Comments

Can Blogging and Employment Co-Exist?

By John S. Hong*

Suppose Rachel Jones, a hypothetical employee at a midsized newspaper, writes the following entry on her personal Web log:

I really hate clowns. Seriously. Okay, first off. They have these stupid little tricks that they do to thrill little kids. Then they have that evil-looking make-up that gives me nightmares. They run around laughing like complete morons and then charge you an arm and a leg for a couple of hours of complete torture.

Jones's supervisor finds the entry during her weekly Friday ritual of reading through her employees’s Web logs. The supervisor’s husband happens to be the clown that worked the party Jones threw for her children. The day after that posting, Jones is fired.

The fairness of terminating Jones’s employment is debatable. Jones’s supervisor may genuinely perceive the Web log—or “blog,” as it is more commonly known—entry as a personal insult against her and her family. If Jones’s co-workers commonly read the blog and know of the supervisor’s affinity for clowns, this “personal insult” might have a detrimental effect on company morale, hurting the company’s bottom line. On the other hand, Jones’s entry does not deal at all with the newspaper’s business interests. It is merely a personal rant regarding off-duty activities that does not in the least pertain to the news. So what rights does an employee, such as Jones, have when fired for an off-duty blog posting that does not pertain to her employer’s business interests or other legitimate business needs?

* Class of 2007; B.A., Davidson College, 1999; Managing Editor, U.S.F. Law Review, Volume 41. I would like to thank my fiancée, Michelle, and my parents for encouraging and supporting my legal education. I would also like to thank Professor Maria L. Ontiveros who provided me the edits to make this piece suitable for publication. Lastly, I would like to thank my editor, Melissa Brown, for her hard work in preparing this Comment for publication.

1. See infra note 3 and accompanying text for the definition of Web log.
Current employment-related statutory schemes insufficiently address off-duty activities, leaving bloggers (the term applied to those who maintain blogs) vulnerable to unwarranted adverse employment actions by their employer. The development and increased use of the Internet has established an entirely new medium of communication. Yet, the existing legal framework has failed to keep up with this burgeoning technology. An employer's unbridled ability to regulate an employee's online communication² arguably violates a privacy right so far as that regulation affects the employee's sense of autonomy. This Comment explores the extent to which a blogger who exercises this autonomy right, by publishing thoughts or opinions online, should legitimately fear termination or other retaliatory actions by the snooping employer.

The employer's duty to respect the basic privacy rights of employees makes up only half the equation, however. With this new means of communication comes a responsibility for discretion by the employee. After all, an employer should not have to tolerate an employee revealing company secrets or badmouthing the company's product on a personal blog. Employment law must draw a line between these managerial rights of the employer and the privacy rights of the employee.

Part I introduces the technology of blogging and its pervasive nature in society today as a means of communication. The section discusses the implication of blogging to employees, who must contend not only with the invasion of their autonomy by their employers but also the risk of adverse employment actions by an employer who dislikes the contents of the blogger's publication. The section then addresses the employer's concern with blogging and the impact of such publications on the business interests of employers.

In light of the need for balance between the countervailing interests of employers and employees, Part II proposes a model state statute that substantively protects the rights of bloggers while keeping in mind the business interests of employers. Part II then discusses current state statutory schemes that address off-duty blogging by employees, concluding that these laws insufficiently address off-duty conduct in light of recent technological advances that have made online communication commonplace in our society. Part II argues that state statutory schemes, although currently insufficient, address privacy

---

² See David R. Marshall, Bloggers in the Workplace: "They're Here!", EDWARDS & ANGELL LLP LAB. & EMP. BULL., Summer 2005, at 1, available at http://www.eapdlaw.com/files/News/9f42d58a-a149-4c89-be35-000e864ca1c1/Presentation/NewsAttachment/538a99db-76f9-45e6-adf4-02106fd8359/L%26E_summer05.pdf.
concerns better than protection evolved through common law or implemented through federal legislation. Finally, Part II urges the state legislatures to pass laws, such as the proposed model statute, that reasonably protect the autonomy of employees and their lifestyle choices in the context of blogging.

I. Privacy Implications of Blogging for the Employee and the Employer

Blogs are the latest trend to explode onto the cyberspace scene. Blogs have traditionally been used for two functions: (1) as an online diary, in which the author chronicles a log of thoughts; and (2) as a personal Web site that provides updated headlines and news articles of other sites that are of interest to the user, which may also include journal entries, commentaries, and recommendations compiled by the user.³ Millions of workers, perhaps as much as five percent of the United States workforce, maintain blogs; yet, only about fifteen percent of employers have specific policies addressing work-related blogging.⁴ Employee blogs inevitably raise employment concerns akin to the issues raised by emails and Internet usage, such as workplace discipline.⁵

A. The Technology

In December 1997, Jorn Barger introduced the term, “Web log,” which today is commonly known as a “blog.”⁶ People use the terms “Web log” and “blog” interchangeably.⁷ “Weblogger” and “blogger” refer to the person who creates or authors a blog.⁸ Blogs emerged as a way for technically-savvy individuals to help others unearth useful Internet sites by listing websites visited by the writer in chronological order and occasionally including a line or two of commentary about those sites. These comments would guide a reader to favored sites

⁷. See id.
⁸. See id.
more pointedly than traditional search engines. Viewers appreciated this guidance in the early days of the Internet, when high-speed access was practically inaccessible and users paid an hourly fee for browsing via dial-up. Visiting these blogs allowed people to avoid spending time aimlessly surfing the Internet.

Blogging has evolved since its early days and links are no longer the primary focus of the sites. The usual line or two of commentary has become paragraphs and pages of ideas, events, or opinions of the author. Blogging has become a popular form of online expression and has attracted the entire spectrum of Internet users. No typical blogger exists; bloggers range from high school students discussing breakups with their sweethearts, to an owner of an NBA franchise giving his blog-readers information about his personal investments.

Blog use has skyrocketed in recent years, more so even within the last year. In the summer of 2005, the Internet hosted an estimated thirty-two million blogs. As of November 2006, that number had surpassed fifty-five million.

The popularity of blogging increased dramatically after Andrew Smales, a programmer in Toronto, launched the first do-it-yourself Web log tool—Pitas.com—in July of 1999. Pitas.com made knowledge of programming languages, such as HTML, unnecessary. Now, ease of use makes it possible for anyone who has access to a computer and the Internet to blog. Bloggers no longer have to rely on an in-

---

10. See id.
14. Marshall, supra note 2, at 1 (stating that a study conducted by Perseus Development Corporation found that among the top twenty Web log service providers, there were 31.6 million user accounts).
17. See id.
18. The author of this Comment—in spite of his limited computer-programming experience—accessed a blog site, setup his own blog, and published an opinion within a matter of minutes on the Internet. Blogging is a technological endeavor that is unique and separate from traditional web pages. Bloggers do not need to know any computer languages to publish, like C++ or JAVA. Bloggers do not even need to learn FrontPage to publish on a blog site.
termediary to publish online, like a webmaster, system administrator, or a web content manager. By following simple directions and clicking the requisite buttons, a blogger can publish any idea or opinion within seconds. Bloggers can also blog ad nauseam, publishing something every minute, day, or week. No one monitors or censors the contents of blog sites.

B. Employee-Employer Concerns at the Intersection of Employment and Online Communication

The explosion of blog ownership and readership affects the world of employment in many ways. In certain industries, employers encourage blogging. Some corporate executives embrace blogging as a medium to communicate with their employees or as a brand-building technique for current and potential clients and customers.19 For example, Sun Microsystems maintains its own blog site that is utilized by 1300 of Sun’s employees, including the company president, Jonathan Schwartz.20 In response to Mr. Schwartz’s request to use blogs to communicate with investors, the chairman of the Securities and Exchange Commission, Christopher Cox, posted a comment on Mr. Schwartz’s blog, stating: “I thought you might appreciate my taking advantage of the Internet’s speed and potential for broad dissemination by posting here [on Jonathan’s blog] as well . . . . The Commission encourages the use of websites as a source of information to the market and investors . . . .”21

In many other industries, employers have discouraged blogging—and for good reason. Employers may reasonably assume that loose-lipped employees will talk about company secrets or simply give negative publicity to the company. Searching “fired for blogging” on Google yields thousands of results, including personal anecdotes on actual terminations, recommendations for employer policies on blogging, and news articles on terminations based on the contents of an employee’s blog site. In fact, such terminations have become so commonplace that Internet vernacular supplies a term for this situation:

“dooced,” which means “getting fired because of something that you wrote in your weblog.”

1. Risks to Employee Bloggers

Employees put their jobs on the line when they write publicly, so blogging employees must be aware of the type of behavior that can trigger a negative response from the employer. Because blogging is no longer a technologically-advanced endeavor, ill thoughts or criticisms that would have only been shared in private conversation in the past are now easily published online where they are read and shared by a large Internet community. The increased ease of use and lower barrier to reaching the online public has created the need for bloggers to use discretion when publishing—discretion that the employer may feel is underutilized. The employers in the three situations detailed below felt that their blogging employees underutilized such discretion, leaving them with no option but to fire the bloggers.

a. Bloggers Beware: Terminations for Blogging Abound

Bloggers have not only suffered legal consequences, but have lost their jobs due to their online activities. Some of these terminations have occurred when the employee blogged directly about their employment. For example, in July 2002, the Houston Chronicle (“Chronicle”) fired reporter Steve Olafson. Under the pseudonym Banjo Jones, Olafson maintained the Brazosport News, a personal blog covering various subjects, including his family and local politics. His blog’s political commentary discussed the very topics and individuals about which the Chronicle paid Olafson to cover as a reporter. Never informed by Olafson of the blogsite, the Chronicle editors remained unaware of its existence until a reporter from another local paper contacted them, complaining that Olafson had criti-

23. A blogger may find him/herself as the defendant in a lawsuit. See Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003) (implying that a blogger may not be liable for libelous statements made by another and added to a blog, but not that direct libel is outside the scope of consequences for indiscriminate bloggers); Lyrissa Barnett Lidsky, Silencing John Doe: Defamation & Discourse in Cyberspace, 49 DUKE L.J. 855, 919–44 (2000) (stating that when a blogger writes what he believes is an opinion, courts may find it to be a statement of fact instead and, therefore, be open to a possible libel judgment).
25. Id.
26. Id.
cized him on the site. The Chronicle editors asked Olafson to take down his site. They criticized his "gonzo journalism" and were angry that he had created material that they perceived to be harmful to the newspaper's reputation. The newspaper suspended Olafson for a week and then permanently terminated his employment.

Other companies have fired employees for conduct loosely related to their employment. In October 2004, Delta Air Lines ("Delta Air") fired a flight attendant, Ellen Simonetti, because of the content of her blog. The blog anonymously chronicled her life, including her work as a flight attendant. Simonetti made sure to keep the writing and pictures anonymous, referring to her employer as "Anonymous Airlines," the city in which she was based as "Quirksville," and herself as "Queen of the Sky." In fact, a large part of the blog contained fictional stories because Queen of the Sky developed into a character in her own right, apart from Simonetti's actual experiences at Delta Air. The airline reviewed her blog photos showing her in a Delta Air Lines uniform aboard a plane and revealing the lace of her brassiere as well as her thighs. On September 25, 2004, in response to these pictures, the airline suspended Simonetti indefinitely. A month later, Delta Air terminated her employment.

Companies have also fired employees for conduct wholly unrelated to their employment. Programmer Mark Pilgrim was fired after his manager followed a link on one of the company websites (a website that Pilgrim created) to Pilgrim's personal blog and discovered an essay reflecting on his past addictions to nicotine, alcohol, and marijuana. Pilgrim had already overcome his addictions and the substances posed no threat to his work productivity, but the manager demanded that Pilgrim completely abandon the personal blog. Pilgrim offered to compromise by removing the link from the company

27. Id.
28. Id.
29. Id.
32. Id.
33. Id.
34. Diary of a Fired Flight Attendant, supra note 30.
35. Twist, supra note 31.
38. Id.
website to his personal blog. The manager rejected the compromise and insisted that Pilgrim take down the site. Pilgrim refused, and he posted his resume on the blogsite in anticipation of losing his job. Viewing the resume post as insubordination, the manager fired Pilgrim.

The anecdotal evidence above suggests, at the very least, that employers are using the contents of their employees' blogs to make employment decisions, sometimes to the detriment of the employee. Blogging's popularity is so prevalent that it can now be safely considered "a key part of online culture," a culture that involves millions of participants. Employees' blogging activities should, therefore, enjoy some measure of protection, based on their right to privacy in non-work related matters.

b. Bloggers Beware: The Privacy Right to Autonomy at Risk

There is an inherent contradiction in recognizing the protection of privacy for blogging. The publication of a blog for the entire Internet community to read is, by default, a public endeavor. So, how can a blogger reasonably seek privacy protection for communicating openly on the Web? The answer may lay in a closer look at the role blogging plays in the daily lives of many Web users. The concept of privacy discussed herein does not rely on the four types of harmful activities typically redressed by the laws seeking to protect privacy. Instead, this discussion of privacy relates to another activity recently gaining ground as a basis for protection under the umbrella of privacy actions: the protection of autonomy in choosing one's own lifestyle.
The explosion of the blogosphere, and technology in general, has opened a new door through which the employer is now capable of intrusively and surreptitiously managing the employee. The large number of bloggers demonstrates that people are communicating online as commonly as, if not more than, through print and in person (consider online dating, for instance). Blogging, as a new medium of communication, has been used more extensively in recent years partly due to the fact that anyone, including employers, can easily access it. Yet it does not necessarily follow that because people now use this new tool to increase communication, an employer should have the increased right to monitor an employee's off-duty conduct with this tool. Unfortunately for bloggers, however, no restrictions on this type of monitoring exist. The law has yet to address the privacy complications that result from this technological development.

Privacy, which is universally recognized as a fundamentally important value, loses out to employers's interests where the law fails to provide protections. What employees do outside the workplace, independent and unrelated to the job, is their own business, not the business of the employer. Off-duty conduct, therefore, should not serve as the basis for an adverse employment action. This idea links closely to basic notions of privacy and the right to individual autonomy.

There is literature that gives credence to the idea that the right to privacy is powerful enough to serve as the basis for the protection of off-duty conduct by the employee. Professor Pauline Kim, for example, argues that the principle of privacy rights, having found its way into constitutional jurisprudence, should transcend even the at-will employment presumption because “[p]rivacy is an essential part of the complex social practice by means of which the social group recognizes—and communicates to the individual—that his existence is his own.” An invasion of privacy, then, is intrinsically harmful because it entails the denial of basic forms of respect accorded members of the community. Since an extensive backdrop of social norms, which include...
cludes legitimate privacy expectations, inevitably plays a role in the creation of an employment relationship, employees must be afforded those privacy expectations in the employment setting.\textsuperscript{51}

These expectations should be reasonably limited, however. Professor Kim acknowledges that because employers and employees engage in a joint effort to achieve common business ends, employees must relinquish certain claims to privacy they would otherwise enjoy against the world-at-large.\textsuperscript{52} But because the employment relationship is for a specific, limited purpose, any relinquishment must be limited to the achievement of that business purpose.\textsuperscript{53} In other words, "employer intrusions [into an employee's core privacy rights] should not be permitted unless essential to meet some business need."\textsuperscript{54}

In another similarly-related context, Professor Catherine Fisk advocates the notion of autonomy as a means of protecting the individual's right to dress in the work environment as he or she sees fit, so long as that appearance does not offend a legitimate employer interest. "[A] robust right of privacy . . . could be extended to cover the autonomy right of employees to choose their appearance absent some legitimate employer justification . . . . I am not . . . willing to sacrifice the autonomy rights of [the] nonreligious [sic] to dress in the way that is important to them."\textsuperscript{55} In spite of the fact that dress at work is, like blogging, inherently public, Professor Fisk believes that protection of the employee's choice in dress belongs under the ambit of privacy.

The term, a "right of privacy," is a misnomer. Privacy protects all sorts of behavior that are not necessarily hidden from view; it protects a boundary between the self and the world or between one's personal life and one's work life. "As many have observed, privacy should be about autonomy, rather than secrecy."\textsuperscript{56}

Justification for autonomy in off-duty blogging is very similar to justification for autonomy in dress: neither implicates secrecy or intrusions therein. Yet, there is a clear privacy intrusion on unwitting employees who communicate online and get fired for the blog entry the next day. Thus, the law should afford off-duty bloggers privacy protection from adverse employment actions. That protection, however, can-

\begin{itemize}
\item \textsuperscript{51} Id. at 698.
\item \textsuperscript{52} Id. at 702.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Fisk, supra note 45, at 1127–28.
\item \textsuperscript{56} Id. at 1139.
\end{itemize}
not ignore and must be balanced with the protection of employers’ rights.

2. Employers Have the Right to Manage Their Employees

Employers have many legitimate concerns when it comes to the blogging activities of employees. Bloggers often fail to appreciate the power of blogs to communicate with millions of Internet users. Employers may feel it is their right to have access to information about their employees’ online conduct because certain behavior can subject them to liability.

Because of the doctrine of respondeat superior, an employer must be concerned about its employees engaging in tortious or even criminal behavior. Tort liability could extend to the employer who does not exercise proper control or whose neglect made the activity possible. One type of tortious behavior, for example, is discrimination.

The following two cases illustrate how comments made by employees on blog sites may be admissible in a discrimination case. First, in Cooley v. Carmike Cinemas, Inc., an employee sued an employer for age discrimination. The employee offered two off-duty verbal statements allegedly made by the president of Carmike to support his discrimination claim. The first alleged comment involved his displeasure about spending the holidays with his family because he did not “like to be around old people.” In another context, he also allegedly said that “[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.” The admission of these statements was challenged on appeal as being too prejudicial. But the Sixth Circuit found that the error, if any, by the trial court in letting the jury

57. Bloggers may also put their jobs at risk because they are operating under the belief that the First Amendment protects their expressive activity. However, the First Amendment imposes no restriction on a private employer preventing it from terminating an employee for his or her expressive conduct. Marshall, supra note 2.
58. The doctrine of “respondeat superior” provides that an employer is liable for an employee’s tort or crime if the employee’s acts were within the scope of employment. Freeman v. Busch, 349 F.3d 582, 586–87 (8th Cir. 2003).
59. 25 F.3d 1325 (6th Cir. 1994).
60. Id. at 1327–29.
61. Id. at 1329.
62. Id.
63. Id.
hear these two statements was "harmless" since there was other sufficient evidence to support the jury's verdict.  

Similarly, in Hardin v. S.C. Johnson & Son, Inc., the plaintiff-employee attempted to use a co-worker's off-duty, verbal, racist statements about African-American women to support her race discrimination claim. Though the attempt was ultimately unsuccessful, the court stated that if the employer "spoke [the racist statements] in the workplace or to Hardin's face within the limitations period—the thrust of this opinion could be markedly different." Although the cases above both dealt with off-duty verbal statements—as opposed to off-duty blog contents—one may reasonably conclude that the courts could find that statements published in blogs are equally actionable.

Employers may also fear potential liability for the criminal activities of their employees. Where a blog discusses political topics and public figures, an employee can easily engage in libelous statements that create liability for the employer. Online libel, therefore, raises similar concerns for employers as off-line defamatory statements. Criminal activities can also affect a business's reputation. For example, a blogger who provides links to illegal works or pornographic material could jeopardize the employer's integrity or the employer's relationship with others. This is particularly so where the blogger makes use of the employer's computers, network, and work time to facilitate such activities.

An employer may also worry about other behavior that, although not legally actionable, is bad for business and could hurt the company or the employer personally. An employer will worry about the content of blogs that mention the company, as did Delta Air Lines, Pilgrim's employer, and the Houston Chronicle in the examples above.

64. Id. at 1392.
65. 167 F.3d 340 (7th Cir. 1999).
66. Id. at 343.
67. Id. at 345.
68. Libel consists of the publication of defamatory matter by written or printed words, in physical form, or by any other means of communication, which has the potentially harmful qualities characteristic of written or printed words. Restatement (Third) of Torts § 568(1) (1938).
69. See Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 313–15 (S.D.N.Y. 2000) (addressing the online posting of a DVD decryption program, which resulted in a violation of copyright protection for the employer as well as revenue loss).
70. See Andersen v. McCotter, 100 F.3d 723, 725 (10th Cir. 1996) (discussing the termination of employment for an intern who spoke negatively about her employer in a television interview).
If an employee blogger badmouths clients, the reputation of the company is more at risk than that of the blogger. The damage to the company’s reputation could be immeasurable where the company bases its business transactions on confidentiality and an employee-blogger writes about particular clients. If a blogger badmouths co-workers, the targeted victims may feel that the blogging has invaded their privacy or that the work environment as a whole is unfriendly to them. Some employees may not work as well with others if they fear their every movement is subject to public scrutiny.

The employer concerns presented above are particularly warranted upon consideration of the easily accessible and permanent nature of Internet content. Because blogs are easily accessible and searchable, once the blog announces something harmful, retraction is difficult. While written or oral disclosures may be tracked down and the recipients sworn to secrecy, data and information on the Internet are easily searchable. Google, for example, provides a search engine exclusively for blogs. Each blog site, like Xanga.com, also provides search engines for the blogs on its servers.

Savvy employers will use this searchability to their advantage. Engaging in these simple search techniques can yield a wealth of information on a given employee-blogger, information that may prove useful in assessing the employee’s productivity or loyalty. There may undoubtedly also be a myriad of information useful in assessing the employee-blogger’s personal interests in music, film, and dating, but irrelevant to business interests. What must not be lost in this discussion are the consequences to the blogger of the employer using this management tool. An awareness that their employer scour the Internet for employee blogs and takes employment actions based on such searches may deter employees from engaging in future communication on the Internet.

An employer’s right to manage employees, although justified for the above reasons, inevitably gives rise to legitimate concerns regarding privacy for the contents of employees’ blogs. Not surprisingly, the interests of employees and employers are inversely proportional to each other: the greater the privacy right for the employee, the lesser the managerial right for the employer; conversely, the greater the managerial right for the employer, the less privacy afforded to the employee. The law must balance this conflict between the two groups in an efficient manner and as equitably as possible.

II. Implementing Employment Protection for the Blogger: A Solution Proposed to Address Current Failures

The crux of this Comment lies not with simply advocating the need to recognize an area of privacy to protect employees, but the means by which to implement law protecting employees from adverse employment actions. Indeed, the authors cited above have sufficiently discussed autonomy as protected by privacy, but none have taken the additional step of demonstrating how to implement this type of protection in the law.

The most appropriate manner in which to implement this protection is for the individual states to pass legislation. To this end, this Comment proposes a model statute to effectuate this purpose. Some states, notably California, New York, North Dakota, and Colorado, have actually taken some steps to protect an array of off-duty conduct. Yet, as this Comment will illustrate, none of these states sufficiently protect the autonomy of the employee-blogger. The states need to enact legislation that specifically addresses these concerns.

A proposal alone, however, fails to address the type of reform necessary to achieve the ultimate goal of protecting the employee. Equally as important is the choice of mechanism in reforming the existing law, or the lack thereof. Process is a crucial element in determining outcome. The differences between statutory law and judicially-created common law and between federal and state law, affect the way in which a new rule is interpreted, applied, and further amended. To fully and effectively protect employees against unjust discipline for lawful off-duty behavior, state legislation will ultimately be necessary.

Before delving into the model statute and the appropriateness of state legislation to protect the autonomy of private-sector employees, a brief understanding of the current laws protecting employees is in order. All states, save for one, retain the at-will presumption, in which an employee can be fired for good reason, bad reason, or no reason at all. Thus, as a rule of thumb, an employee has no protection for any off-duty writings, including blogs. This holds true in spite of the mistaken belief by many employees that their speech is protected by the First Amendment’s free speech guarantee.

72. See discussion infra Part II.B.
73. The statutory law of Montana provides that the at-will relationship has been set aside in favor of a presumption that employment is for-cause. MONT. CODE ANN. §§ 39-2-903, 39-2-904 (2005).
74. First Amendment speech law pertains to the powers of the government, not the private employer. See Marshall, supra note 2.
For certain classes of employee bloggers, existing laws provide a basis for a reasonable expectation of protection. With respect to state laws, employees can appeal to exceptions to the at-will presumption for protection of their off-duty blogging.\textsuperscript{75} Off-duty blogging may also fall within the scope of protection provided by federal laws, such as: the National Labor Relations Act\textsuperscript{76} (which protects certain employees's discussions regarding wages, benefits, and other terms and conditions of employment); or federal anti-discrimination statutes, including Title VII of the Civil Rights Act of 1964,\textsuperscript{77} the Americans with Disabilities Act,\textsuperscript{78} or the Age Discrimination in Employment Act\textsuperscript{79}—all of which prohibit employers from discriminating based on protected classifications.\textsuperscript{80} Employers should also ensure that their actions do not violate state anti-discrimination statutes\textsuperscript{81} or whistleblowing laws.\textsuperscript{82} However, none of these legal protections encompass off-duty conduct as its own category. A blogger who writes about workplace health benefits may find protection under the Family and Medical Leave Act,\textsuperscript{83} but the same blogger would find no protection for writing about the company party.

A. A Model State Statute for Off-Duty Conduct Balancing the Rights of the Employee and the Employer

The following proposal addresses blogging and many other contexts in which employment issues arise with regard to off-duty conduct. The proposal is designed to reconcile the tension between employees's legitimate expectation of privacy and employers's potential liability.

\textsuperscript{75} For an extensive discussion on the common law protections relevant to off-duty blogging, see Gutman, \textit{supra} note 37.


\textsuperscript{78} 42 U.S.C. §§ 12101-13 (2000).


\textsuperscript{80} For an extensive discussion on the federal statutory protections relevant to off-duty conduct in general, see Marisa Anne Pagnattaro, \textit{What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct As the Basis for Adverse Employment Decisions}, 6 U. PA. J. LAB. & EMP. L. 625, 670–77 (2004).

\textsuperscript{81} See, e.g., California's Fair Employment and Housing Act. CAL. GOV'T CODE §§ 12900–96 (West 2005) (providing protection for employees from harassment or discrimination that is directed at certain immutable characteristics, including age, sex, race, and medical condition).

\textsuperscript{82} See, e.g., California's Whistleblower Protection Statute. CAL. LAB. CODE § 1102.5(b) (West 2003).

While the following proposal covers blogging and other off-duty recreational activities, it is not designed to address all contexts in which employees may be fired for off-duty lifestyle conduct. The statute (at least in part) should contain the following provision:

1. Unless otherwise provided by law, it shall be unlawful for an employer to take adverse employment action against an individual with regards to terms, conditions, compensation, or privileges of employment because of lawful conduct by the employee that occurs outside of working hours, off the employer's premises, and without the use of the employer's equipment or property:
   (a) An employee's lawful activity for which the employee receives no compensation, including, but not limited to, sports, games, hobbies, exercise, reading, the viewing of television and movies, or engaging in Internet communications.
2. The provision enumerated above shall not protect off-duty activity that:
   (a) creates a *material* conflict of interest with regards to the employer's trade secret, proprietary information, or business-related interests; and/or
   (b) relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer.

This model lifestyle discrimination statute provides an employee with the right to engage in lawful off-duty blogging while balancing the employee's autonomy rights with the employer's business and fiduciary interests.

If the Houston Chronicle fired Steve Olafson for his blog within a jurisdiction that recognizes the model lifestyle statute, the court would likely uphold the termination as lawful. In doing so, the court would find Olafson's blog to be in violation of the conflict-of-interest restriction because (1) the blog he wrote directly contradicted what he wrote for the Chronicle, and (2) the information in the blog came from sources of the Chronicle. The court would also likely find that Olafson violated the duty of loyalty inherent in the employee's relationship with the employer.

Ellen Simonetti's case is slightly more elusive than Olafson's under the model statute. The court would not likely find that the "Queen of the Sky" blog she maintained at the time of her firing con-

---

84. The proposed statute excludes the enforcement mechanism or any particular remedies afforded the aggrieved complainant, which are beyond the purview of this Comment. Further, the author recognizes the unreasonable nature of passing legislation that solely addresses blogging, outside the context of other "lifestyle" issues. For this reason, the model statute addresses lifestyle discrimination in general, including a non-exhaustive list of lifestyles, such as blogging.
stituted a conflict of interest since she did not stand to personally gain from the journal. Further, her duties at Delta did not suffer on account of the blog. A reasonable argument exists, however, that the provocative pictures she posted of herself inside the cabin of a Delta airplane were reasonably and rationally related to her particular employment activities. Thus, depending on the tendencies of the presiding court, the model statute could be applied to protect Simonetti's employment, while still providing sufficient leeway to deny Simonetti relief.

Mark Pilgrim is the one employee who the model statute would seemingly protect. A link from a programming site to his personal blog that reflected, in one entry, on his past addictions to marijuana and alcohol would not constitute a fiduciary conflict of interest. An account of the past hardly impedes the fulfillment of a present job. Further, Pilgrim stood to gain nothing from that particular journal entry, at least with regards to his job as a programmer. A past substance addiction is also not related to a current bona fide employment requirement for a computer programmer, nor is it reasonably or rationally related to the job.

The success of the model lifestyle statute lies in (1) its acknowledgement of the new medium of communication through blogs that the Internet provides, as well as (2) the balance between the legitimate privacy interest of employees and the realistic fiduciary interest of employers. As previously mentioned, some states have already passed legislation that addresses some lifestyle-discrimination concerns of private-sector employees.

B. Existing State Statutes and Their Failures to Sufficiently Protect the Blogger

More than half the states have enacted statutes to protect employees engaging in lawful off-duty conduct from adverse employment actions by employers. Such adverse actions by employers have been coined "lifestyle discrimination." Yet the vast majority of the lifestyle discrimination statutes merely protect employees's right to consume

---

85. On the other hand, Ms. Simonetti has gained plenty, in terms of fame and fortune, since Delta terminated her employment. See Diary of a Fired Flight Attendant, Nov. 13, 2006, http://queenofsky.journalspace.com/ (indicating that she has signed copies of her book on Amazon for $27.95).

86. LITTLER MENDELSON, supra note 5, at 1271.

87. Id.
lawful products, such as tobacco. In fact, only four states provide a statutory scheme broadly protecting employees engaging in all lawful off-duty activities. These states are California, New York, Colorado, and North Dakota. For the most part, the statutes passed by the legislatures in New York, Colorado, and North Dakota treat lawful off-duty conduct similarly, balancing employees' privacy rights with employers' business needs. The only difference between the three lies in the language the legislatures use to provide an escape clause for employers.

As for California, the statutory language may give the reader an impression of broad applicability, but the scope of the law has been tempered severely by judicial opinion. California's statutes effectually provide no more than a procedural process for implementing privacy protections already afforded to its citizens.

1. The Failure of Purely Procedural Instruments: California

In addition to the right to privacy contained in California's state constitution, California has a separate law pertaining to a worker's right to privacy for off-duty conduct. Under section 96(k) of California's Labor Code, enacted in 2000 as part of the Labor Standards Enforcement Act, the Labor Commissioner has the responsibility of handling all "[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." Further, Labor Code section 98.6(a) provides that "[n]o person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or ap-

88. Gely & Bierman, supra note 45, at 1099 (stating that "[i]n the late 1980's the tobacco industry began aggressively lobbying state legislatures to pass laws protecting the rights of employees and prospective employees to smoke while off-duty ... . In total, over thirty states have passed legislation protecting the off-duty rights of employee smokers ... .").

89. LITTLER MENDELSON, supra note 5, at 1271.

90. Id. Though Montana also protects employees for engaging in lawful off-duty activities, such protection is based not on any specific statute protecting off-duty conduct, but a general statute eliminating the at-will presumption in Montana. See MONT. CODE ANN. §§ 39-2-903, 39-2-904 (2005).

91. See CAL. CONST. art. I, § 1 (providing that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.").

92. CAL. LAB. CODE §§ 77-107 (West 2003).

93. CAL. LAB. CODE § 96(k) (West 2003).
plicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96 . . . .”

In 2001, the California Legislature explained that the aforementioned sections of the labor code provide employees with a necessary, yet inexpensive, administrative remedy for their pursuit of their rights. The Legislature also declared that the Labor Standards Enforcement Act furthered the state interest in protecting the rights of individual employees and job applicants who could not otherwise afford to protect themselves.

After its enactment, however, concerns arose about the scope of section 96(k) and the ramifications for employers in California. With questions raised about the breadth of section 96(k), the California Attorney General responded by stating that the statute did not abrogate existing law that prevented peace officers from participating in off-duty conduct conflicting with their job duties. Although the Attorney General's response applies directly to public-sector employees, it contains language that could be construed to extend to private-sector employees. The opinion states 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.” The Attorney General went on to state 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 led to the conclusion that section 96(k) “did not create new substantive rights for employees . . . . [T]he established a procedural mechanism that allows the Commissioner to assert, on behalf of em-

---

94. CAL. LAB. CODE § 98.6(a) (West 2003).
96. Id.
99. Id. at 228.
100. Id. at 229.
101. Id.
ployees, their independently recognized constitutional rights."\textsuperscript{102} Thus, the California Legislature clearly intended for section 96(k) to provide employees with merely a procedural instrument, rather than a substantive right, by which they could assert rights already guaranteed under current California law.

The cases decided in California regarding the scope of section 96(k) have affirmed the interpretation provided by the California Attorney General. In \textit{Barbee v. Household Automotive Finance Corp.},\textsuperscript{103} an employer fired a sales manager for dating a co-worker, pursuant to the company's non-fraternizing policy.\textsuperscript{104} The plaintiff-employee alleged that because his consensual relationship with his co-worker was lawful and conducted during nonworking hours, he was protected by section 96(k).\textsuperscript{105} The appellate court disagreed, stating that section 96 “does not describe any public policies . . . [but] simply outlines the types of claims over which the Labor Commissioner shall exercise jurisdiction.”\textsuperscript{106}

The court in \textit{Grinzi v. San Diego Hospice Corp.}\textsuperscript{107} reached a similar result for the employer. The plaintiff-employee, a manager, alleged that the private corporation terminated her employment because of her membership in “Women's Garden Circle,” an investment group her employer believed to be an illegal pyramid scheme.\textsuperscript{108} The court held that section 96(k) provides merely a procedure by which the Labor Commissioner exercises jurisdiction, but not any independent basis for public policy.\textsuperscript{109} The court also held that section 98.6 does not establish public policy against terminations for conduct not protected under the Labor Code.\textsuperscript{110}

Thus, in spite of the generous language of sections 96(k) and 98.6(a), California's Labor Code merely provides a procedural supplement to the substantive rights already guaranteed by California's First Amendment free speech provision. Since that provision applies only to governmental actions and “expresses no public policy regarding

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{102} Id. at 230. This opinion served as the basis for rejecting a police officer's argument that his employer "impermissibly relied on off-duty conduct in terminating his employment." \textit{Paloma v. City of Newark}, No. A098022, 2003 WL 122790, at *12 (Cal. Ct. App. Jan. 10, 2003).
\item \textsuperscript{103} 6 Cal. Rptr. 3d 406 (Ct. App. 2003).
\item \textsuperscript{104} Id. at 408–09.
\item \textsuperscript{105} Id. at 412.
\item \textsuperscript{106} Id. at 413.
\item \textsuperscript{107} 14 Cal. Rptr. 3d 893 (Ct. App. 2004).
\item \textsuperscript{108} Id. at 896.
\item \textsuperscript{109} Id.
\item \textsuperscript{110} Id.
\end{itemize}
\end{footnotesize}
terminations by private employers," bloggers in California have no greater employment protection than their counterparts in the forty-six other states that lack statutes addressing lifestyle discrimination. California’s laws fail to protect the lifestyle choices made by a private-sector employee—such as the choice to blog about non-work related topics—from the possible negative responses of the prying manager.

2. The Failure of Substantive Approaches to Statutory Regulation of Off-Duty Conduct

a. New York

New York’s Recreational Activities Law, section 201-d, states that an employer may not discharge an individual from employment or otherwise discriminate against the “individual in compensation, promotion or terms, conditions, or privileges of employment because of . . . [the] 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.” Section 201-d, however, expressly limits protection to activities that do not “create[ ] a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest.” At first glance, the New York statute seems to broadly protect off-duty lifestyle choices made by the employee, limiting behavior only to that which is legal, recreational, and not in material conflict with the employer’s business interests.

Few cases interpret the scope of section 201-d, specifically discussing the definition of “legal recreational activities.” Nearly all of those cases deal solely with the issue of whether “dating” or “cohabiting” falls within that definition. Those courts agree that dating does not

111. Id.
112. N.Y. LAB. LAW § 201-d (McKinney 2002).
113. Id. §§ 201-d(2) through 201-d(2)(c).
114. 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) through (e).
fall within the ambit of the law.\textsuperscript{116} In one case, the court stated that the legislative history of section 201-d "evinces an obvious intent to limit the statutory protection to certain clearly defined categories of leisure-time activities."\textsuperscript{117} Another stated that "one of the primary motivations [in the enactment of section 201-d] was to protect smokers and users of tobacco products against the extensive vigilantism which their lawful leisure time recreational activity has invoked in recent years."\textsuperscript{118} These cases demonstrate the courts's unwillingness to extend protection for off-duty conduct not expressly contemplated by the state legislature.

In the only case that discusses interpretation of section 201-d outside of the dating context, the plaintiff attempted to extend "legal recreational activities" to include the installation of telephone equipment for personal profit.\textsuperscript{119} Because the statute states that the term, "recreational activities," is defined to include "any lawful, leisure-time activity, for which the employee receives no compensation . . . ,"\textsuperscript{120} the court called the argument "patently frivolous."\textsuperscript{121} Based on the cases above, it seems New York courts will not broadly interpret the phrase "recreational activity" in section 201-d.

No New York case addresses computer usage, or blogging in particular, with regard to an employee's off-duty conduct. The analysis in \textit{McCavitt} seems promising for the blogging employee seeking protection, since the court made a point to indicate that the New York legislature, in drafting section 201-d, intended to protect lawful leisure time recreational activities from "extensive vigilantism."\textsuperscript{122} The case may not be helpful in gaining blogging rights, however, because the court also explicitly stated that "{[h]istory tells us that one of the primary motivations was to protect smokers and users of tobacco products.}"\textsuperscript{123} Further, the court relied on the fact that "the enactment [of section 201-d] . . . was accomplished only after revisions to satisfy lengthy opposition focused on its prospective interference with the concept of employment at will."\textsuperscript{124}

\begin{flushleft}
\textsuperscript{116} \textit{McCavitt}, 89 F. Supp. 2d at 498; \textit{Hudson}, 725 N.Y.S.2d at 319; \textit{Bilquin}, 729 N.Y.S.2d at 519; \textit{Wal-Mart Stores}, 621 N.Y.S.2d at 159.
\textsuperscript{117} \textit{Wal-Mart Stores}, 621 N.Y.S.2d at 160.
\textsuperscript{118} \textit{McCavitt}, 89 F. Supp. 2d at 498.
\textsuperscript{120} N.Y. LAB. LAW § 201-d(1) (b) (McKinney 2002) (emphasis added).
\textsuperscript{121} Cheng, 64 F. Supp. 2d at 285 n.2.
\textsuperscript{122} \textit{McCavitt}, 89 F. Supp. 2d at 498.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\end{flushleft}
On the other hand, the plain language of section 201-d addresses a non-exhaustive list encompassing a myriad of off-duty activities, indicating that the legislature intended for the statute to be interpreted broadly. Blogging could possibly fit into the "hobby" category of the recreational activities protected by the statute. Blogging, for most purposes, is a hobby, whether created or read by the blogger. However, given the New York Legislature's proclivity to avoid "interference with the concept of employment at will," the courts likely would not extend the reach of "hobby" to authoring and publishing blogs. The courts would probably treat blogging as "television, movies, and similar materials," thereby protecting only the reading and viewing of blogs. Since the protection sought is for the writing of a blog, such a characterization would prove detrimental to the blogger's rights. Further, depending on how loosely the judiciary will interpret section 201-d(3) and the phrase "material conflict of interest related to the . . . business interest," blogging can receive as much, that is, as little, protection as it currently does under the at-will regime.

Section 201-d is a well-written and broadly-worded statute. Yet the New York statute ultimately lacks any reference to the technological advances that have given rise to the blog. Ten years ago, the blogosphere was no more than a niche group of technologically-savvy individuals, for whom broad statutory protection would not have been reasonable. Today, the blogosphere has millions of participants. It is a completely new space for communication that is used extensively by employee and employer alike. For this very reason, the blogger's universe of privacy from the employer has shrunk. For the New York statute to remain current with the ever changing landscape of electronic communication and its privacy implications, it must be revised to address these very concerns.

b. Colorado

The Colorado statute, section 24-34-402.5, provides that "[i]t 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

---

125. "Recreational activities' shall mean 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 materials." N.Y. LAB. LAW § 201-d(1)(b) (McKinney 2002).
127. N.Y. LAB. LAW § 201-d(3)(a).
nonworking hours." The statute contains two exceptions for the employer to lawfully terminate the employment of an individual based on off-duty activities. First, the employer may lawfully terminate the employment of an individual whose off-duty conduct "relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee . . . rather than to all employees of the employer." Second, termination is lawful where it "is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest."

Though the general rule may be similar to that in New York, the exceptions to the rule that weigh in favor of the employer are strikingly different. The Colorado statute, in contrast to the New York statute, gives the employer greater leeway in justifying termination of an employee for off-duty conduct. The conflict of interest need not be "material" as in New York. In fact, no conflict of interest is necessary in Colorado at all. There merely needs to be an appearance of a conflict of interest.

Though no court in Colorado has addressed section 24-34-402.5 in the blogging context, the courts have, interestingly enough, construed the statute quite broadly in other contexts. In Gwin v. Chesrown Chevrolet, the appellate court affirmed a jury verdict for an employee fired by Chesrown's general manager. The termination of employment occurred as a result of the employee's voluntary participation in a sales seminar and his subsequent demand for a refund of the cost of attending the seminar. Though the employer involved itself by paying one-half of the seminar price, the court found that the employer did not fire Gwin for attending the seminar but for demanding a refund from the motivational speaker. In spite of the employer's fiduciary involvement in the seminar, the court liberally found that the employee's off-duty conduct at the seminar, i.e., de-

129. Id. § 24-34-402.5(1)(a).
130. Id. § 24-34-402.5(1)(b) (emphasis added).
132. Id. at 468.
133. Id. at 466.
134. Id. at 468.
135. Id. at 470 (noting that the plaintiff demanded the refund from the speaker pursuant to the speaker's guarantee of satisfaction).
manding a refund from the motivational speaker, was not “reasonably related to [the employee’s] employment.”

Marsh v. Delta Air Lines, Inc. best illustrates the Colorado courts’s willingness to construe section 24-34-402.5 in favor of the employee by limiting the reach of its exceptions. In Marsh, a baggage handler for Delta Air Lines wrote a disparaging letter about his employer to the editor of the Denver Post. After the letter was published, Delta fired the baggage handler. The district court ultimately upheld the termination by Delta as lawful, but it did not do so because of any conflict of interest or appearance thereof. The court held that the statutory term, conflict of interest, relates only “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.” The court stated that the plaintiff did not disregard his duties in favor of personal gain by writing the disparaging letter to the newspaper, nor did he seek any personal gain. Thus, notwithstanding the fact that the baggage handler negatively portrayed his employer in a public forum, the court nevertheless found that his actions failed to amount to any conflict of interest with Delta or even an appearance of a conflict of interest.

As mentioned above, no Colorado case involving section 24-34-402.5 has addressed the termination of employment based on blogging. Based on the opinions above, however, an online blog would likely constitute a lawful activity as contemplated by the drafters of the Colorado statute. If an employee in Colorado were to write a disparaging entry about his or her employer on an online blog, the Colorado courts would not likely find such behavior to constitute a conflict of interest.

However, simply because the Colorado courts have been willing to liberally construe the language of its lifestyle discrimination statute does not necessarily mean that the statute itself is written in the most

136. Id. at 471.
138. Id. at 1460.
139. Id. at 1461.
140. Id. at 1463 (holding that section 24-34-402.5 encompasses an implied duty of loyalty, which the employee breached by writing the disparaging letter to the newspaper).
141. Id. at 1464.
142. Id. (emphasis added) (internal quotation omitted).
143. Id.
144. However, the blog would probably amount to a breach of the duty of loyalty to the employer, for which termination would be lawful under section 24-34-402.5, in spite of the lawful nature of the conduct.
effective manner. For example, New York courts, given their tendency to avoid confrontation with the employment at-will doctrine, would likely interpret the Colorado statute to encompass fewer lifestyle decisions than do Colorado’s own courts. Specifically, the exception, “necessary to avoid the appearance of a conflict of interest,” is so vague that a court could reasonably do away with the general rule by focusing on the language of this exception. While protecting the employer’s business interests is necessary, such protection must be better balanced to also reflect protection for the employee’s right to privacy. This protection can be found in the language of the model statute proposed above.

c. North Dakota

North Dakota’s Human Rights Act, section 14-02.4-01, enacted in 1991, establishes the protection of “lawful activity” during non-work hours and away from work premises. This protection is incorporated directly into the state’s law prohibiting other forms of employment discrimination, such as those based on race, national origin, and sex. It prohibits “discrimination on the basis of . . . participation in lawful activity off the employer’s premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.” Based on the language alone, the Human Rights Act is similar to that of New York, the only difference being that a court in North Dakota would look for a “direct conflict” rather than a “material conflict” and an “essential business-related interest” rather than activity merely “related to the employer’s . . . business interest.”

No court in North Dakota, to date, has contemplated blogging and termination with regards to the Human Rights Act. Yet it seems unlikely that blogging would be protected. The court in Hougum v. Valley Memorial Homes stated that the legislature did not design the statute to protect an employee’s off-duty conduct that is “deleterious to the well-being of the employer’s mission.” In fact, in 1993, two years after the passage of section 14-02.4-01, the North Dakota Legislature passed legislation to also exclude protection for an employee’s

146. Id.
147. Id.
148. Id.; N.Y. LAB. LAW § 201-d(3)(a) (McKinney 2002).
149. 574 N.W.2d 812 (N.D. 1998).
150. Id. at 821 (internal quotation omitted).
off-duty conduct "if that participation is contrary to a bona fide occupu-
ational qualification that reasonably and rationally relates to employ-
ment activities and the responsibilities of a particular employee."151

The language above mirrors that of Colorado's off-duty statute. It was this very language that was the source of litigation in *Fatland v. Quaker State Corp.*152 In that case, the employer fired Fatland after finding out that he continued to have ownership interest in a competitor of Quaker State, in direct violation of company policy.153 The court found that the employer had a legitimate conflict of interest concern because the competitor would benefit from confidential information that the employee could secure for the competitor.154

In *Hougum*, the court discussed the scope of the term, "essential business-related interest," as found in the Human Rights Act. In the case, the employer, a Christian, non-profit nursing home organization,155 fired its chaplain for masturbating in the bathroom stall of a department store.156 The employer asserted that Hougum's actions "undermined his effectiveness as a chaplain and therefore directly conflicted with its business-related interests."157 However, the court stated that the issue is "not the same type of business and economic conflicts of interest at stake in *Fatland*"158 and "decline[d] to hold, as a matter of law, . . . [that] Hougum's activity was in direct conflict with [the employer's] essential business-related interests."159

Based on the cases above, a blogger may find protection for his or her online journal in a number of circumstances. If brought before a North Dakota court, the Houston Chronicle's firing of Steve Olafson would likely be found lawful because his online blog constituted competition, and his personal use of newspaper information for the blog would be an essential business-related interest. On the other hand, Mark Pilgrim's firing for maintaining a blog on which he posted an essay about his past addictions would most likely be found unlawful because such addictions are "not the same type of business and economic conflicts of interest at stake in *Fatland*,"160 especially since Pil-
grim was a computer programmer by trade. Ultimately, in spite of the
tendencies of the North Dakota judicial system, the statute remains
vague enough for a conservative court to find that the law either does
not apply or is excluded from the blogging context.

The statutes enumerated above demonstrate that while some
states have been willing to broadly construe existing lifestyle discrimi-
nation statutes, the statutes themselves have inadequately addressed
the issues raised by emerging technology. New York’s Legal Recrea-
tional Activities Law addresses many specific activities that are pro-
tected yet fails to protect online communications like blogging. Other
statutes, like those in Colorado and North Dakota, fail to address any
specific activities. As a result, those statutes provide loopholes for em-
ployers and judges to deny relief to employees seeking privacy protec-
tion for their blogs.

C. State Legislatures Should Enact Employment Law Regulating
   Blogging

   This Comment has focused on a model for state legislation and
the failures of existing legislation to protect off-duty lifestyle conduct,
such as blogging. Missing from the discussion thus far, however, is a
rationale for relying on state legislation to address these privacy needs,
rather than relying on the common law or even federal legislation.

1. Legislative Reform Would Most Appropriately Address Blogging

   The type and scope of laws that a court makes differ significantly
from those created by legislation. Even if both institutions implement
identical changes, the very fact that the rule appears in legislation
rather than the common law affects the way the new rule is later ap-
plied and further amended. In this way, legislative reform addressing
off-duty blogging offers advantages lacking in the common law
process.

   First, the development of the common law is slow and incremen-
tal compared to legislation. It also does not have the newsworthi-
ness of legislation. Two significant advantages offered by legislation
are its relative ease of reference and the publicity that precedes its
enactment. The debate over immigration reform in the spring of 2006
illustrates this point. Not a single day passed in March and April of

Brook. L. Rev. 91, 98 (2003).
162. Id.
2006 without news about immigration protests and responses, or lack thereof, by Congress.\textsuperscript{163}

Moreover, a legislative measure suits changes to lifestyle discrimination\textsuperscript{164} laws better than a judicial mandate because there is no basis for which a court would have the authority to carve out an at-will exception for blogging. Changes to the common law begin from foundational principles and proceed by legal reasoning. Judges typically do not invent legal doctrine out of thin air that distorts or fails to extend accepted legal principles. No court has created an exception to the at-will regime for off-duty conduct pertaining to a "lifestyle"; courts have merely interpreted existing statutory laws to expand or limit the reach of an employer's ability to discriminate based on a lifestyle. Changes in the law that do not logically relate to existing common law principles are the province of the legislature. A court in Arizona would be hard pressed to apply the legislative intent for the passage of the privacy lifestyle statute in New York as the basis for carving a lifestyle exception to the at-will presumption. The Arizona state legislature, on the other hand, has no legal obstacle to enacting such a law, using the statutes from Colorado, New York, and North Dakota, or the statute proposed herein as models.

Legal reform from the judiciary is unlike new legislation because there is no guarantee that the changes a judge wishes to make would fit into existing common law paradigms. Because judges consider one case at a time, case-specific, non-transferable law can result from a decision in a difficult or atypical case. Conversely, statutes tend to be drafted from a broader perspective. Legislatures can enact an employment-related law encompassing all off-duty lifestyles, including exceptions considering business interests. A legal legislative framework,


\textsuperscript{164} \textit{Littler Mendelson, supra} note 5, at 1271 (defining lifestyle discrimination as an adverse employment action against the employee by the employer for engaging in lawful off-duty conduct).
which as a whole works together to achieve economic and social goals, would better serve the needs of both the employee and the employer.

Finally, a new statute "could pick and choose across a broad spectrum of possible enforcement devices."\(^{165}\) Given the fact that the courts are regarded generally as "too formal, too costly, and already overloaded,"\(^{166}\) in drafting the law, the legislature could choose an existing administrative agency, such as the California Department of Fair Employment and Housing, to enforce the legislative mandate. Referring to the existing governmental apparatus and climate of employment relations of each state would yield the most efficient manner in which the legislature could effectuate such a remedy.\(^{167}\) On the other hand, the judiciary has no capacity to construct an administrative apparatus for purposes of enforcement. Courts could do no more than simply defer future enforcement to the courts within its own jurisdiction.

2. The Superiority of Legislation by the State over the Federal Government

Until the 1960s, the National Labor Relations Act and the Fair Labor Standards Act\(^{168}\) were the only two federal statutes regulating the workplace.\(^{169}\) Since then, however, Congress has adopted a host of employment-related statutes, which can be thematically categorized into two general types of actions: (1) the prohibition of discrimination on the basis of certain protected characteristics; and (2) the establishment of minimum workplace requirements.\(^{170}\) Under the first category, Congress enacted Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the American with Disabilities Act. Under the second category, Congress enacted the Occupational Safety and Health Act of 1970\(^{171}\) ("OSHA"), the Employee Retirement Income Security Act of 1974,\(^{172}\) the Family and

\(^{165}\) Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 77 (1988). Though a proposal for any particular enforcement mechanism is beyond the scope of this Comment, the ability of a legislature to draft such a provision makes it preferable compared to the common law.

\(^{166}\) *Id.*

\(^{167}\) *Id.*


\(^{170}\) *Id.*


Medical Leave Act of 1993 ("FMLA"), and the Worker Adjustment and Retraining Notification Act.\footnote{173} Enactment of a statute for the protection of a "lifestyle," i.e., blogging, does not fit into either of these categories. Statutes that provide protection under the first category cover individuals not as workers, but either as members of a particular group or on the basis of a specified protected trait. Federal action, under the first category, is limited to prohibiting job discrimination only on the specified bases of race, sex, religion, national origin, age, and the like.\footnote{175} To protect an off-duty blogger is to differentiate between an individual's conduct during and away from work, rather than between any particular trait that remains constant whether at work or at home. There is simply no justification for a law protecting off-duty blogging through the prohibition of discrimination on the basis of certain protected characteristics.

Protecting the off-duty blogger under the second category would also controvert congressional intent to limit protection to workplace standards. Off-duty conduct by its very nature is unrelated to the workplace; to clump a statute protecting particular off-duty conduct with OSHA or FMLA would be completely arbitrary.

Moreover, state legislation appears more promising since four states—California, Colorado, North Dakota, and New York—have already enacted laws to address off-duty conduct.\footnote{176} Further, state legislatures have the inherent flexibility of experimenting with alternative procedures, which Congress may not have because it must address the needs of the entire country rather than just those of one state.\footnote{177} States have the luxury of experimenting with different enforcement regimes, be it the court or an administrative agency, based on the needs of the particular state. States also have the flexibility of tailoring restrictions to the protection for lawful off-duty conduct, pursuant to the needs of its citizens and legislatures alike. For example, the state of Louisiana could specifically protect off-duty membership in a hurricane-relief organization—protection that would probably pertain less to citizens of North Dakota.

In addition, leaving the protection of employees's privacy rights to the states has affirmative benefits over and above what a national

\footnote{173. 29 U.S.C. §§ 2101–09 (2000).} \footnote{174. Befort, supra note 169, at 380.} \footnote{175. See supra notes 76–83 and accompanying text.} \footnote{176. See CAL. LAB. CODE § 96(k) (West 2005); COLO. REV. STAT. § 24-34-402.5(1) (2006); N.D. CENT. CODE § 14-02.4-01 (2004); N.Y. LAB. LAW § 201-d(2)(b)-(d) (McKinney 2002).} \footnote{177. St. Antoine, supra note 165, at 71.}
standard could offer. Federalism allows states to use their laws to compete for businesses and workers. The states that have the most efficient mix of legal rights and duties will attract the right mix of businesses and workers. If a state's law is too protective of workers, companies will locate elsewhere. If a state's law is too protective of businesses, workers will relocate. This argument suggests that rules produced by this interplay are more likely to be efficient than rules promulgated by a nationwide regulatory regime.

Conclusion

Legitimate business-related reasons exist for which an employer may fire an employee for off-duty blogging. However, employees should have the right to enjoy privacy that supports and cultivates their lifestyle choices and the right to autonomously engage in off-duty lawful conduct so long as it does not interfere with their employer's legitimate business interests.

The United States Supreme Court has stated that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."\(^{178}\) This Comment does not go so far as to advocate a change in the traditional interpretations of the First Amendment or a constitutional right to privacy for bloggers. But with the understanding that blogs constitute a "new media" by which millions of people communicate, this Comment proposes a model statute that provides privacy protection for employees that state legislatures should effectuate. States have always been the primary purveyors of employment-related laws, save for the niche laws that prohibit discrimination on the basis of membership in a protected class or establish minimum workplace requirements. Lifestyle discrimination, or, more specifically, discrimination based on blogging, fits into neither category of laws. A statute, moreover, gives the legislature flexibility to address the broad concern of lifestyle discrimination—rather than one aspect therein—and choices between alternative enforcement mechanisms. Given the increasing popularity of communicating through blogs, the number of adverse employment actions based on those blogs will only rise. A corresponding rise in the protection for such communication in the employment arena should follow suit.