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Facebook is Not Your Friend: Protecting a Private Employee's Expectation of Privacy in Social Networking Content in the Twenty-First Century Workplace

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**FACEBOOK IS NOT YOUR FRIEND:
PROTECTING A PRIVATE EMPLOYEE’S
EXPECTATION OF PRIVACY IN SOCIAL
NETWORKING CONTENT IN THE
TWENTY-FIRST CENTURY WORKPLACE**

CARA MAGATELLI*

Abstract.....	103
I. Introduction	104
II. Potential Causes of Action.....	109
A. United States Constitution	109
1. First Amendment	109
2. Fourth Amendment.....	110
B. NLRB and NLRA	111
C. Off-Duty Conduct Statutes	112
1. California	113
2. Colorado	114
3. New York	115
4. North Dakota	117
D. Privacy	118
III. Cases.....	119
A. Pietrylo v. Hillstone Restaurant Group.....	119
B. EEOC v. Simply Storage Management, L.L.C.....	121
C. Romano v. Steelcase, Inc.....	122
IV. Discussion	123
A. Potential Consequences of the Above Holdings.....	123
B. New Definition of “Legitimate Business Interest” in the Context of SNS Posts	124
V. Conclusion	129

ABSTRACT

This Comment explores the implications SNS postings have on private employers concerning the off-duty, non-work related conduct of their employees. This argument recognizes that an employee is entitled to engage in whatever legal off-duty conduct he chooses, so long as the behavior does not damage his employer’s legitimate business interests. An employer should not be able to use information gleaned from an employee’s SNS postings, unrelated to an employer’s

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business interests, to punish an employee her choices outside the work place. Disciplining or terminating an employee for his off-duty lifestyle choices permits the morals and standards of the employer to control the employee's personal life.

I. INTRODUCTION

Imagine an eighteen-year-old woman out on the town for a night of revelry. Imagine that said young woman poses for photographs with a passed-out young man, his body festooned with drawings of swastikas and phallic symbols. Then, the photographs are posted to a website for all of her friends to see. No big deal, chalk it up to youthful indiscretion? The sort of activity that a person is not fired for, right? Wrong. The New England Patriots ("Patriots"), an NFL team, fired eighteen-year-old cheerleader, Caitlin Davis, for being in such photographs on the website Facebook.¹ In the photographs, Davis leaned over an unconscious male, his face covered with drawings of phallic symbols, swastikas, and offensive statements.² The photographs bounced from Facebook, to onblastatlast.com, to deadspin.com.³ Despite her protests that the photographs were "taken out of context" and that she did not draw on the individual,⁴ the New England Patriots fired Caitlin Davis.⁵

The Internet is littered with the tales of those people fired over the content of their social networking sites profiles.⁶ Social networking sites ("SNS") and social media⁷ are websites that "allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system."⁸ Facebook boasts over eight hundred million active users.⁹ Approximately 50% of all active users log onto the website daily.¹⁰ Every minute, YouTube users upload 48 hours of streaming video onto the

¹ Catharine Smith & Craig Kanalley, *Fired over Facebook: 13 Posts That Got People CANNED*, HUFFINGTON POST (July 26, 2010, 11:40 AM), http://www.huffingtonpost.com/2010/07/26/fired-over-facebook-posts_n_659170.html?s17699&title=NFL_Cheerleader_Fired.

Facebook is a social networking website. For a definition of "social networking websites", see *infra* text accompanying note 7.

² *Id.*

³ Sarah F. Sullivan, *New England Patriots Cheerleader Caitlin Davis Fired over Facebook Pictures*, YAHOO! VOICES (Nov. 5, 2008), <http://voices.yahoo.com/new-england-patriots-cheerleader-caitlin-davis-fired-2161126.html>.

⁴ *Id.*

⁵ Smith & Kanalley, *supra* note 1.

⁶ *See id.* Those fired for their Facebook postings are said to be "Facebook fired." Keith R. Crosley, *Dooced, Twerminated, Facebook Fired: Lingo and Facts about Social Media and Employee Terminations*, PROOFPOINT (Sep. 2, 2009), <http://blog.proofpoint.com/2009/09/dooced-twerminated-facebook-fired-lingo-and-facts-about-social-media-and-employee-terminations.html>.

⁷ For purposes of this article, "social networking sites" will refer to both social networking and social media websites.

⁸ Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 237 (2011) (quoting Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, J. COMPUTER-MEDIATED COMM. (Oct. 2007), <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>).

⁹ Facebook, *Statistics*, FACEBOOK, <http://facebook.com/press/info.php?statistics> (last visited Nov. 8, 2011).

¹⁰ *Id.*

website.¹¹ Twitter, the micro-blogging website, has 100 million users.¹²

To participate in an SNS, a user creates a profile and interacts with other users by posting messages to profiles, posting photographs and videos, and creating status updates.¹³ A post's content takes many forms, like musings on traffic or a link to a particular website. Just as the Supreme Court predicted in *City of Ontario v. Quon*, SNSs are now a "necessary instrument[] for self-expression, [and] self-identification."¹⁴

While a user's postings are published to a profile, access to a profile is not *carte blanche*; each SNS offers privacy settings wherein a user can limit her profile's accessibility. For example, a Twitter user can "protect [her] tweets" so they are only seen by a user's followers and her tweets are not available to the public.¹⁵ Similarly, Facebook allows a user to set a default privacy level of "public," "friends," or "custom."¹⁶ Facebook even permits a user further customization by allowing her to choose, for example, who can post on her wall, or who can view her photographs.¹⁷ The existence of privacy settings exemplifies the inherent tension between the "human desire to share information with others" and the desire to "maintain[] one's privacy."¹⁸ SNSs are causing formerly disparate social contexts, like employment and off-duty conduct, to collapse into one.¹⁹ With SNS use a dominant aspect of everyday life,²⁰ "[i]nformation sharing on the web has reshaped our expectations of privacy,"²¹ particularly within the sphere of employment law.²²

¹¹ YouTube, *Statistics*, YOUTUBE, http://youtube.com/t/press_statistics (last visited Jan. 6, 2012). This statistic is from 2010. *Id.* Over 800 million "unique users" visit YouTube monthly. *Id.*

¹² *One Hundred Million Voice*, TWITTER BLOG (Sep. 8, 2011), <http://blog.twitter.com/2011/09/one-hundred-million-voices.html>.

¹³ *See Company Overview*, FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited Feb. 23, 2012).

¹⁴ 130 S. Ct. 2619, 2630 (2010).

¹⁵ *Account*, TWITTER, <http://twitter.com/settings/account> (last visited Jan. 6, 2012).

¹⁶ *Privacy Settings*, FACEBOOK, <http://facebook.com/settings/?tab=privacy> (last visited Jan. 6, 2012).

¹⁷ *Id.* However, these privacy settings frequently change without notice, so a user should be vigilant in checking his privacy settings to ensure it reflects his wishes.

¹⁸ DOUGLAS DEXTER, *SOCIAL MEDIA POLICIES IN THE NEW DIGITAL AGE: NEW ISSUES FOR EMPLOYERS 2* (2011), available at http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/annualmeeting/028.authcheckdam.pdf.

¹⁹ Danah Boyd, *Facebook's Privacy Trainwreck: Exposure, Invasion, and Social Convergence*, 14(1) *CONVERGENCE: THE INT'L J. RES. INTO NEW MEDIA TECHS.* 13, 18 (2008), available at <http://www.danah.org/papers/FacebookPrivacyTrainwreck.pdf>.

²⁰ *See Statistics*, *supra* note 9.

²¹ DEXTER, *supra* note 18, at 28.

²² Jean M. Roche, Note, *Why Can't We Be Friends?: Why California Needs a Lifestyle Discrimination Statute to Protect Employees From Employment Actions Based on Their Off-Duty Behavior*, 7 *HASTINGS BUS. L.J.* 187, 187 (2011).

Presently, employers use information gleaned from online searches in their hiring decisions.²³ An employer can monitor his employees at-work Internet usage, so long as the practice is publicized and known to employees.²⁴ Namely, an employer is entitled to read an employee's emails and check an employee's Internet activity.²⁵

There are concerns about the type of information an employee can reveal in her SNS postings, intentionally or unintentionally—"risks that employees may reveal trade secrets, harass their co-workers, criticize their supervisors, or simply discuss politically—or, morally—charged topics in a manner that may be linked with the company."²⁶ Because an employer has a financial interest in his business's reputation, an employer is entitled to protect his business's reputation as a legitimate business interest.²⁷ Furthermore, as "personal reputation is increasingly influenced by what others know about us online,"²⁸ it is understandable that an employer may want to monitor his employees' SNS profiles. An employer can enact a SNS policy to mitigate or eliminate the risks associated with an employee's SNS profile.²⁹ Therefore, since an employer has a

²³ *Id.* at 189. However, online searches should be restricted to job-related information. William C. Martucci et al., *Hiring and Firing in the Facebook Age (With Sample Provisions)*, PRAC. LAW., Oct. 2010, at 19, 21. Accordingly, "[s]hould an employer use information found via an online search to disqualify an applicant, an employer must be able to articulate a job-related rationale for the disqualification. If the information is not related to the job at stake, or the employer can articulate no such rationale," the employer is "vulnerable" to a discrimination claim. *Id.*

²⁴ *Id.* For example, an employee has no expectation of privacy in emails sent over the employer's email system when the employer maintains a practice of monitoring computer usage, the employer has informed an employee that she has no reasonable expectation of privacy in company emails, and the employee clicked a privacy warning in order to access the employer's computer system. Roche, *supra* note 22, at 189 n. 15. In some states, an employer is required to give notice to his employees prior to monitoring his employee's email communications and Internet activity. See CONN. GEN. STAT. § 31-48d(b)(1) (1998); DEL. CODE ANN. tit. 19, § 705(b)(1)-(2) (2002).

²⁵ Arthur D. Rutkowski & Barbara Lang Rutkowski, *Employee's Privacy Rights in Social Networking Web Site Postings: Are Facebook Firings Legal?*, 23 NO. 11 EMP. L. UPDATE 1, 1 (Nov. 2009) [hereinafter Rutkowski & Rutkowski, *Employee's Privacy Rights*]; see also *Fact Sheet 7: Workplace Privacy and Employee Monitoring*, PRIVACY RTS. CLEARINGHOUSE (last updated Jan. 2012), <http://www.privacyrights.org/fs/fs7-work.htm> ("If an electronic mail (e-mail) system is used at a company, the employer owns it and is allowed to review its contents.").

²⁶ Martucci, *supra* note 23, at 20.

²⁷ Roche, *supra* note 22, at 189. For a definition of "legitimate business interests", please see discussion *infra* Part IV.B.

²⁸ *Id.* (quoting Harry A. Valetk, *Off the Clock: Should Your Personal Online Chronicles Jeopardize Your Career?*, LAW.COM (Feb. 5, 2008), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202136231178>).

²⁹ Arthur D. Rutkowski & Barbara Lang Rutkowski, *Social Media Policies: Should Your Company Adopt One? Consider the Issues; View the Sample Policy to Decide*, 24 NO. 11 EMP. L. UPDATE 1, 9 (Nov. 2010) [hereinafter Rutkowski & Rutkowski, *Social Media Policies*]. See *id.* and Martucci, *supra* note 23, at 25-26. This Comment will not analyze said policies.

In *City of Ontario v. Quon*, the United States Supreme Court recognized that "employer policies concerning communications" are what "shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated." 130 S. Ct. 2619, 2630 (2010). The case asked whether a city employee, Quon, had a reasonable expectation of privacy in the text messages on his government-issued pager. *Id.* at 2622. While the Court held that Quon did have a reasonable expectation of privacy in the text messages, the Court refused to decide whether an employee always had a reasonable expectation of privacy in employer-provided technology. *Id.* at 2630.

However, the Supreme Court's aversion to decide cases involving emerging technologies is eroding, as evidenced by the Court's landmark decision in *United States v. Jones*, 132 S. Ct. 945 (2012). The

legitimate business interest in her company's reputation, it is unreasonable to completely forbid an employer from perusing her employees' SNS profiles.

However, much online behavior "does not *directly* affect the business interests of the employer, and thus, should not be used against the employee" in an employer's employment decisions.³⁰ The topic of SNS posts can be of a more controversial nature—comments, photographs, or posts can reveal that an employee participates in risky behavior, like skydiving, or that she is involved in a homosexual relationship. Although the above examples do not overtly implicate an employer's business interests, an employer can legally terminate an employee for such behavior.³¹ Generally, the employment at-will doctrine allows an employer to "take action against [an employee]" for her SNS profile's content.³² Consequently, an employer can base an adverse employment decision on the fact that he disagrees with an employee's lifestyle choices.³³

Although an employee waives some of her privacy rights to an employer upon accepting employment,³⁴ courts or legislatures should recognize the difference between an employee waiving some of her privacy rights in the workplace versus having an employer's influence an employee's off-duty, non-work related decision out of fear of an adverse employment decision.

The above examples show that employers are disciplining employees for off-duty conduct as in SNS postings.³⁵ Further complicating the matter is the fact that employees consider their SNS profiles private.³⁶ Employer and employee attitudes towards social networking are not merely divergent, but completely antagonistic. According to a 2009 study by Deloitte, LLP, 53% of employees believe their SNS

Court held that the government violated Jones's Fourth Amendment rights when it attached a global positioning service ("GPS") device to his vehicle to track its movements. According to the Court, "[t]he [g]overnment physically occupied private property for the purpose of obtaining information" when attaching a GPS device to Jones's car parked in his driveway. *Id.* at 949. The Court did not decide if Jones had a reasonable expectation of privacy, because the Fourth Amendment rights in question did not "rise or fall with the *Katz* formulation." *Id.* at 947; *see supra* text accompanying note 40. The *Jones* decision suggests that the Court is willing to apply Constitutional principles to emerging technologies, which is in marked contrast to how the Court shied away from doing just that in *Quon*. *Compare id.* at 945, with *Quon*, 130 S. Ct. at 2630. By deciding that a technological device can invade a person's Fourth Amendment rights, the Supreme Court validates the present reality that technology is an omnipresent part of everyday life. Furthermore, there is reason to hope that the Supreme Court's *Jones* decision will influence lower courts to adopt a more liberal view of technology and its place in everyday life.

³⁰ Roche, *supra* note 22, at 190 (emphasis added).

³¹ *See infra* text accompanying note 32.

³² The at-will employment doctrine allows an employer to fire an employee for any reason. Martucci, *supra* note 23, at 22. Forty-nine states presume employment is at-will. Joseph Lipps, *State Lifestyle Statutes and the Blogosphere: Autonomy for Private Employees in the Internet Age*, 72 OHIO ST. L.J. 645, 649 (2010). Montana is the only state that does not presume at-will employment. *Id.*

³³ *See supra* text accompanying note 32.

³⁴ *See supra* text accompanying note 24.

³⁵ Martucci, *supra* note 23, at 22.

³⁶ DELOITTE LLP 2009 ETHICS AND WORKPLACE SURVEY AND RESULTS, SOCIAL NETWORKING AND REPUTATIONAL RISK IN THE WORKPLACE 6 (2009), available at http://www.deloitte.com/assets/DocUnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf. Opinion Research Corporation conducted a telephone survey for Deloitte LLP. *Id.* at 15. They surveyed a national probability sample of 2,008 employed adults aged eighteen and older living in private households. *Id.* Opinion Research Corporation also surveyed 500 business executives via an online survey. *Id.*

are “none of their employer’s business.”³⁷ However, 40% of executives disagree.³⁸ 30% of executives admitted to informally monitoring their employee’s SNS profile postings.³⁹ The chasm between employer and employee perception of SNS profiles is wide, and without some sort of resolution—either judicially or legislatively—litigation is inevitable. Both legislatures and courts are resistant to change the employment laws to recognize that an employee’s participation with SNS warrants protection from adverse employment decisions. Instead of forcing an employee to risk her livelihood when she participates in a socially acceptable form of interaction, the law should accept the reasonableness of such interaction by protecting it. SNS are part of the social culture, and the law should recognize this reality.⁴⁰

This Comment explores the implications SNS postings have on private employers concerning the off-duty, non-work related conduct of their employees. This argument recognizes that an employee is entitled to engage in whatever legal off-duty conduct he chooses, so long as the behavior does not damage his employer’s legitimate business interests. An employer should not be able to use information gleaned from an employee’s SNS postings, unrelated to an employer’s business interests, to punish an employee her choices outside the work place. Disciplining or terminating an employee for his off-duty lifestyle choices permits the morals and standards of the employer to control the employee’s personal life.

Part I introduced the general landscape of SNS policies and employment environment. Part II provides a background of the various causes of action available to an employee to protest an employer’s employment decision, as well as examining the applicability of such claims to the regulation of an employee’s off-duty conduct. Section A discusses the United States Constitution’s protection for free speech and against unlawful searches and seizures. Section B examines how the National Labor Relations Board (“NLRB”) has applied the National Labor Relations Act (“NLRA”) to cases wherein an employee was terminated for her SNS postings. Section C addresses the parameters of state off-duty conduct statutes. Section D gives an overview of the common law right to privacy. Part III analyzes the recent cases and holdings that involve SNS. Part IV further analyzes how these holdings apply in Caitlin Davis’s situation to illustrate the consequences of limitless employer discretion. Section B offers a definition for legitimate business interests to be applied to SNS employment cases to determine if an employee’s post-employment affairs affect her employer’s legitimate business interests. Part V asserts why it is imperative that governments or legal bodies—at

³⁷ *Id.* at 6.

³⁸ *Id.*

³⁹ *Id.* Even if employers *are* monitoring SNS pages, 61% of employees stated they would not change their online activities, and that they would adjust their SNS profile content. *Id.* Even more telling is that 27% of employees surveyed stated that they “don’t consider the ethical consequences of posting comments, photos, or videos online—and more than one-third don’t consider their boss, their colleagues, or their clients.” *Id.* at 8. This survey suggests that employees consider their SNS postings to be their own personal space, divorced from their jobs, its responsibilities, and their SNS profile’s impact on their employer’s business interests. In light of such attitudes, it is clear that an employer is entitled to monitor an employee’s SNS profile for things like trade secrets reveals and the like. See Martucci, *supra* note 23, at 20.

⁴⁰ Emily H. Fulmer, *Privacy Expectations and Protections for Teachers in the Internet Age*, 2010 DUKE L. & TECH. REV. 14, ¶ 62 (2010).

either the state or federal level—draw the line between an employer's legitimate business interests and an employee's freedom to structure her free time.

II. POTENTIAL CAUSES OF ACTION

An employee can use some causes of actions to combat her employer's unjust employment action. Between the United States Constitution, the NLRA, state statutes, and privacy causes of action, a plethora of options are available to an employee. Unfortunately, judicial action severely limits these causes of action for a private employee.

A. *United States Constitution*

Forty-two U.S.C. section 1983 confers a cause of action to a person whose constitutional rights are violated by the government or its actors.⁴¹ Governmental and public employees can avail themselves to the federal constitutional rights of free speech and privacy, guaranteed by the First⁴² and Fourth Amendments,⁴³ respectively.⁴⁴ An employee is not protected by the Constitution against an employers adverse employment decisions.⁴⁵

1. *First Amendment*

At first blush, the First Amendment appears to be an ideal cause of action for a government employee to levy against her employer.⁴⁶ However, the Supreme Court has limited the First Amendment's application, qualifying which types of speech garner protection.⁴⁷ For a successful First Amendment claim, an employee

⁴¹ See 42 U.S.C. § 1983 (2006).

⁴² The First Amendment protects a person's freedom of speech. See U.S. CONST. amend. I. "Speech" means the "constitutionally protected interest in [the] freedom of expression." See *Connick v. Myers*, 461 U.S. 138, 142 (1983) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605–06 (1967)).

⁴³ The Fourth Amendment protects an individual from the invasion of the government's unreasonable searches and seizures. U.S. CONST. amend. IV; see also ERWIN CHERMERINSKY, CONSTITUTIONAL PRINCIPLES 516 (4th ed. 2011) (citing *Wolf v. Colorado*, 338 U.S. 25 (1949)). Not every act is "private" for Fourth Amendment purposes. See *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."). Courts apply Justice John Marshall Harlan's reasonableness standard to determine if a person had a reasonable expectation of privacy: first, the individual must have manifested "an actual (subjective) expectation of privacy," and, secondly, society is "prepared to recognize" this expectation as reasonable. *Id.* at 361 (Harlan, J., concurring); see also *Smith v. Maryland*, 442 U.S. 735, 740, 742–43 (1979) (holding that there is no reasonable expectation of privacy in the phone numbers one dials, nor does society recognize such a privacy expectation).

⁴⁴ Both state and federal governments are bound by the Constitution. See CHERMERINSKY, *supra* note 43, at 518 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1961)) ("[T]he prohibition of unreasonable searches and seizures of the Fourth Amendment . . . are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.").

⁴⁵ See § 1983.

⁴⁶ Kelly Schoening & Kelli Kleisinger, *Off-Duty Privacy: How Far Can Employers Go?*, 37 N. KY. L. REV. 287, 305 (2010).

⁴⁷ See Lipps, *supra* note 32, at 648–49.

must speak out “on a matter of ‘public concern.’”⁴⁸ Thus, a police department does not violate the First Amendment when it terminates a police officer for operating and starring in a pornographic website.⁴⁹ Although public employees are free to run pornographic websites for a profit, they are not free to participate and “avoid [government] discipline at the same time.”⁵⁰ A public employee “has greater protection if [she] discusses a matter of public concern.”⁵¹ If courts can limit the seemingly broad protection of the Constitution, then it is of no surprise that courts give private employers broad discretion to make employment decisions.

2. Fourth Amendment

The Fourth Amendment protects a public employee from her employer’s unreasonable searches and seizures.⁵² First, a court determines if the employee had a reasonable expectation of privacy, and secondly, the court determines whether the search was reasonable in its scope.⁵³ The court balances the employee’s invasion of privacy against the government’s need for control in the workplace.⁵⁴ Within the context of SNS, a government employer can implement an electronic communication policy to destroy an employee’s reasonable expectation of privacy so as to insulate themselves against Fourth Amendment claims.⁵⁵

⁴⁸ *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). The First Amendment’s “primary aim is the full protection of speech upon issues of public concern.” *Id.* at 154. “Public concern” is a matter “concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment.” *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam) (citing *Connick*, 461 U.S. at 138).

If an employee is “speak[ing] or writ[ing] on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification ‘far stronger than mere speculation’ in regulating it.” *Roe*, 543 U.S. at 80 (quoting *U.S. v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 465 (1995)).

When an employee claims that her governmental employer violated her First Amendment right, a court engages in two separate inquiries to determine if the employee’s conduct was related or unrelated to her public employment. *Dible v. City of Chandler*, 515 F.3d 918, 925 (9th Cir. 2007). If the employer’s speech was related, the court balances the employee’s interests “as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.” *Id.* at 927 (quoting *Roe*, 543 U.S. at 82). If the employee’s speech was unrelated, the court still uses a balancing test. *Id.* Although the Supreme Court has not dictated a clear balancing test, the Ninth Circuit balanced “the asserted First Amendment right against the government’s justification.” *Id.*

⁴⁹ *Dible*, 515 F.3d at 922–23. The police department terminated Dible for violating the department’s rules forbidding outside employment and disreputable conduct. *Id.* at 926.

The Dibles also argued that the city violated their First Amendment rights to privacy and freedom of association. *Id.* at 929. The Ninth Circuit recognized that the First Amendment includes a right to privacy in the “right to make personal decisions and a right to keep personal matters private.” *Id.* (citing *Germ v. U.S. Trustee (In Re Crawford)*, 194 F.3d 954, 958 (9th Cir. 1999)). However, the Ninth Circuit rejected the Dibles’s claim as “virtually oxymoron[ic].” *Id.* at 930. Without evidence that the City publicized the Dibles’s connection to the Dibles’s pornographic website, the City did not invade the Dibles’s right to privacy. *Id.*

⁵⁰ *Id.* at 930.

⁵¹ *Schoening & Kleisinger*, *supra* note 46, at 306.

⁵² *Id.* at 307.

⁵³ *Id.*

⁵⁴ *O’Connor v. Ortega*, 480 U.S. 709, 719–20 (1987).

⁵⁵ *Schoening & Kleisinger*, *supra* note 46, at 309.

These protections do not extend to private employees.⁵⁶ Because employment is at-will in forty-nine states,⁵⁷ private employees are less protected against an employer's arbitrary employment decisions than a public employee. Thus, an employee may resort to a statutory scheme for their cause of action.

B. NLRB and NLRA

Recently, the NLRB grappled with the difficult question of how much to protect an employee's SNS postings criticized her employer.⁵⁸ The NLRA⁵⁹ applies to both public and private employees, regardless of whether they are unionized.⁶⁰ Specifically, the Act protects an employee's rights to unionize, collectively bargain, and participate in concerted activity.⁶¹ When an employer terminates an employee for work-related SNS posts, the employer's activity may be activity in violation of the NLRA.

Cases fall under two categories: first, cases that challenge an employer's SNS policies as overbroad,⁶² and secondly, cases that challenge an employer's adverse employment decision based upon an employee's SNS posts.⁶³ The NLRB applies a two-part test to determine if an employee's SNS post is protected under

⁵⁶ Rutkowski & Rutkowski, *Employee's Privacy Rights*, *supra* note 25, at 2.

Public employees have had little success in claiming that they have a reasonable expectation of privacy in their SNS posts. In particular, the SNS profiles of public school teachers have led to firings, and as a consequence, litigation. *See generally* Fulmer, *supra* note 40 (advocating that the law guarantee teachers "special protection" against "professional discipline" for legal, private conduct in their SNS posts). However, in the Supreme Court's recent decision in *U.S. v. Jones*, 132 S. Ct. 945 (2012), the Court did not shy away from deciding how the Constitution's rights apply to an emerging technology; *see supra* text accompanying note 29.

⁵⁷ *See supra* text accompanying note 24.

⁵⁸ *See generally* OFFICE OF GEN. COUNSEL, NAT'L LABOR RELATIONS BD., OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2011) [hereinafter REPORT OF THE ACTING GENERAL COUNSEL] (discussing recent case developments within context of SNS). Since many of cases are in the early stages of litigation, surveys of the cases and issues are to "assist employers and counsel [to] identify issues with which they should [employers and counsel] be aware [of] as they grapple with the application of labor law to employee use of social media." MICHAEL J. EASTMAN, A SURVEY OF SOCIAL MEDIA ISSUES BEFORE THE NLRB, 1 (U.S. Chamber of Commerce 2011), [hereinafter SURVEY OF SOCIAL MEDIA ISSUES], available at <http://www.uschamber.com/sites/default/files/reports/NLRB%20Social%20Media%20Survey%20-%20FINAL.pdf>. For a complete summary of the cases, issues, and applicable statutes involved, *see generally* SURVEY OF SOCIAL MEDIA ISSUES, at 9-34.

⁵⁹ *See* National Labor Relations Act §§ 1-1129 U.S.C. §§ 151-69 (2006).

⁶⁰ Schoening & Kleisinger, *supra* note 46, at 312.

⁶¹ National Labor Relations Act § 7, 29 U.S.C. § 157 (2006). These rights are called "Section 7 activities" or "Section 7 rights". *See* REPORT OF THE ACTING GENERAL COUNSEL, *supra* note 58, at 12. Concerted activity is when an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself." Meyers Indus., Inc., 268 N.L.R.B. 493, at 497 (1984), *rev'd sub nom.* Prill v. N.L.R.B., 755 F.2d 941 (D.C. Cir.), *cert. denied* 474 U.S. 948 (1985). Since concerted activity communications are protected, an employer with a social networking policy cannot "chill" employees from exercising their Section 7 rights. *See* Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998).

⁶² Overbroad policies are the type that restricts discussions about wages, constructive discharges, terminations of co-workers, and general criticisms of the employer and its management. SURVEY OF SOCIAL MEDIA ISSUES, *supra* note 58. An employer needs to be careful that her policy does not chill concerted activity. *See supra* text accompanying note 61.

⁶³ SURVEY OF SOCIAL MEDIA ISSUES, *supra* note 58, at 4.

the NLRA.⁶⁴ First, the employee's SNS post must be "related to an ongoing labor dispute."⁶⁵ Second, the SNS post cannot "be so disloyal, reckless or maliciously untrue as to lose [the NLRA's] protection."⁶⁶ However, even if an employer's SNS post is concerted activity, it is not protected if the employee's SNS post "constitutes 'insubordination, disobedience or disloyalty' which . . . is adequate cause for discharge."⁶⁷ Thus, it follows that an employer does not violate the NLRA for terminating an employee should he reveal the employer's trade secrets or confidential client information.

The NLRB has applied these holdings to cases where an employer terminates an employee for SNS postings relating to the employer.⁶⁸ Generally, the NLRB broadly construes what constitutes protected activity.⁶⁹ In doing so, the NLRB displays a flexibility to adapt the law to the realities of the twenty-first century workplace. The NLRB's activity and holdings stand in stark contrast to the activities of state and federal judiciaries, as explored in Parts II.B and III.A-C.

However, the NLRB's holdings only apply to work-related correspondences, thus, reveal little about whether the NLRA protects posts about off-duty conduct.

C. Off-Duty Conduct Statutes

Presently, twenty-nine states have statutes offering some protection for an employee's off-duty conduct.⁷⁰ Such statutes protect an employee's many activities, such as smoking, drinking, moonlighting and other off-duty lawful conduct.⁷¹ Through these statutes, state legislatures have chipped away at the at-will employment doctrine.⁷² Only four states protect general off-duty conduct.⁷³

State statutes vary in scope of their protection, and because of their broad language courts have been responsible for statutory interpretation.⁷⁴ Consequently, statutory interpretation differs greatly.⁷⁵ Generally, the "statutes are still undefined and require modification to better fit the growing Internet lifestyle."⁷⁶

⁶⁴ See *infra* notes 65–66.

⁶⁵ *Endicott Interconnect Techs., Inc., v. N.L.R.B.*, 453 F.3d 532, 537 (D.C. Cir. 2006).

⁶⁶ *Id.* (quoting *Am. Golf Corp.*, 330 N.L.R.B. 1238, 1240 (2000)).

⁶⁷ *Id.* (quoting *N.L.R.B. v. Local Union No. 1229, Int'l Bhd. of Elec. Workers* 346 U.S. 464, 477–78 (1953)).

⁶⁸ For example, one case involved an employee's posted photographs and comments criticizing a sales event organized by the employer. See REPORT OF THE ACTING GENERAL COUNSEL, *supra* note 58, at 6–9.

⁶⁹ See *supra* text accompany note 68.

⁷⁰ Roche, *supra* note 22, at 198.

⁷¹ *Id.*

⁷² Lipps, *supra* note 32, at 652, 655. Employers attempted to restrict an employee from lawfully imbibing certain substances, or her participation in lawful conduct, out of "employer's concerns about rising health care costs." Roche, *supra* note 22, at 198.

⁷³ Lipps, *supra* note 32, at 652, 655.

⁷⁴ *Id.* at 653.

⁷⁵ *Id.* at 653, 676 ("[S]uch divergent views on enforcement, remedies, and exception clauses . . . preclude consistent statutory interpretation.").

⁷⁶ *Id.* at 655.

1. California

At first glance, sections 96(k)⁷⁷ and 98.6⁷⁸ of the California Labor Code seem to limit at-will employment.⁷⁹ Section 96(k) allows the Labor Commissioner to file an employee's "[c]laim [] for los[t] wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises."⁸⁰ Section 98.6 states that "[n]o person shall discharge an employee or in any manner discriminate against any employee . . . because the employee . . . engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96."⁸¹ When read together, it seems that the two sections forbid an employer from disciplining an employee for off-duty conduct. However, California's appellate courts limit such an application.

In *Barbee v. Household Automotive Finance Corp.*, defendant Household Automotive Finance Corp. terminated plaintiff Barbee for dating a subordinate employee in violation of the employer's policy.⁸² Barbee sued his former employer claiming that the employer infringed upon his constitutional right to privacy,⁸³ and that his termination violated the public policy of section 96(k).⁸⁴ The court stated that section 96(k) did not confer "any substantive rights" upon an employee,⁸⁵ but only "authorize[d] such claims to the Labor Commissioner to vindicate existing public policies in favor of individual employees."⁸⁶ Thus, section 96(k) only applies when an employee's discipline or termination violated existing rights.⁸⁷ The court further limited their holding in *Barbee* by finding that a claim for wrongful termination in violation of public policy must be based upon a right "protected by the Labor Code" specifically.⁸⁸ Therefore, sections 96(k) and 98.6 do not prevent an employer from disciplining or firing an employee for her off-duty SNS postings.⁸⁹

The court's restrictive interpretation of sections 96(k) and 98.6 strips them of any "substantive protection."⁹⁰ Thus, the courts have prevented these laws from being applied to new circumstances. If Caitlin Davis lived in California, she could

⁷⁷ CAL. LAB. CODE § 96(k) (West, Westlaw through 2011 Reg. Sess.).

⁷⁸ § 98.6 (Westlaw).

⁷⁹ Scott A. Freedman & Jessica A. Barajas, *Monitoring and Regulating Employee Conduct in the Age of Social Media Web Sites*, L.A. DAILY J., Jan. 31, 2011, at 5, available at <http://www.mpplaw.com/files/Publication/539d9780-2be5-49f2-aa3a-1ab41758b98c/Presentation/PublicationAttachment/80e72941-2b0d-4533-ba32-298643269a58/MonitoringAndRegulatingEmployeeConduct.pdf>.

⁸⁰ § 96(k) (Westlaw).

⁸¹ § 98.6(a) (Westlaw).

⁸² 6 Cal. Rptr. 3d 406, 409 (Ct. App. 2003).

⁸³ Barbee's privacy claim failed because he did not have a reasonable expectation of privacy due to the company's policy that forbid a manager from dating a subordinate. *Id.* at 411–12.

⁸⁴ *Id.* at 408.

⁸⁵ *Id.* at 413.

⁸⁶ *Id.* at 414.

⁸⁷ *See id.* at 412.

⁸⁸ *Grinzi v. San Diego Hospice Corp.*, 14 Cal. Rptr. 3d 893, 904 (Ct. App. 2003).

⁸⁹ *See id.*

⁹⁰ Lipps, *supra* note 32, at 662.

not sue the Patriots under these statutes because they do not confer any new substantive rights. Since California is an at-will employment state,⁹¹ and sections 96(k) and 98.6 do not create new causes of action, Caitlin Davis cannot protest her termination.⁹²

2. Colorado

Colorado's statute forbids an employer from disciplining or terminating an employee for any "lawful activity off the premises of the employer during nonworking hours"⁹³ An employer can restrict an employee's off-duty conduct if the employee's conduct "[r]elates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities,"⁹⁴ or such conduct creates a conflict of interest "to the employer or the appearance of such a conflict of interest."⁹⁵ The statute protects an employee "who engage[s] in activities that are personally distasteful to their employer," but are nonetheless "legal and unrelated to an employee's job duties."⁹⁶

In *Marsh v. Delta Air Lines, Inc.*, the court articulated the statute's scope.⁹⁷ In *Marsh*, Delta Air Lines terminated Marsh for a letter he wrote to the Denver Post that criticized Delta's hiring policies.⁹⁸ The court held that the statute was not an "absolute" "shield" for any off-duty conduct.⁹⁹ Thus, if an employee is arguing her privacy was violated, her rights are balanced against her employer's business needs.¹⁰⁰ The court adopted Delta Air Line's argument that a duty of loyalty was an inherent "occupational requirement" within § 24-34-402.5(1)(a)'s exception.¹⁰¹ Therefore, Marsh's letter criticizing Delta Air Lines breached his duty of loyalty and his subsequent termination was legal.¹⁰²

In *Marsh*, the court's willingness to create exceptions to the statute is disturbing and undermines the legislature's broad language. With such an ambiguous phrase as "duty of loyalty," an employer can argue that nearly anything violates such a duty. For example, when applied to the above hypothetical, the Patriots can argue Caitlin Davis's debauched photographs breached her duty of loyalty to the Patriots because her actions reflected poorly

⁹¹ See *supra* text accompanying note 32.

⁹² See *supra* Part I.

⁹³ COLO. REV. STAT. ANN. § 24-34-402.5(1) (West, Westlaw through the end of the First Reg. Sess. of the 68th Gen. Assemb. (2011)).

⁹⁴ § 24-34-402.5(1)(a) (Westlaw).

⁹⁵ § 24-34-402.5(1)(b) (Westlaw).

⁹⁶ *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458, 1462 (D. Colo. 1997). In the same decision, the deciding court stated the statute's application: "[T]his statute should protect the job security of homosexuals who would otherwise be fired by an employer who discriminates against gay people, members of Ross Perot's new political party who are employed by a fervent democrat, or even smokers who are employed by an employer with strong anti-tobacco feelings." *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 1460 ("Plaintiff wrote a letter to the editor of the Denver Post that strongly criticized Delta's decision to employ hourly contract workers to replace laid-off full-time employees.").

⁹⁹ *Id.* at 1463.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1462-63.

¹⁰² *Id.* at 1463.

upon her employer, just as Marsh's letter reflected poorly on Delta Air Lines. By restricting the statute's application, the deciding court eliminated the statute's effectiveness to protect off-duty conduct.

Fortunately, later decisions limited the *Marsh* holding. In *Watson v. Public Service Co. of Colorado*, the court held that § 24–34–402.5(1) applied to any and all lawful, off-duty conduct, regardless of whether it was work-related.¹⁰³ In *Watson*, the employer terminated an employee because the employee called the Occupational Safety and Health Administration off-duty.¹⁰⁴ The employer argued § 24–34–402.5(1) did not apply because the telephone call was work-related.¹⁰⁵ They further argued § 24–34–402.5(1) only applied to private, non-work related activities.¹⁰⁶ The court rejected the employer's argument; the court interpreted the statute's language broadly, stating that "[a]ny" means "all."¹⁰⁷ The court limited the *Marsh* court's decision influence by nothing that the *Marsh* court's rationale relied on a decision that did not involve a claim under § 24–34–402.5(1).¹⁰⁸ Furthermore, no Colorado appellate court had adopted the *Marsh* court's analysis.¹⁰⁹

If Caitlin Davis lived in Colorado, she could sue the Patriots for terminating her for her SNS photographs. Although it was unsavory to pose for photographs in front of a passed-out young-man for one's own amusement, it most certainly is not illegal. Furthermore, Caitlin Davis's photographs did not fall within the statute's exceptions.¹¹⁰ Colorado's broad statute offers a twenty-first century employee the ability to participate in SNS without the fear of an employer's retribution. Furthermore, it still protects the employer's business interests.¹¹¹

3. New York

New York's off-duty statute protects an employee's "legal recreational activities outside work hours, off the employer's premises and without the use of the employer's equipment or other property" and so long as it does not "create a material conflict of interest" to the employer's business interests.¹¹² Recreational activity is "any lawful, leisure-time activity . . . which is generally engaged in for recreational purposes."¹¹³ It was this distinction—of an activity's purpose—that influenced the court in *New York v. Wal-Mart Stores, Inc.* to hold that dating was not a recreational activity and was not a protected activity within § 201-d.¹¹⁴ By

¹⁰³ 207 P.3d 860, 864–65 (Colo. App. 2008).

¹⁰⁴ *Id.* at 863.

¹⁰⁵ *Id.* at 864.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting *Kauntz v. HCA-Healthstone, L.L.C.*, 174 P.3d 813, 817 (Colo. App. 2007)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 865.

¹¹⁰ See COLO. REV. STAT. ANN. § 24–34–402.5(1)(a) & (b) (West, Westlaw through the end of the First Reg. Sess. of the 68th Gen. Assemb. (2011)).

¹¹¹ See the exceptions in § 24–34–402.5(1)(1) & (b) (Westlaw).

¹¹² N.Y. LAB. LAW §§ 201-d(2)(c), d(3)(a) (McKinney, Westlaw through L.2011, chapters 1 to 55, 57 to 521, 523 to 594, and 597 to 600 (2011)).

¹¹³ § 201-d(1)(b) (emphasis added).

¹¹⁴ 621 N.Y.S.2d 158, 158 (App. Div. 1995) (two employees terminated for dating each other in

the court's logic, dating was wholly distinguishable from recreational activities because dating's "indispensible element . . . [of] romance" was absent from recreational activities.¹¹⁵ The court reasoned that by listing specific activities in § 201-d(1)(b)¹¹⁶ reflected the legislature's "obvious intent" to restrict "statutory protection to [a] certain clearly defined categories of leisure-time activities."¹¹⁷ Through the doctrine of *noscitur a sociis*, personal relationships were deemed to be "outside the scope" of recreational activities the legislature envisioned to be protected under § 201-d.¹¹⁸

Although the Southern District of New York refused to follow *Wal-Mart* in *Pasch v. Katz Media Corp.*, dating is still not a protected under § 201-d.¹¹⁹ Critics railed applying such a narrow interpretation of § 201-d, but no court has adopted the rationale expressed in dissenting opinions.¹²⁰ The court's restrictive interpretation of § 201-d(1)(b)'s "recreational activities" was further entrenched by the Second Circuit's decision in *McCavitt v. Swiss Reinsurance America Corp.*¹²¹ Concluding that in the absence of evidence suggesting the New York Court of Appeals would hold differently, the Second Circuit was bound by the *Wal-Mart*

violation of company policy), *aff'd*, *McCavitt v. Swiss Reins. Am. Corp.*, 237 F.3d 168 (2d Cir. 2001) (per curiam).

¹¹⁵ *Wal-Mart Stores, Inc.*, 621 N.Y.S.2d at 158. The court attempted to clarify the distinction between dating leisure-time activities through the following example: "[A]lthough a dating couple may go bowling and under the circumstances call that activity a "date", when two individuals lacking amorous interest in one another go bowling or engage in any other kind of "legal recreational activity", they are not "dating." *Id.*

¹¹⁶ The non-exhaustive list of protected activities include "sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material." § 201-d(1)(b).

¹¹⁷ *Wal-Mart Stores, Inc.*, 621 N.Y.S.2d at 158.

¹¹⁸ *Id.*

¹¹⁹ 94 Civ. 8554, 1995 WL 469710, at *4-5 (S.D.N.Y. Aug. 8, 1995) (employee alleged she was demoted for dating a former co-employee). Rejecting *Wal-Mart's* rationale, the court held that the legislature intended § 201-d to include all social activities. *Id.* at *5. The court stated that the legislative history showed that the "purpose of the statute is to prohibit employers from discriminating against their employees simply because the employer does not like the activities an employee engages in after work." *Id.*

¹²⁰ The *Pasch* court's opinion adopted Justice Paul J. Yesawich, Jr.'s dissent in *Wal-Mart*. *See id.* Justice Yesawich interpreted § 201-d(1)(b)'s expansive categories of "hobbies" and "sports" as signifying the legislature's intent to broadly define recreational activities to include social relationships. *Wal-Mart Stores, Inc.*, 621 N.Y.S.2d at 158 (Yesawich, J., dissenting). Justice Yesawich also pointed out that inherent in the statute was the intent to protect "a certain degree" of an employee's freedom to choose her own life during off-duty hours. *Id.* To interpret the statute otherwise hampered § 201-d(1)(b) "remedial purpose." *Id.*

And despite conceding that the Second Circuit was bound by *Wal-Mart's* precedent in *McCavitt*, Judge Joseph M. McLaughlin explained the holding's absurdity:

If, when deciding to protect "recreational activities," the Legislature saw fit to protect an employee's right to engage in such historically revered activities as riding a motorcycle and hang-gliding, it certainly should have extended protection to the pursuit of a romantic relationship with whomever an employee chooses—even a fellow, unmarried employee outside the office, during non-working hours.

It is repugnant to our most basic ideals in a free society that an employer can destroy an individual's livelihood on the basis of whom he is courting, without first having to establish that the employee's relationship is adversely affecting the employer's business interests.

McCavitt v. Swiss Reinsurance Am. Corp., 237 F.3d 166, 169 (McLaughlin, J., concurring).

¹²¹ *Id.* at 166.

decision.¹²²

Despite the seemingly broad grant of protection guaranteed in § 201-d, subsequent court interpretations have rendered the expansive language meaningless. Section 201-d offers little protection because “recreational activity” is narrowly construed.¹²³ If Caitlin Davis lived in New York, the Patriots termination would not violate § 201-d. If an employer can terminate an employee for her choice of intimate relationships,¹²⁴ it is difficult to surmise that a court would hold debauched photographs posted to an SNS to be within § 201-d’s protection.

4. North Dakota

On its face, North Dakota’s statute offers broad protection for an employee’s lawful off-duty conduct, so long as said conduct is “not in direct conflict” with the employer’s “business-related interests,”¹²⁵ or “contrary to a bona fide occupational qualification that reasonably and rationally relates to the employment activities and the responsibilities of a particular employee.”¹²⁶ However, the courts have held that certain exceptions are inherent to the statute, and thus, certain off-duty conduct does not warrant the statute’s protection. For example, the court has held that certain employees have a duty of loyalty to his employer.¹²⁷ By creating exceptions not contained within the statute’s language, an employee cannot know what sort of off-duty conduct is protected.

Furthermore, the statute does not clearly define “lawful activity” which further complicates the question of what types of conduct is protected.¹²⁸ In *Hougum v. Valley Memorial Homes*, Hougum was arrested for masturbating in a public bathroom’s stall; his employer, Valley Memorial Homes, terminated Hougum as a result of the arrest.¹²⁹ Hougum sued Valley Memorial Homes for violating § 14-02.4-03.¹³⁰ Hougum argued that he engaged in lawful activity because the public restroom stall was a temporarily private space.¹³¹ Due to previous precedents,¹³² the court refused to determine whether Hougum’s off-duty

¹²² *Id.* at 168.

¹²³ *See supra* notes 114–22.

¹²⁴ *See New York v. Wal-Mart Stores, Inc.*, 621 N.Y.S.2d 158, 158 (App. Div. 1995); *Pasch*, No. 94 Civ. 8554, 1995 WL 469710, at *4–5.

¹²⁵ N.D. CENT. CODE ANN. § 14-02.4-03 (West, Westlaw through 2011 Reg. and Spec. Sess.).

¹²⁶ § 14-02.4-08 (Westlaw) (emphasis added). The “occupational qualification” must relate to a particular employee, and not to “all employees of that employer.” *Id.* This section of the statute is a limitation to the at-will employment doctrine. *Fatland v. Quaker State Corp.*, 62 F.3d 1070, 1072 (8th Cir. 1995).

¹²⁷ *See Fatland*, 62 F.3d at 1072–73 (holding that employee’s termination because of his ownership in a competing business was not discrimination for lawful off-duty conduct in violation of § 14-02.04-03 or -8, and that said ownership was a “legitimate source of concern” for the employer).

¹²⁸ § 14-02.4-03.

¹²⁹ 574 N.W.2d 812, 815 (N.D. Ct. App. 1998).

¹³⁰ *Id.*

¹³¹ *Id.* at 820. Masturbating in a public place is illegal under § 12.1–20–12.1 of the North Dakota Code. N.D. CENT. CODE ANN. § 12.1–20–12.1 (West, Westlaw through 2011 Reg. and Spec. Sess.).

¹³² The court noted that the enclosed stall of a public restroom was generally not considered a “public” place. *Hougum*, 574 N.W.2d at 821 (citations omitted). This created a genuine issue of material fact as to whether Hougum’s conduct was forbidden by law. *Id.* at 822. If Hougum’s activity

conduct was lawful or unlawful activity.¹³³ The court noted that Valley Memorial Homes's potential conflicts claim¹³⁴ was very different from the employer conflicts in *Fatland*.¹³⁵ In refusing to decide what was lawful within the statute, the court further complicated the matter for employees. By noting the difference between the employer's interests in *Fatland* and *Hougum*,¹³⁶ the court muddled the issue for employers: Is a non-economic interest, like business efficiency, still a viable business interest? Without clarification from either the courts or legislatures on the statute's boundaries, both sides of the issue—employees and employers alike—do not derive any benefit from the statute because the boundaries of protection are still undefined.

However, such ambiguity may be to the advantage of emerging issues, like termination for lawful off-duty conduct as depicted on SNS. Under *Fatland*, if an employee's SNS postings do not involve her employer, it can be speculated that such conduct is protected because it does not explicitly implicate an employer's business.¹³⁷

Thus, if applying North Dakota's statute to Caitlin Davis's situation, the Patriots cannot elucidate a legitimate business-related interest or explain how the content depicted in Caitlin Davis's photographs reasonably related to a cheerleader's occupational qualifications, her act of posting photographs would be protected activity. Furthermore, this analysis holds even if SNS content is deemed "public" because the statute's language only concerns activity that is "off the employer's premises during nonworking hours."¹³⁸ Thus, an employee's SNS postings and its content are protected, regardless of the privacy settings. Such a wide grant of protection is ideal for an emerging issue because it is flexible to a changing society.

D. Privacy

At common law, the Constitution protects a person from governmental invasion, but individual states confer a cause of action upon its citizens for such invasions.¹³⁹ An intrusion upon seclusion claim is the type of claim an employee would use to support an employee's invasion of privacy claim.¹⁴⁰ To sustain a cause of action for the intrusion upon seclusion, the Restatement requires an

was lawful, it could have been protected under the statute, and thus, any subsequent termination would have violated the statute. *Id.*

¹³³ *Id.*

¹³⁴ *Id.* ("[The employer] . . . has raised a claim Hougum's activity undermined his effectiveness as a chaplain and therefore directly conflicted with its business-related interests.")

¹³⁵ *Id.* ("The potential conflicts raised by [the employer] are not the same type of business and economic conflicts of interest at stake in *Fatland*.") (citations omitted).

¹³⁶ Compare *Fatland v. Quaker State Corp.*, 62 F.3d 1070, 1072–73 (8th Cir. 1995), with *Hougum*, 574 N.W.2d at 822.

¹³⁷ *See id.*

¹³⁸ N.D. CENT. CODE ANN. § 14-02.4-03 (West, Westlaw through 2011 Reg. and Spec. Sess.).

¹³⁹ 62 AM. JUR. 2D *Privacy* § 2 (2011) (citing *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530 (1922)). The Restatement (Second) of Torts recognizes four types of privacy invasions—the intrusion upon seclusion; appropriation of name or likeness; publicity of private life; and false light. RESTATEMENT (SECOND) OF TORTS § 62(A)(2)(a)–(d) (1977).

¹⁴⁰ Rutkowski & Rutkowski, *Employee's Privacy Rights*, *supra* note 25, at 5–6.

intrusion into the personal affairs or concerns of another that is highly offensive to a reasonable person.¹⁴¹ Generally, a claimant must plead and prove four elements in order to sustain a cause of action for intrusion upon seclusion.¹⁴² First, an individual must make an unauthorized intrusion or pry into one's seclusion; second, the intrusion must be highly offensive to a reasonable person; third, the matter must be private; and finally, the intrusion must cause emotional distress.¹⁴³ Presently, courts do not recognize the act of viewing a website, even a SNS personal profile, to be highly offensive to a reasonable person.¹⁴⁴

Even if the common law privacy claim was a viable cause of action, not all states recognize the common law right of privacy.¹⁴⁵ Therefore, this claim is not available to many citizens. Unless states without a common law privacy claim recognized a right of privacy in their case law or statutes, an employee cannot assert this claim against her employer. Such a reality leaves an employee without a way to fight against an employer making arbitrary employment decisions based upon off-duty SNS posts.

III. CASES

Generally, state courts have recognized public policy exceptions to at-will employment,¹⁴⁶ but state courts are hesitant to extend public policy exceptions to general off-duty behavior.¹⁴⁷ Presently, no courts have litigated whether an employer's adverse employment decision based upon an employee's off-duty SNS postings violated the employee's rights. State courts have confronted whether content from an individual's SNS profile is discoverable for evidentiary purposes.¹⁴⁸ Thus, this Comment will apply existing case law to the Caitlin Davis hypothetical to analyze the failure of the present case holdings to resolve these issues.

A. *Pietrylo v. Hillstone Restaurant Group*

In *Pietrylo v. Hillstone Restaurant Group*, the co-plaintiff,¹⁴⁹ Brian Pietrylo ("Pietrylo") created a group on Myspace.com called "The Spec-Tator."¹⁵⁰ The

¹⁴¹ RESTATEMENT (SECOND) OF TORTS § 652(B) (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.").

¹⁴² *Intrusion Upon Seclusion, Overview*, IT LAW WIKI, http://itlaw.wikia.com/wiki/Intrusion_upon_seclusion#cite_note-0 (last visited Jan. 15, 2012) (citing *Melvin v. Burling*, 490 N.E.2d 1011, 1013-14 (Ill. App. Ct. 1986)).

¹⁴³ *Id.*

¹⁴⁴ Lipps, *supra* note 32, at 651.

¹⁴⁵ For example, New York does not recognize a common law right to privacy. Rutkowski & Rutkowski, *Social Media Policies*, *supra* note 29, at 4.

¹⁴⁶ See *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330 (Cal. 1980).

¹⁴⁷ Lipps, *supra* note 32, at 650.

¹⁴⁸ See *infra* discussion Parts III.B-C.

¹⁴⁹ A fellow employee, Doreen Marino ("Marino"), was also a party to this action. *Pietrylo v. Hillstone Rest. Grp.*, No. 06-5754, 2008 WL 6085437, at *1 (D.N.J. July 25, 2008) [hereinafter *Pietrylo I*].

¹⁵⁰ *Id.*

group's purpose was to give the past and present employees of Houston's Restaurant an "entirely private" space to vent, "without any outside eyes spying in."¹⁵¹ Membership was by invitation only.¹⁵² Once a member was invited and he accepted, the member accessed The Spec-Tator to read postings or to add new postings.¹⁵³ No managers were invited to join The Spec-Tator, and none were given a password.¹⁵⁴ Members discussed various topics on The Spec-Tator, such as jokes about Houston's customer service requirements, "sexual remarks about management and customers," and "references to violence and illegal drug use."¹⁵⁵

A greeter at Houston's, who was also a member of The Spec-Tator, showed the postings to a manager.¹⁵⁶ The manager was offended by the comments and shared them with other members of the management team.¹⁵⁷ Restaurant managers asked the greeter for her username and password so they could view The Spec-Tator's postings, "which they did five times before firing" the plaintiffs.¹⁵⁸ As a result of their termination, Pietrylo and Marino sued Houston's under seven causes of action, one being the common law invasion of privacy.¹⁵⁹

At his deposition, Pietrylo stated all of the postings were jokes, but members of the management team testified to the posts' offensiveness.¹⁶⁰ In particular, regional supervisor Robert Marano testified that he was concerned about how the postings would affect Houston's operations.¹⁶¹ The court found that a genuine issue of material fact existed regarding whether Pietrylo and Marino had a reasonable expectation of privacy in The Spec-Tator, and for that reason, the jury decided the issue.¹⁶²

Ultimately, the jury rejected the plaintiffs' privacy invasion claim.¹⁶³ The jury sheet revealed that the jury recognized The Spec-Tator as a "place of solitude and seclusion" designed to "protect the [p]laintiffs' private affairs and concerns."¹⁶⁴ However, because of The Spec-Tator's secluded status, the jury did not find that the plaintiffs had a reasonable expectation of privacy in that space.¹⁶⁵

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Pietrylo v. Hillstone Rest. Grp., No. 2:06-cv-05754-FSH-PS, 2009 WL 2342553 (D.N.J. June 26, 2009) [hereinafter *Pietrylo III*].

¹⁵⁵ *Pietrylo I*, 2008 WL 6085437, at *3-4.

¹⁵⁶ *Id.* at *2.

¹⁵⁷ *Id.* at *3-4.

¹⁵⁸ *Pietrylo III*, 2009 WL 2342553, at *2.

¹⁵⁹ *Pietrylo I*, 2008 WL 6085437, at *4-5. The other causes of action were for violations of the federal Wiretap Act, 18 U.S.C. §§ 2510-22 (2006); the parallel New Jersey Wiretapping and Electronic Surveillance Control Act, N.J. STAT. ANN. § 2A:156A-3, -4(d) (West 2008); the federal Stored Communications Act, 18 U.S.C. §§ 2701-11 (2006); New Jersey's parallel provision, N.J. STAT. ANN. § 2A:156A-27 (West 2008); and wrongful termination in violation of public policy—first, for violating public policy favoring freedom of speech, and for violating public policy against privacy invasions. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* Specifically, Marano was worried that the posts contradicted Houston's "four core values" of "professionalism, positive mental attitude, aim to please approach, and teamwork." *Id.*

¹⁶² *Id.* at *7.

¹⁶³ *Pietrylo v. Hillstone Rest. Grp.*, No. 06CV05754, 2009 WL 1867659 (D.N.J. June 16, 2009) [hereinafter *Pietrylo II*].

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Thus, their privacy claim failed.¹⁶⁶ Although the jury did not find for the plaintiffs on their privacy claim, the case still establishes that employers can be found liable for using information from SNS to discipline or terminate their employees, especially if the employer obtained that information without the employees' consent.¹⁶⁷

B. EEOC v. Simply Storage Management, L.L.C.

In *EEOC v. Simply Storage Management, L.L.C.*, the court held that the EEOC must produce a claimant's relevant SNS communications per a defendant's discovery request.¹⁶⁸ Two claimants alleged that the defendant, Simply Storage, was liable for sexual harassment.¹⁶⁹ The relevant issue was whether the claimants' SNS profiles and other communications were within the scope of discovery for the defendants.¹⁷⁰ The defendants sought "all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments, and applications," photos and videos posted within a certain time frame.¹⁷¹ Significantly, the court interpreted "SNS profile" to mean absolutely any and all content that an SNS user posted to her profile.

The EEOC objected to producing all SNS profile content, partly because it would "improperly infringe on claimants' privacy"; the EEOC also argued that SNS content production should be restricted to content that "directly address[ed] or comment[ed] on matters alleged in the complaint."¹⁷² To the court, the "main challenge" was defining "appropriately broad limits" on SNS content's discoverability in a way consistent with the Federal Rule of Civil Procedure 26(b).¹⁷³ The court developed a "test" that the claimants had to provide copies of all SNS content that "reveal[ed], refer[red], or relate[d] to any emotion, feeling, or mental state, as well as communications that reveal[ed], refer[red], or relate[d] to events that could reasonably be expected to produce a significant emotion, feeling, or mental state."¹⁷⁴ Thus, the court interpreted SNS content to be anything relevant to a case's issues.¹⁷⁵

¹⁶⁶ *Pietrylo III*, 2009 WL 2342553, at *2. However, the jury found the defendant to have violated the federal Stored Communication Act and New Jersey's parallel provision; and the jury awarded Pietrylo and Marino over \$13,000 in back pay, compensatory, and punitive damages. Galit Kiercut, *Recent Developments in Employment Law and the Impact of Technology on Workplace Trends*, ASPATORE, 2011 WL 4452119 *1, *2 (Aug. 2011).

¹⁶⁷ *Id.*

¹⁶⁸ *EEOC v. Simply Storage Mgmt., L.L.C.*, 270 F.R.D. 430, 437 (S.D. Ind. 2010).

¹⁶⁹ *Id.* at 432.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* The timeframe in question here was from April 23, 2007 until the hearing. *Id.*

¹⁷² *Id.* at 432, 434.

¹⁷³ *Id.* at 433–34.

¹⁷⁴ *Id.* at 436. The court reasoned that the EEOC's request that claimants produce only communications that directly referenced their sexual harassment claims was too restrictive. *Id.* at 435. However, to require the claimants to provide all SNS content ignored the reality that just because a claimant was active on her SNS profile did not mean the activity was relevant to a claim or defense at issue in the litigation. *Id.*

¹⁷⁵ *Id.*

C. *Romano v. Steelcase, Inc.*

In *Romano v. Steelcase, Inc.*, Romano claimed that the defendant, Steelcase, Inc., caused her to suffer injuries that negatively affected her “enjoyment of life.”¹⁷⁶ SNS content was at issue because Steelcase, Inc. argued that reviewing public portions of the plaintiff’s Facebook and MySpace pages showed she had “an active lifestyle” in the time period she claimed her injuries prevented such pursuits.¹⁷⁷ As a result of how Romano’s SNS photographs belied her claim, Steelcase, Inc. requested “full access to and copies of [the] [p]laintiff’s current and historical records/information on her Facebook and MySpace accounts.”¹⁷⁸ Romano refused on the grounds that providing such content violated her rights to privacy.¹⁷⁹ Although this Comment will not explore the evidentiary implications of holding SNS profiles discoverable, the court’s rationale reveals how courts view an individual’s privacy expectations in her SNS profile.

The *Romano* court relied on decisions from other jurisdictions.¹⁸⁰ First, the *Romano* court applied the Second Circuit’s dicta in *United States v. Lifshiz*—which analogized emails to letters—to the issue of SNS privacy.¹⁸¹ By analogizing emails to letters, the *Lifshiz* court held that a person did not have a reasonable expectation of privacy in her emails.¹⁸² The *Romano* court concluded the same rationale extended to SNS profile content.¹⁸³ Unfortunately, the *Romano* court ignored the *Lifshiz* court’s fairly limited analogy—the only significant difference between emails and letters is the delivery method. Thus, while it was reasonable for the *Lifshiz* court to hold that there is no privacy expectation in emails, it was not reasonable for the *Romano* court to apply the *Lifshiz*’s holding to SNS profile privacy. The content, audience, and general nature of SNS profiles are radically different from that of emails; the *Romano* court applied a somewhat antiquated standard to a completely new type of technology. The *Romano* court ignored the issues and concerns that arise with a new technology type.

More disturbing was the *Romano* court’s adoption, by way of reference, of other jurisdictions’ rationales for denying that a user has a reasonable expectation of privacy in her SNS posts. According to *Beye v. Horizon Blue Cross Blue Shield of New Jersey*, an individual’s privacy concerns are *de minimis* when the individual posted the content to their profile.¹⁸⁴ By this rationale, an individual does not have a reasonable expectation of privacy in *any* of her postings, regardless

¹⁷⁶ 30 Misc. 3d 426, 429 (N.Y. Sup. Ct. 2010).

¹⁷⁷ *Id.* Romano traveled within the time period alleged. *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 432.

The case dictates that the relevancy of certain evidence cannot be withheld by “hid[ing] behind self-set privacy controls on a website” if that evidence is both material and relevant, and the plaintiff is claiming substantial damages for the loss of enjoyment of life. *Id.* at 431.

¹⁸⁰ *Id.* at 433.

¹⁸¹ *Id.* (citing *United States v. Lifshiz*, 369 F.3d 173 (2d Cir. 2004)).

¹⁸² *Id.* (“[E]mails would be analogous to a letter—writer whose expectation of privacy ordinarily terminates upon delivery of the letter.”).

¹⁸³ *Id.*

¹⁸⁴ *Id.* (citing *Beye v. Horizon Blue Cross Blue Shield of N.J.*, No. 06–5537, 2007 WL 7393489 (D.N.J. Dec. 14, 2007)).

of her profile's privacy settings. The court in *Moreno v. Hanford Sentinel, Inc.* held that an individual has no "reasonable expectation of privacy where that person took [the] affirmative act of posting [to her] own [SNS profile], making it available to anyone with a computer and opening it up to the public eye."¹⁸⁵

In contemplating its holding, the *Romano* court went a step further by holding that:

[W]hen [Romano] created her [SNS] accounts, she consented to the fact that her personal information would be shared with others, *notwithstanding her privacy settings* Since [Romano] knew that her information *may* become publicly available,¹⁸⁶ she cannot now claim that she had a reasonable expectation of privacy.

Here, by holding that an SNS user cannot have a reasonable expectation of privacy, regardless of her privacy settings, the court erases the possibility of addressing the question in the near future. The implications of the *Romano* court's holding are explored further in Part IV.A.

IV. DISCUSSION

A. *Potential Consequences of the Above Holdings*

The three cases above, when examined in their totality, paint a disturbing portrait of how courts perceive emerging technology and privacy. Significantly, the courts have shown they are not willing to recognize that an individual has an expectation of privacy in an SNS profile. These holdings represent a major boon to employers because if an employee's profile is *not* private, then it logically follows that an employer is free to use an SNS profile's content in her employment decisions, regardless of what the content represents.

SNS profile participants run the gamut of all types of people. To hold all profiles as being inherently public¹⁸⁷ is an overextension of the public's expectations. Furthermore, it cannot be said that an employee who takes the affirmative act to set her SNS profile access to "private"¹⁸⁸ does not have a reasonable expectation of privacy; if that were not true, then why would there be privacy settings? If an individual did not believe her SNS profile was private, then why would she take the steps to protect it?¹⁸⁹ And why would an SNS developer continue offering privacy settings if no one can be said to respect them? Additionally, it seems unjust that SNS participants are to have no reasonable expectation of privacy in an SNS profile's content on the mere possibility it *may*

¹⁸⁵ *Id.* (citing *Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App. 4th 1125 (Ct. App. 2009)).

¹⁸⁶ *Id.* at 434 (emphasis added).

¹⁸⁷ *See id.* at 434.

¹⁸⁸ *See* discussion *supra* Part I about SNS privacy settings.

¹⁸⁹ The *Romano* court attempted to buttress the argument that an SNS user cannot claim a reasonable expectation of privacy in her SNS profile's content by pointing to the fact no SNS website offers a guarantee of *complete* privacy. *Romano*, 30 Misc. 3d at 434. However, the *Romano* court still includes Facebook's language that privacy settings are offered to allow a user to limit access to her SNS profile. *Id.* Even if there is not complete privacy, SNS developers *still* offer users the option to restrict access to their profile. *See* discussion *supra* Part I. This strongly suggests that SNS developers recognize, on some level, that users view their SNS profile's content as private.

become public.¹⁹⁰ A court should not be allowed to erase a privacy expectation because of something as tenuous as the qualifier “may.”

Courts focus on certain aspects of SNS—that they are meant to share—ignoring privacy settings.¹⁹¹ Instead, courts seem content to paint all SNS activity with the same brush. Just because a person has an SNS profile to connect with her friend and family does not mean her SNS profile, and all its content, should be deemed public in the eyes of the law. Furthermore, it is unreasonable to accept, as the *Romano* court contends, that SNS profiles are, by their very nature, public, or “else they would cease to exist.”¹⁹² People use SNS to connect with people,¹⁹³ not to advertise their lives to anyone with an Internet connection. The mere existence of privacy settings suggests that there is a privacy expectation within SNS postings as recognized by the SNS developers themselves.¹⁹⁴ A person should not be forced to surrender her SNS profile’s content to the entire Internet-using public¹⁹⁵ just to participate in the self-expression of SNS.¹⁹⁶ If these holdings are carried to their furthest conclusion, the results are far too broad and overreaching.

Courts are supposed to evolve and adapt to society, and presently, the public’s participation in SNS is too entrenched in modern life for the courts to ignore the issues of privacy.

B. New Definition of “Legitimate Business Interest” in the Context of SNS Posts

An employer can claim a legitimate business interest in parts of her business where she has invested money.¹⁹⁷ Thus, an employer has a legitimate business interest to protect not only traditional business information, such as client lists, but also more intangibles, like its reputation.¹⁹⁸ However, the term legitimate business interests is ambiguous and amorphous; even the meaning of a fairly static term like “reputation” can be a product of interpretation and context. As a result, an employer can too easily claim any employment decision is founded upon a legitimate business interest.

In an effort to tether a flighty phrase like legitimate business interest to the ground, some jurisdictions have defined a legitimate business interests. It is beneficial to examine these definitions for what they reveal as being what the legislatures and courts pinpoint as being the essence of legitimate business interests. From these statutes, this Comment will propose a new definition of legitimate business interest to evaluate whether an employer’s business interest is implicated by an employee’s SNS content.

Florida’s definition of legitimate business interest developed within the

¹⁹⁰ See *Romano*, 30 Misc. 3d at 434.

¹⁹¹ See *id.*

¹⁹² *Id.*

¹⁹³ See FACEBOOK, *supra* note 13.

¹⁹⁴ See *supra* notes 15–16.

¹⁹⁵ See *Romano*, 30 Misc. 3d at 434.

¹⁹⁶ See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010).

¹⁹⁷ See *Roche*, *supra* note 22, at 189.

¹⁹⁸ *Id.* at 190.

context of evaluating the legality of restrictive covenants.¹⁹⁹ However, the relevant statute, Florida Statute § 542.335, has a non-exhaustive list of legitimate business interests.²⁰⁰ Legitimate business interest includes trade secrets;²⁰¹ valuable confidential business information; “substantial relationships with specific prospective or existing customers, patients, or clients”; client goodwill associated with a business’s “trade name,²⁰² trademark,²⁰³ service mark,²⁰⁴ or ‘trade dress’”;²⁰⁵ and specialized training.²⁰⁶

The restrictive and limited language of the above-mentioned statutes and case law does not offer an employer protection for interests that may fall outside of the above parameters. Nor would such a restrictive definition benefit an employee. In the face of such limited language, it is reasonably foreseeable that an employer would implement an SNS policy to outright forbid an employee’s use of SNS; an employer could adopt this self-help to protect his business interests in a way that the legislature or courts do not.²⁰⁷ Should an employee disobey such a policy in an effort to maintain relationships through SNS, she would be subject to the same sort of adverse employment decisions this Comment seeks to resolve. However, the statute pinpoints the most crucial component of legitimate business interests—customers and clients. The importance of customers is reinforced by Illinois’s seven-factor test for determining a legitimate business interest.

In Illinois, courts look at seven factors to determine if an employer has a legitimate business interest.²⁰⁸ The seven factors are:

- (1) the length of time required to develop clientele; (2) the amount of money invested to acquire clients; (3) the degree of difficulty in acquiring clients; (4) the extent of personal customer contact by the employee; (5) the extent of the employer’s knowledge of its clients; (6) the duration of the customer’s association with the employer; and (7) the continuity of the employer–customer relationships.²⁰⁹

¹⁹⁹ See *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1230–31 (11th Cir. 2009).

Florida statute section 542.335 is a “framework for analyzing, evaluating and enforcing restrictive covenants contained in employment contracts.” *Id.* (quoting *Envtl. Servs., Inc. v. Carter*, 9 So. 3d 1258, 1262 (Fla. Dist. Ct. App. 2009)).

²⁰⁰ FLA. STAT. § 542.335(1)(b) (West, Westlaw through 2012 2nd Reg. Sess.). A restrictive covenant not supported by one or more legitimate business interests is void and unenforceable as a matter of law. *Id.*

²⁰¹ A trade secret is defined as being “[a] formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors” that has independent economic value and is kept secret through reasonable efforts. BLACK’S LAW DICTIONARY 727 (3d ed. 2006).

²⁰² A trade name is “[a] name, style, or symbol used to distinguish a company, partnership, or business (as opposed to a product or service); the name under which a business operates.” *Id.*

²⁰³ Generally, a trademark is “[a] word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others.” *Id.*

²⁰⁴ A servicemark is “[a] name, phrase, or other device used to identify and distinguish the services of a certain provider.” *Id.* at 649.

²⁰⁵ Trade dress is a business’s total image. See generally *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 763 (1992).

²⁰⁶ FLA. STAT. § 542.335(1)(b) (West, Westlaw through 2012 2nd Reg. Sess.).

²⁰⁷ See *supra* text accompanying note 58.

²⁰⁸ See *Reliable Fire Equip. Co. v. Arredondo*, 965 N.E.2d 393, 402 (Ill. 2011).

²⁰⁹ *Hanchett Paper Co., v. Melchiorre*, 792 N.E.2d 395, 401 (Ill. App. Ct. 2003); *aff’d, Reliable Fire Equip. Co.*, at 402.

Factors are assessed within the “totality of the facts and circumstances” of each case, with no single factor dispositive.²¹⁰ Instead, factors are “nonconclusive aids.”²¹¹

Presently, “legitimate business interest(s)” are prime for an employer’s manipulation to terminate an employee for her off-duty conduct, regardless of whether it negatively affected an employer’s business interests. Since an employer should only be able to terminate an employee for off-duty SNS posts that implicate an employer’s legitimate business interest, this Comment proposes a new standard to determine if an employee’s SNS post damaged, or could damage, her employer’s legitimate business interests.²¹² If an employer cannot establish that the employee’s SNS content damages an employer’s legitimate business interest, then the employer’s adverse employment decision is illegal.

Thus, bearing the above in mind, this Comment proposes the following: to have an actionable legitimate business interest(s) to discipline or terminate an employee for the content of her off-duty, non-work related SNS post, an employer must show that the SNS post has damaged, or will substantially damage, the employer’s relationship with specific prospective or existing customers, patients, or clients.²¹³ Factors a court may consider to evaluate this relationship include, but is not limited to: the length of time undertaken to develop clientele; the amount of money invested to develop client(s); employer’s knowledge of its clientele; and the duration of the customer’s relationship with the employer.²¹⁴ An employer cannot require that an employee give the employer access to her SNS profile as a condition of employment.²¹⁵ If an employee’s off-duty, non-work related conduct

²¹⁰ *Reliable Fire Equip. Co.*, at 403.

²¹¹ *Id.* The seven-factor test is used with a “three-prong rule of reason” to “determine the enforceability of a restrictive covenant not to compete.” *Id.* The three-prong rule of reason is “reasonable only if the covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public.” *Id.* at 396 (citing *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1223 (N.Y. 1999)).

²¹² In general, courts assess legitimate business interests within the context of determining the enforceability of non-compete covenants in employment contracts. See generally R.P. Davis, *Validity and Enforceability of Restrictive Covenants in Contracts of Employment*, 98 A.L.R. 963 (1935); LOUIS ALTMAN & MARIA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 16:32 (4th ed. 2011), available at 2 Callmann on Unfair Comp., Tr. & Mono. § 16:32 (Westlaw).

²¹³ See FLA. STAT. § 542.335(1)(b) (1996).

²¹⁴ See *Hanchett Paper Co.*, 792 N.E.2d at 401.

²¹⁵ A recent trend has developed of employers requesting potential employees to give the employer their SNS passwords. Because employees have availed themselves to Facebook’s privacy settings, it has become “more difficult for outsiders to look in.” Rebecca Greenfield, *It’s Getting Harder for Your Employer to Use Facebook Against You*, THE ATLANTIC WIRE (Sep. 7, 2011), <http://www.theatlanticwire.com/technology/2011/09/its-getting-harder-your-employer-use-facebook-against-you/42170>. As a result, employers are desperate to find “other ways to reclaim the insights” that SNS profiles provide, and thus, have started requiring that potential employees give their SNS’s passwords as part of the interview process. Megan Garber, *Would You Give Job Interviewers Your Facebook Password? Because They Might Ask*, THE ATLANTIC (Mar. 20, 2012, 10:18 AM), <http://www.theatlantic.com/technology/archive/2012/03/would-you-give-job-interviewers-your-facebook-password-because-they-might-ask/254810>. However, employees have spoken out against this practice. In the public sector, the Maryland Department of Corrections was forced to discontinue this practice when the American Civil Liberties Union got involved. Greenfield, *supra*. In New York, a statistician “ended a job interview after he was asked to provide his Facebook password during its proceedings.” Garber, *supra*.

There is concern that such a practice will become commonplace. On May 2, 2012, Maryland

is illegal, the employer cannot discipline or terminate the employee without showing damage to her business interests. This definition of legitimate business interest and its factors are applicable within the specific context of adverse employment decisions made on the basis of an employee's SNS profile's content.

The above defines legitimate business interests in terms of the essence of business—relationships with a party willing to pay for the business's services. It goes without saying that a business, from doctors to restaurants to contractors, cannot succeed without a paying clientele. By equating legitimate business interest with customer/client relationships, much of the ambiguity surrounding terms like "reputation interest" is removed. The confusion is removed because the employer is forced to pinpoint *how* an employee's SNS content will damage the employer's business in a concrete way, as opposed to supposition.

Another benefit of the above definition is that it puts the burden on the employer to prove how the employee's SNS posts will harm the employer's business by damaging client relationships. This makes sense because the employer is in a better position to provide such information.

This is beneficial because it places the burden on the employer to both explain and show the negative impact of their employee's SNS posts. By requiring the employer to demonstrate how said posts impact their relationships with customers, the employer is forced to elucidate a sound basis for his adverse employment decisions. Instead of a knee-jerk reaction to an employee's lifestyle choices, an employer must look to his customer's opinion, and not rely on his own opinions.²¹⁶ In so doing, an employer cannot make an adverse employment decision because an employer dislikes an employee's lifestyle choice. It forbids an employer from relying on the supposition that an employee's off-duty, non-work related SNS postings will have a negative impact on the employer's business relationship because the employer must point to *specific, verifiable* sets of customers. The employer is in a better position to evaluate such relationships. Furthermore, this definition is good for employers because it recognizes her right

became the first state to pass a law prohibiting employers from demanding Facebook passwords from either their present or *prospective* employees. Labor and Employment—User Name Privacy Protection and Exclusions, ch. 233 (codified as MD. CODE ANN., LAB. & EMPL. § 3-712 (Oct. 1, 2012); Saul Ewing LLP, *Governor O'Malley Signs Maryland Law Prohibiting Employers from Seeking Access to Personal Social Media Information; Other States Considering Similar Bans*, JD SUPRA (May 2, 2012), <http://www.jdsupra.com/legalnews/governor-omalley-signs-maryland-law-pro-75409>. State legislatures in California, Illinois, Massachusetts, New Jersey, New York, and Washington are considering similar bans. Saul Ewing LLP, *supra*. Such a practice by employers may soon violate federal law. On April 27, 2012, Representative Eliot Engel of New York and Representative Jan Schakowsky of Illinois introduced the Social Networking Online Protection Act, which will subject violators to a \$10,000.00 fine. Social Networking Online Protection Act, H.R. 5050, 112th Cong. (2d Sess. 2012).

Given how quickly both state and federal legislatures have responded to this practice, asking for an SNS *password* violates an individual's privacy; it follows that using any information obtained from an SNS profile in such a way also violates a person's privacy. It is unclear as to whether employers will be prohibited from demanding SNS passwords from both employees and prospective employees in *all* state's legislation. However, given that both Maryland's law and the proposed House bill prevent employers from making SNS passwords a condition of employment for either employees or prospective employees, it logically follows that such is the standard in the other states' legislation. Furthermore, it does not address the main topic of this article—whether employers can use information from SNS profiles, *without the password*, in employment decisions.

²¹⁶ This Comment does not focus on what level of an employer's knowledge is sufficient to show that his business relationship with customers or potential customers will be damaged by the employee's off-duty, non-work related posts.

to protect her legitimate business interests.

The factors benefit the employer as well. They help refine the definition's specificity requirement. Factors give an employer a guideline of what an employer can point to when evaluating how an employee's SNS post damages her legitimate business interest. Furthermore, by not requiring that the employer use the above factors, it recognizes that the employer has a legitimate business relationship in things like new clients or customers; it recognizes that there is a need to protect business relationships that have not yet fully developed, but should be protected. Because the employer carries a burden to show cause for an adverse employment decision, it is not necessary to require them to pass a factor test. Instead, an employer may point to certain factors if the factors assist to clarify her position.

This definition is also best for an employee because it forces the employer to articulate exactly *how* the employee's SNS postings damage the employer's business through a loss or harmed business relationship. Thus, it is much more difficult—if not impossible—for an employer to base employment decisions on his distaste for an employee's lifestyle choices, or, on the supposition that an employee's lifestyle choices could negatively impact the employer's business. An employer will not be able to react to an employee's off-duty SNS post without proof of the postings potential or actual damage to the business. This ultimately protects an employee's interests by protecting her right to participate in SNS.

Furthermore, this definition restores a degree of privacy to an employee's SNS posts.²¹⁷ An employer may see the employee's SNS posts, but the employer cannot base adverse employment decisions upon an employee's SNS postings if said postings do not affect the employer's business relationships. Thus, an employee can participate in SNS without fearing it will lead to employment discipline or termination.

In applying the above to Caitlin Davis's situation, the Patriots would have to show exactly how her photographs damaged the Patriots' relationship with their customers. This could be ticketholders, vendors, or advertisers—businesses have customer bases. However, for the Patriots, no matter how distasteful Caitlin Davis's photographs were, it would be difficult to find cause to terminate her. Are an eighteen-year-old's photographs really going to prevent the Patriots from selling tickets? From obtaining advertisers? The above definition forces an employer to make decisions that are realistic within the context of his business. An NFL team is made up of far more than a cheerleader. If the above definition existed during Caitlin Davis's publicity troubles, most likely, she could not have been fired.

Most importantly, the above definition gives a zone of privacy around a person's decisions. No matter how immature or bizarre a decision may be, the individual is entitled to make her own choices without the noose of employment discipline or termination looming over her. And in that freedom, a person has the privacy to make choices knowing her employer cannot harm her employment situation without cause. Certainly, someone like a Caitlin Davis would have "paid" for her distasteful photographs, but it would have been eternal embarrassment or criticism. An employer's influence should not extend into an employee's life once she is off-duty and free to structure her own time. An

²¹⁷ See discussion *infra* Part I.

employee should be free to make legal, off-duty choices—even bad choices—and post about said choices on her SNS profile. If someone makes a bad decision—like posing for photos of an individual with swastikas drawn all over him—that individual will get enough flak from her SNS profile followers to learn a lesson. The cost need not be in the form of losing her job.

V. CONCLUSION

It is not ideal that a large portion of an individual's life is lived in the semi-public sphere of SNS profiles; however, it is reality. SNS are not a fleeting trend. Courts should construct laws that recognize the realities of life as it is presently lived, which is why courts should protect a person's expectation of privacy in her SNS posts by requiring that an employer show how his legitimate business interests are damaged before making an adverse employment decision. Otherwise, it is foreseeable that there will be an increase in litigation that forces courts to change their position on SNS profiles, or legislatures will do it for the courts instead.