plaintiff only if the speech for which she was allegedly terminated involved a 'matter of public concern'.") But see Campbell v. Windham Cmty. Mem'l Hosp., Inc., 389 F.Supp.2d 370, 382 (D. Conn. 2005) (stating that discharged employee's speech was potentially protected because it addressed her employer's potentially illegal practices with respect to private third parties—specifically, "[w]hether a non-denominational non-for-profit hospital is discriminating against patients or disclosing confidential information is a matter of public concern."); Winik-Nystrup v. Mfrs. Life Ins. Co., 8 F.Supp.2d 157, 157 (D. Conn. 1998) (explaining plaintiff's statements to her superiors regarding her planned vacation with a friend who worked for a competitor and her act of taking the vacation were not protected speech, whereas her association with her friend may be protected by the First Amendment).

136. See Campbell, 389 F.Supp.2d at 382 (illustrating potentially protected speech based on written responses to employer); Lowe, 52 F.Supp.2d at 355 (explaining that plaintiff's potentially protected speech, complaints of allegedly improper storage of propane, was in the form of internal complaints).

137. COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2001).
138. Id. at § 24-34-402.5(1)(a).
been discharged for writing a letter to a newspaper critical of the airline.\footnote{139} The court first determined that the purpose of the statute is to shield "employees who are engaging in private off-the-job activity, that is unrelated to the employee[']s job duties, from termination for participation in the non-work related activities."\footnote{140} However, noting that the shield is not absolute and "that the legislature recognized that the policy of protecting an employee's off-the-job privacy must be balanced against the business needs of an employer . . ." the court concluded "that one of the bona fide occupational requirements encompassed within the scope of . . . [Colorado’s ‘lawful activities’ statute] is an implied duty of loyalty, with regard to public communications, that employees owe to their employers."\footnote{141} The court considered the actions of the plaintiff as that of "a disgruntled worker venting his frustrations to his employer whom he felt betrayed him and his coworkers."\footnote{142} The court concluded there was no wrongful discharge, "because Plaintiff was not attempting to inform the public of a safety concern, and because Plaintiff did not attempt to solve his grievance through Delta’s grievance system, his actions breached the bona fide occupational requirements of an implied duty of loyalty encompassed in . . . [Colorado’s ‘lawful activities’ statute]."\footnote{143} Based on this reasoning, if an employee is publicly griping about work in her personal blog, she is subject to discharge, despite her being engaged in a private off-the-job activity, because she has violated a duty of loyalty owed to her employer.

The state of New York has adopted legislation that prohibits employers from discriminating against employees on the basis of their legal political activities, legal use of consumable products, and legal recreational activities—all off-site, outside of work hours without the use of the employer’s equipment or other property.\footnote{144} The statute specifically excludes, however, any activity which "creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest . . ."\footnote{145} To date, the majority of cases dealing with the “recreational activities” portion of the statute have defined recreational activities as not including romantic relationships or extramarital affairs,\footnote{146} although the Supreme Court, Appellate Division has

\footnotesize{\footnote{139}{952 F.Supp. at 1462.}}\footnote{140}{Id. at 1462-63.}\footnote{141}{Id. at 1463.}\footnote{142}{Id.}\footnote{143}{Id.}\footnote{144}{N.Y. LAB. LAW § 201(d)(2)(d) (McKinney 2005). The statute also prohibits discrimination based on membership in a union. Id.}\footnote{145}{Id. at § 201(d)(3)(a).}\footnote{146}{See, e.g., State v. Wal-Mart Stores, Inc., 621 N.Y.S.2d 158 (N.Y. App. Div. 1995) (finding that legislative history of statute forbidding employer discrimination against employees excluded dating relationships from the definition of leisure activities); McCavitt}
ruled that an employee who was terminated as a result of a discussion during recreational activities (dinner at a restaurant) outside of the workplace in which her political affiliations became an issue, stated a cause of action for a violation of the state’s statute. Similar to Colorado’s statute (as well as North Dakota’s, discussed below), New York’s statute excludes activities which conflict with the employer’s business interest. It is arguable, therefore, that if the New York statute were applied to employee blogging activities, the courts may find publicly griping about work to conflict with the employer’s business interest.

North Dakota’s statute prohibits discrimination by an employer, in part, 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.” In the only case interpreting this language, the Supreme Court of North Dakota ruled that it was a disputed issue of fact whether a chaplain who was discovered engaging in unseemly behavior in a Sears store bathroom was terminated for participating in lawful activity off the employer’s premises during nonworking hours.

Massachusetts has adopted legislation which specifically protects an employee’s right of privacy, a subject which is discussed below.

J. Invasion of Privacy

The origin of the notion of an individual right of privacy is traced to an 1890 article by Samuel Warren and Louis Brandeis. Some states have codified the right of privacy, or incorporated it in their constitution. Although courts have been very reluctant to recognize employee privacy in the workplace, most workplace invasion of privacy actions are based on the common law tort of intrusion upon seclusion. The Restatement

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148. N.D. CENT. CODE § 14-02.4-03 (2005).
151. See Todd Wesche, Reading Your Every Keystroke: Protecting Employee E-Mail Privacy, 1 J. HIGH TECH. L. 101, 109 (2002) (discussing common law’s adaptation to developing technology and, consequently, increased opportunities for employers to invade their employees’ privacy).
153. See Wesche, supra note 151, at 110-11. See also Gabel & Mansfield, supra note
(Second) of Torts defines the tort of intrusion upon seclusion as follows:

"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."\(^\text{154}\) Courts have recognized that employees may have a limited expectation of privacy in the workplace (principally based upon intrusion of seclusion), and that if an employee is terminated on the basis of information obtained through an invasion of privacy, the employee’s discharge may be wrongful.\(^\text{155}\)

Of course, as Pagnattaro points out, before an employee can make a claim that their privacy was violated, the information that forms the basis of claim must truly be private.\(^\text{156}\) The tort of invasion of privacy would therefore not apply to an employee’s blog that is available for anyone with Internet access to read. However, not all blogs are available to the public. In addition, the majority of workplace privacy cases have involved on-the-job activities, while a private blog maintained by an employee would be categorized as off-the-job conduct. Few cases have dealt with workplace privacy in the context of off-site activities, though they still have a close nexus to the workplace. For example, in Johnson v. K-Mart Corp., an employer hired undercover agents to investigate workplace vandalism and allegations of employee drug use.\(^\text{157}\) The reports from the undercover investigators also included information related to various employees’ personal lives.\(^\text{158}\) In Johnson, the Illinois Appellate Court formally recognized the tort of invasion of privacy by intrusion upon seclusion and adopted the four elements necessary to establish a claim for the tort: "(1) an unauthorized intrusion or prying into the plaintiff’s seclusion; (2) an intrusion that is offensive or objectionable to a reasonable person; (3) the matter upon which the intrusion occurs is private; and (4) the intrusion..."
causes anguish and suffering.

One issue applicable to a private employee blog is whether the fact that the information is voluntarily disclosed negates a claim for intrusion upon seclusion. In Johnson, the defendant (K-Mart) claimed there could be no intrusion upon seclusion since the employees voluntarily disclosed the personal information in question. The court believed, however, that the means used by K-Mart to induce the plaintiffs to reveal the personal information were deceptive, ruling there was a material issue of fact as to whether K-Mart's "act of placing private detectives, posing as employees, in the workplace to solicit highly personal information about defendant's employees was deceptive." In overturning the lower court's grant of summary judgment in favor of K-Mart, as to the personal information collected, the court found "that a material issue of fact exists regarding whether a reasonable person would have found defendant's actions to be an offensive or objectionable intrusion."

In Fischer v. Mt. Olive Lutheran Church, Inc., the U.S. District Court dealt with a situation where the employer monitored a private phone call by an employee, where the call took place through the Church's phone system. Here, there was an element of privacy because the employer had given permission to employees to use the phone in an empty office for private phone calls. In addressing claims by the plaintiff of the Church's violation of specific provisions of the Electronic Communications Privacy Act, the court denied the Church's motion for summary judgment to dismiss that claim because once other Church employees determined that Fischer's telephone conversation was not work-related, "they had an obligation to cease listening and hang up." It could be argued, therefore, that if an employer is monitoring a private employee's blog, it has no legitimate business interest in doing so once it ascertains there is no work-related content. Of course, if the employer does find work-related information on the blog, then the employee's claim of intrusion upon seclusion would be weakened.

Overall, courts have not been conducive to finding liability for what are essentially off-site intrusions by employers. For example, in Smyth v. Pillsbury Co., the court upheld the discharge of an employee who was fired because of the content of an e-mail message he sent from his home to a supervisor over the company's e-mail system. The company determined
the e-mail was inappropriate and unprofessional—this despite the fact the company had stated that it would not monitor e-mail messages. The court ruled there was no “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 facts in *Karch v. Baybank FSB* appear very closely analogous to circumstances surrounding a private employee blog. In *Karch*, neighbors overheard a telephone conversation between Karch and her friend, a co-worker, on their radio scanner. The conversation took place on a Saturday evening, during non-work hours, and it involved mostly personal matters; however, some work-related comments were overheard. Initially, the neighbors listened to the conversations for amusement, but they later reported them to the defendant. Karch was initially reprimanded and had a note inserted into her personnel file admonishing her to “limit her conversations regarding personal situations with [bank] personnel as well as customers.” Karch ultimately resigned, claiming her workplace became hostile. As to Karch’s claim of invasion of seclusion against the defendant and one of its officers, the Supreme Court of New Hampshire upheld the lower court’s dismissal of the claim, ruling that it was the neighbors who had potentially intruded upon Karch’s seclusion, not the Bank (and particularly the officer) who had received the information and then acted upon it. *Karch* indicates that if readers of a private blog report its content to the blogger’s employer, most likely there is no possible claim for intrusion upon seclusion.

IV. CONCLUSION

As the blogging phenomenon continues to grow, one could expect more employees to be fired as a result of the content of their personal blogs. Whether the employees have any recourse—i.e., whether the employer faces liability for wrongful discharge—depends on a variety of state and federal laws, both common and legislative. For example, employers may be limited by federal law (the Secured Communications Act) from accessing private employee blogs (where the employer has not been authorized to access the blog). Employers may also face liability,

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166. *Id.* at 98.
167. *Id.* at 101. See also Pagnattaro, *supra* note 72, at 634-35, for additional discussion of Smyth.
168. 794 A.2d 763 (N.H. 2002).
169. *Id.* at 769.
170. *Id.*
171. *Id.* at 773. See also, Pagnattaro, *supra* note 72, at 635 for additional discussion of Karch.
again under federal law (the National Labor Relations Act), if the content of an employee’s blog (whether public or private) rises to the level of concerted activity (i.e., the blog is used by employees to improve their working conditions, rather than merely occasionally complain about the workplace). The employer must also ensure that all employees are treated equally to avoid a claim by a protected class of employees that their blogging activities were treated differently than similar activities by employees outside the protected class.

Where there is an express employment agreement, an employer may find just cause for terminating an employee who injures the employer’s reputation or interests by publicly criticizing the employer. Under this theory, the employee has violated a duty to be loyal to his or her employer. Whether the discharge is subject to an implied contract is more complex, depending on both the jurisdiction and the actions of the parties. The employer may need to ensure compliance with discipline and termination procedures stated in employee handbooks. Similarly, if the employer has adopted a blog policy, the employer must ensure that it has not casually communicated it to employees (i.e., it must be clearly made part of the employment agreement) and the employer must follow the policy if taking action against the employee.

Despite these potential statutory or contractual liabilities, the employment-at-will doctrine remains a powerful tool for employers to discharge employees without having to establish a just cause. While some commentators have argued that the evolution of exceptions to the employment-at-will doctrine may be portending its demise, this review of the doctrine, particularly in an attempt to apply its exceptions to employees fired for blogging, clearly indicates the doctrine is alive and well. Even in states that have statutorily extended protection for at will employees who are discharged for engaging in lawful conduct, the protections are still quite limited. In particular, there is no overt protection for employees when their conduct adversely affects the employer’s legitimate business interest. And though employees may believe they have a free-speech right to say what they wish, the majority of courts recognize that this right does not apply in a private employment relationship. And the one state that does extend the free-speech right to private employees limits its application to issues of public concern—not mere griping about work.

172. See, e.g., Ballam, supra note 23, at 654 (footnotes omitted):

The doctrine was widely followed throughout the late-nineteenth century and the first part of the twentieth century. Dating from the 1960s, however, when government was focusing more of its regulations on quality of life and individual liberty issues, many exceptions to the doctrine’s applicability began developing from both statutory and common law sources.
Finally, because fundamentally, most employee blogs are public, a blogging employee will find little, if any, protection in a claim for invasion of privacy. However, even where an employee maintains a private blog (limiting access to pre-authorized users), courts have not been sympathetic in analogous situations—generally requiring outrageous behavior on the part of the employer, and only where the content is purely personal, with no relationship to the employer.

Based on current employment law, employees who blog are best advised to heed the caveat: bloggers beware.