

Social Media and the Workplace: Legal, Ethical, and Practical Considerations for Management

Frank J. Cavico

The H. Wayne Huizenga School of Business and Entrepreneurship
Nova Southeastern University
Email: cavico@nova.edu

Bahaudin G. Mujtaba

(correspondent author)

The H. Wayne Huizenga School of Business and Entrepreneurship
Nova Southeastern University
Ft. Lauderdale, Florida USA 33314. USA.
Email: mujtaba@nova.edu

Stephen C. Muffler

The H. Wayne Huizenga School of Business and Entrepreneurship
Nova Southeastern University
Email: scmuffle@nova.edu; scmuff@msn.com

Marissa Samuel

The H. Wayne Huizenga School of Business and Entrepreneurship
Nova Southeastern University
Email: marisamu@nova.edu; msamuel.law@gmail.com

I. Abstract

The prevalence, widespread use, and influence of technology in society today, including the workplace, is undeniable. Computers, the Internet, email, and cell phones are now indispensable parts of social interaction as well as business; and their sophistication, uses, and reach are expanding continually. Social media has completely transformed the life of many, many people. In particular, social media has materially changed the way in which people communicate. Social media affords people readily and easily usable ways to stay in touch with family, friends, colleagues, and co-workers, including the ability to rapidly share information and commentary. Business today is also taking advantage of social media – for marketing, management, and human resource purposes. Furthermore, the conception of the “workplace” has been broadened with the advent of technology and especially the existence of “telecommuting.” “The increase in work outside the office...has further blurred the boundary between work and home, public and private” (Gelms, 2012, p. 268). Social media, therefore, is being widely used in business and professional as well as personal settings. Of course, social media sites and accounts can contain some very personal and intimate information about people. Consequently, employers, employees, job applicants, as well as the legal system, are confronting with ever-increasing frequency the advancement of technology, the growth and proliferation of social media, and the challenges and difficulties presented by the use of social media and the modern-day workplace. Courts as well as legislative bodies, however, are now just beginning to address legal claims caused by social media and employment. Moreover, the extensive use of social media in the workplace also raises serious moral and ethical concerns.

Given the popularity, prevalence, sophistication, and ever-growing use of social media, it is no surprise that social media in an employment context raises many difficult, as well as novel, legal, ethical, and practical issues. This article, therefore, is a legal, ethical, and practical examination of social media in employment. The legal section of this article is a very substantive one where the authors extensively address the legal ramifications of social media in the private employment context. Statutory laws – federal and state, common law doctrines, as well as proposed federal and state laws, are examined to ascertain their applicability to social media policies and practices in employment. Case law, regulatory law, as well as legal and management commentary, are also examined to determine how a wide variety of laws apply, and could apply, to social media in the workplace. Case illustrations of legal principles being applied to social media workplace disputes as well as hypothetical examples are provided by the authors. As noted, the focus of

this article is on the private employment context; however, the authors do briefly address some of the seminal federal constitutional issues that would arise in the public sector workplace. Even if a practice is legal, the question arises, or should arise, as to whether it is moral. Accordingly, the moral concerns regarding social media and the workplace will be addressed in this article through the application of several established ethical theories. The authors define, explicate, and apply these ethical theories to the subject matter of social media and employment to determine whether it is moral to use social media to make employment decisions. These ethical theories will be Ethical Egoism, Ethical Relativism, Utilitarianism, and Kant's Categorical Imperative. Next, based on the aforementioned legal and ethical analysis, the authors discuss the practical implications for employers, managers, employees, and job applicants. The authors provide some succinct suggestions for employees and job applicants as to proper social media practices. The authors then make extensive recommendations for employers and managers on how to achieve certain business objectives but without violating the law or treating job applicants and employees in an immoral manner. The authors end their work with a brief summary and some concluding comments and observations. The authors, finally, as a sample in Appendix A, have included a company social media policy approved by the National Labor Relations Board.

Key Words: social media, social networking, Facebook, discrimination, harassment, retaliation, civil rights, Title VII, ADEA, ADA, labor law, NLRA, concerted activities, electronic communication privacy acts, lifestyle protection laws, tort, invasion of privacy, defamation, ethics, morality, employment, employment at-will, public policy, employee, job applicant, employer, management.

II. Social Media: Definition, Overview, and Trends

The first task is to define "social media." This undertaking is difficult "because of social media's amorphous nature and infinite platform types" (Hudson and Roberts, 2012, p. 769). Social media, very generally, consists of web-based Internet networks where users can share information and communicate with other users in a collective manner. Hudson and Roberts (2012, p.769) define social media as "a form of electronic communication that allows user-generated interaction between the media's creator and the user." Smith (2012, p. 1) states that social media "is a term used to describe social interactions using technology (such as the Internet and cell phones) with any combination of words, pictures, video, or audio." A key feature of social media is that it is not passive but interactive; that is, "visitors can communicate and socialize, sharing emails, documents, pictures, video, audio files, and do each in a number of different ways" (Smith, 2012, p. 1). Venezia (2012, p. 24) defines social media as "any online service or site that focuses on building social networks or relations among people who share interests. Generally, these sites consist of a representation of each user (usually a profile), his/her links, and a variety of additional services depending upon the individual site. Most of these services are web-based and provide means to interact over the Internet, like Facebook does. Social media sites allow users to share ideas, activities, events, photos, videos, and many other things to whoever may be interested." Gelms (2012, p. 265) adds that "social media allows users to connect with previously established friends and also build new relationships based on common interests, thereby providing an alternative technological platform for standard social communication and interaction." A U.S. House of Representatives Bill, the Social Networking Online Protection Act (2012), defines the term "social networking website" as "...any Internet service, platform, or website that provides a user with a distinct account...whereby the user can access such account by way of a distinct user name, password, or other means distinct from that user; and...that is primarily intended for the user to upload, store, and manage user-generated personal content on the service, platform, or website." Gelms (2012, p. 265) adds that "broadly speaking, social networking sites allow users to establish relationships with other users based on a unique identity online." Finally, Hudson and Roberts (2012, p. 769) point out that though the terms "social media" and "social networking" are used synonymously, there is a "slight difference," that is, the former referring to the means by which communications are transmitted, whereas the latter referring to functional tools for information-sharing.

Social media has developed and grown due to the large increase in the number of computers, the creation of the mobile cell phone, and the widespread access to and use of the Internet. Social media is plainly an important part of people's lives today. Jatana, Sandoval, and Glyer (2012, p. 13) report that in 2010 social media accounted for 22% of all time that people spent online. Smith (2012, p. 2) reports that in 2008, about 24% of the population over 12 years of age had a profile space on a social networking site; and by 2010 that number had risen to 48%. Moreover, use per social media user is rapidly increasing as well. Smith (2012, p. 2) also reports that the number of people using social networking sites "several times a day" more than doubled from 2009 to 2010 from 18 to 39 million. Smith (2012, p. 2) relates that in 2010 people spent 22.7% of their time online on social networking sites, which figure was an increase

from 15.8% in 2009; and that today more than 66 million Americans report using social networking sites. Furthermore, texting is now a daily activity for almost one-half of mobile phone owners, with nearly one-half of mobile phone owners (45%) age 12 or more years of age texting multiple times daily (Smith, 2012, p. 2). Gelms (2012, p. 266) adds that the time people spend on social networks has surpassed the time spent on email communications. Most interestingly, Gelms (2012, p. 266) also states that “as the number of social media users has increased, the type of users has also changed. While social media originally catered to a younger audience, over time the user population has become older and more diverse. Although social media use has grown dramatically across all age groups, recent growth among older users has been especially noticeable. A recent study found that 86% of financial professionals had a business or personal account on one or more social media platforms, a 13% increase in just one year.”

In addition to the many types of people using social media, there are many types of social media to use, all of which can have ramifications – good and bad - in the workplace. Some of the major social media sites and networks are as follows:

LinkedIn is a social and networking site geared for professionals that was created in 2003 to provide professional people with access to networking, marketing, advertising, and job search opportunities. Any person can search for another person’s online profile; and no password is required to conduct a search. The site can also provide specific employment opportunities; and employers can examine an individual’s job prospects (Venezia, 2012). The site has more than 70 million users globally from more than 200 countries, according to Hearing and Ussery (Part I, 2012, p. 35). The site has more than 100 million members, and adds new members at the rate of about one million per week, according to Smith (2012, p. 2).

Facebook is a social networking site that was founded in 2004 to enable people to communicate more effectively with their friends, families, colleagues, and coworkers. It is the fastest growing and probably the most popular social media site. Facebook went public in May of 2012 with an initial stock offering that commanded a valuation of over \$100 billion (Raice, 2012, p. B1). The site was estimated to have over 600 million users in 2010 (Jatana, Sandoval, and Glyer, 2012, p. 13), more than half of which access the site daily, and which use accounted for 10% of all Web pages viewed in the U.S. in 2010. Facebook users can discuss their current activities as well as current events, comment on other people’s postings, post demographic information, personal preferences, pictures, and videos, as well as communicate and readily share information with their “Facebook friends”; and the average Facebook user is said to have about 130 friends (Hearing and Ussery, Part I, 2012, p. 35). Smith (2012, p. 2) reports that as of July 2011, Facebook had more than 750 million users worldwide, and that about one-half of these users had visited the site at least once a day. Gelms (2012, p. 266) relates that Facebook users include approximately 60% of the Internet population in the United States. The *Wall Street Journal* (Raice, 2012, p. B1) reports that in April of 2012, U.S. visitors to Facebook increased to 158 million, which represented a 5% increase from the previous year, and that Facebook users spent more than six hours a month on the site, which was a 16% increase from the year earlier (compared to 4 hours for all Google sites, including YouTube, and 3 ½ hours for Yahoo sites. Moreover, the *Wall Street Journal* (Raice, 2012, p. B1) reports that Facebook has gained a 71% share of the 221 million Internet users in the United States. The *Miami Herald* (Doyle, M. 2012), p. 4A) reported in that over three billion comments and “likes” are posted daily. The *Wall Street Journal* (Fowler, 2012, p. B1) reported that as of September 14, 2012, Facebook had one billion monthly active members.

“Friending,” or connecting with others on the system, emerges as an important facet of Facebook. To illustrate, Badstuebner (2012) conducted a survey of 27 Asian and 66 European respondents concerning their Facebook use. The age group 26-35 years old was the most numerous group surveyed with a share of 65.6%, followed by the age group 16-25 with a share of 31.2%. The remaining age groups represented only a 3.2% share. Women represented a slight majority of the respondents with a 52.7% share. Badstuebner’s (2012, p. 18) results indicated that “Facebook has become a part of every day’s life.” His results indicated that 75.3% of all respondents used Facebook several times a day; 11.8% used it at least once a day. The main reasons given were to keep in touch with friends as well as to share information with colleagues; whereas the option to use Facebook to obtain information on brands, products, or services was selected by only a small portion (17.2%) of the respondents. Regarding the number of “Facebook friends,” Badstuebner (2012, p. 18) found that almost one-half of the participants had 101-300 friends, while a quarter of the respondents had between 301-500 friends. So, plainly, the study “shows that Facebook is used to manage personal friendships” (Badstuebner, 2012, p. 18).

You Tube is a video-sharing website where users can upload, share, and view videos on a wide variety of subject matters, ranging from professional and educational to personal and comical. There are approximately 65,000 videos uploaded daily, and almost 2 billion viewers daily have access to the videos (Hearing and Ussery, Part I, 2012, p. 35).

Twitter is a “real-time” information sharing network, founded in 2006, that enables people to relate by “tweets,” that is, short-text like messages, what is important in their lives and how they feel about people and events, and to discover other people and their thoughts and beliefs and likes and dislikes (Miles and Fleming, 2012). Presently, Twitter has about 110 million users; and acquires about 300,000 new users daily (Hearing and Ussery, Part I, 2012, p. 35). Smith (2012, p. 2) indicates that Twitter has 190 million users and that by 2010, some 65 million “tweets” a day had been sent. Miles and Fleming (2012, pp. 5-6) indicate that as of January 2011 the number of registered Twitter accounts had reached 200 million, with 110 million tweets posted each day.

My Space, founded in 2004, is another site used for social connection and interaction, which has been characterized as a “social entertainment destination” for the younger generation (Miles and Fleming, 2012).

Another important social media-related term to define is “web log” or a “blog.” Blogs are comments posted by people on their own websites or social media sites; blogs contain information and commentary as opposed to advertising or solicitation. In addition to an information-sharing exchange and editorial purposes, blogs can have a self-promotion function too (Smith, 2012). Related to a blog or blogging is the term “micro-blogging,” which refers to a blog that has brief entries concerning the daily activities of a person or a company and which is produced to keep friends, colleagues, clients, and customers informed (Fleming and Miles, 2012, p. 3).

The authors of this article take a broad view of “social media,” encompassing all the aforementioned types of communication and posting. Employers can use social media to recruit, screen, and investigate prospective employees as well as to monitor current employees. Employers can ask for log-in and password information from applicants as well as current employees, or employees may ask to have a human resource manager designated as a Facebook “friend” by the applicant or employee, or the employer simply may ask the applicant or employee to log on to a company computer at work so that the employer can view the person’s social media account. Regarding employer use of social media to make hiring determinations, Jatana, Sandoval, and Glycer (2012, p. 13) as well as Abril, Levin, and Del Riego (2012, pp. 86-87) report on a study that indicated that 45% of employers questioned used social media to screen job applicants; and that 35% of these employers decided not to offer a position to a job applicant based on information found on the applicant’s social networking site. Moreover, the study also indicated that Facebook was the most popular online site for screening job applicants, whereas 7% of employers investigated job applicants on Twitter. The most common reasons for not hiring an applicant were provocative pictures, references to drinking and drug use, and negative comments about previous employers and coworkers (Jatana, Sandoval, and Glycer, 2012, p. 13). Ramasastry (2012) reported on a Microsoft Research study done in 2010 which indicated that 70% of employment recruiters admitted that they had rejected job applicants based on information they found online. Furthermore, the *Wall Street Journal* (Kwoh, 2012, p. B8) reported on a study of 215 recruiters by the Corporate Executive Board that indicated that 44% of recruiters stated that “trashing” an employer on social media is a sufficient reason not to hire an applicant. To further illustrate, the *Wall Street Journal* (Hotz, 2013) reported on a study of “Likes” by Facebook users which indicated that the participants unintentionally revealed and shared very private and intimate personal information, for example, their religious and political views, divorce, drug use, and sexual orientation. The study revealed that patterns of “Likes,” for example, for certain cities, such as Austin, Texas, and movies, could predict drug use; whereas “Likes” for swimming and certain types of cookies indicated no drug use (Hotz, 2013).

Regarding employee use of social media during work hours, Jatana, Sandoval, and Glycer (2012, p. 13) also state that the average employee spends between one and two hours each day using the Internet for personal reasons; and in particular that in 2009, around 77% of employees who had a Facebook account were found to use it during work, thereby “no doubt resulting in a drop in productivity.” Considering the extensive use of social media in employment, Gelms (2012, pp. 267-68) points out that a recent study of *Fortune* 500 companies revealed that 23% have blogs, 62% have corporate Twitter accounts, and 58% have corporate Facebook profiles. Moreover, Gelms (2012, p. 268) relates that “social media is even more prominent among the fastest-growing private companies in the United States, which are known as the Inc. 500. Eighty-three percent of Inc. 500 companies utilize at least one form of social media. Fifty percent of them have blogs, 59% have corporate Twitter accounts, and 71% have a corporate Facebook profile.”

Regarding the existence of employer social media policies, Hudson and Roberts (2012, p. 768) relate that “currently, few employers have a Social Media Policy.... By not having a Policy, the employer and its business are left vulnerable to the whims of its employees’ social media actions and cannot guide employees toward using social media

to protect and further the employer's business purpose." Nonetheless, Abril, Levin, and Del Riego (2012) conducted a survey to determine social media use, employer policies, employer access to social media, and people's attitudes to online privacy. The survey consisted of 2500 Canadian and American undergraduate students. Most (94%) were between 18 and 24 years of age; they were divided almost evenly between males and females; 67% were employed (but less than 10% were employed full-time); 92% indicated that their preferred social media network was Facebook; and that 72% reported restricting access to their profiles by using privacy settings offered by social networking sites (Abril, Levin, and Del Riego, 2012, p.97). The results of the survey were quite revealing indeed, to wit:

- 82% of respondents either were not subject to a workplace social media policy or did not know if they were; and of the 18% who did report being subject to a policy, most reported that compliance was poor and the policies were ineffectual. These results were deemed to be "striking" by Abril, Levin, and Del Riego (2012, p. 113).
- 75% disapproved of employer monitoring of social media or accessing employees' social media profiles, finding such practices to be "somewhat or very inappropriate" (Abril, Levin, and Del Riego, 2012, p. 99).
- 56% considered it to be "somewhat or very inappropriate" for employers to check on job applicants without their knowledge. This result caused Abril, Levin, and Del Riego (2012, p. 99) to posit that "the greater disapproval of intrusions in the private life of employees versus applicants may stem from a shared sentiment that judging a person based on his or her private life is more appropriate before hiring."
- 32% of respondents whose employers did have a formal social media policy stated that the policy banned employee access to social media during working hours; but other policies only prohibited any association with or mention of the employer's name on the employee's social media profile (Abril, Levin, and Del Riego, 2012, p.105).

The survey results of Abril, Levin, and Del Riego (2012) are most instructive, particularly when considering any reasonable expectation of privacy on the part of employees as well as determining appropriate social media policies for employers to promulgate.

Social media is now everywhere! Social media forms an integral part of today's technological society; and for many people social media is a "must." There are many types of social media as well as many benefits – personal, business, and professional - to be obtained from the use of social media. "But networking has a dark side as well" (Smith, 2012, p. 3). There are many examples gleaned from current events and legal cases of employees and employers too getting into trouble by their social media use, to wit:

- An "excellent" job candidate was not hired by the prospective employer when the applicant's LinkedIn profile indicated that he was not a "team player" but rather a "lone wolf" who took credit for everything for himself (Kwoh, 2012).
- A Manatee County, Florida teacher stated in a Facebook exchange with seven other teachers that one of her students "may be the evolutionary link between orangutans and humans." The matter has been referred to the state Department of Education for review (Hawes, 2012).
- Three airline employees were disciplined for posting a picture of a co-worker, an airline customer service agent, on one of the employee's Facebook pages, which showed the co-worker in a crouching position hunched over her desk with part of her buttocks showing and her thong underwear visible (Yancy, 2011).
- A radiology employee was terminated for posting on her Facebook account statements that her boss put extra money in her and other employees' paychecks because he liked them, and also that her boss was a "snake" and creepy (Debord, 2012).
- A New York City teacher was disciplined for posting on her Facebook page the day after a public school student had drowned during a field trip to the beach that she was "thinking the beach sounds like a wonderful day for my 5th graders," "I hate their guts," they are the "devil's spawn," and that she would not throw a life jacket to a child "for a million" (*In the Matter of the Application*, 2012).
- A former employee, a video and social media producer, was sued by her former employer because she displayed on her website as an example of her capabilities as a web designer content that included projects that she had worked on at her former employer (*Ardis Health, LLC*, 2011).
- A New Jersey teacher was suspended as a result of her posts on her Facebook page, which included her opinion that the school's gay history exhibit should be removed as well as comments urging her friends to pray as a result of the sinfulness of homosexuality (Venezia, 2012, p. 28).

- An employee of a Chicago car dealership was fired because he posted critical comments and photos of the employer on Facebook, including a statement that the sales commissions were likely to drop because the dealership's promotional event only served water and hot dogs (Abril, Levin, and Del Riego, 2012, pp. 92-93).
- A high school teacher was fired after posting on her Facebook page that she thought the residents of the school district were "arrogant and snobby" and that she was not looking forward to another school year (Abril, Levin, and Del Riego, 2012, p. 68).
- A flight attendant was discharged for posting suggestive pictures of herself in her company uniform (Abril, Levin, and Del Riego, 2012, pp. 68-69).
- Two employees of a pizza chain franchise were terminated after posting a joke video of themselves on YouTube that showed them preparing sandwiches at work while one put cheese up his nose and mucus on the food (Abril, Levin, and Del Riego, 2012, p. 69).
- A professor of anatomy was denied a job at the University of Kentucky after the hiring committee found articles he wrote suggesting that he might believe in "creationism" (Hsieh, 2011).
- A part-time instructor at a Catholic college in Philadelphia was terminated when he disclosed on his Internet blog that he was in a committed long-term same-sex relationship for about 15 years (Associated Press, 2011).
- In Columbus, Mississippi, two firefighters and a police officer were suspended for "liking" the Facebook post of another firefighter who had written critically about the location of a woman whose two year old child was hit by a car (Doyle, M., 2012).
- A Red Bull Racing crew member was terminated for posting what was perceived as an anti-gay Tweet on his Twitter page (Fleming and Miles, 2012, p. 2).
- Thirteen Virgin Atlantic cabin crew members were discharged after the company discovered that the employees were posting inappropriate comments about their employer and customers on Facebook, including comments that the planes were full of cockroaches and that the passengers were "chavs" (Fleming and Miles, 2012, p. 7).
- A California woman was fired from her job at the Cold Stone Creamery for posting a racial slur about President Obama on Facebook and writing that "maybe he will get assassinated." She claims she is not racist and that she was merely stating her "opinion." The Secret Service is investigating (Nation and World, 2012).
- An employee of the water-taxi service in Ft. Lauderdale, Florida was fired for posting a video on YouTube about a developer's plan to remove a giant rain tree, which could be the largest in the state, along the New River. The Water Taxi leases its hub from the developer who wants to remove the tree for a marine and residential development project (Saunders, 2013).

The authors, therefore, will explore the legal, ethical, and practical consequences of social media in the private employment context and make appropriate recommendations. The first task is to address the legal ramifications of social media in the workplace.

III. Legal Considerations

Although this article is an analysis of the laws impacting social media policies and practices in the private sector, the authors will initially address some of the federal constitutional concerns that would impact public sector employees and employees. The authors then commence the private sector analysis by briefly discussing the basic, traditional, and initial principle of employment law in the U.S. – the common law employment at-will doctrine as well as limitations on the doctrine, particularly the public policy exception. The authors next examine federal statutory law, especially civil rights law and labor law. State lifestyle discrimination statutes are also discussed. Then federal and state laws that protect electronic communications are examined as well as proposed federal and state laws. In addition to statutory law, the authors examine the law of tort to determine its applicability to the subject matter herein. In particular, the intentional tort of invasion of privacy, the tort of defamation, and the doctrine of negligence are scrutinized. Finally, the authors make some pertinent legal conclusions.

A. Constitutional Law

Important constitutional issues arise in the context of public employment and social media. The U.S., that is, the federal, constitution grants constitutional rights that can be asserted against government, including government

employers, but not (with the exception of the 13th amendment's prohibition against slavery and involuntary servitude) against private parties, including private sector employers (Cavico and Mujtaba, 2008). There are, however, some states, such as California, which in their state constitutions do extend certain constitutional rights to the private sector. For example, in California the state constitution extends right of privacy protections to private sector employees (Afram, 2012).

There are three seminal federal constitutional rights that could be asserted by public sector employees against their government employers for allegedly unconstitutional social media policies and practices. Those three constitutional rights are the First Amendment's freedom of speech, the Fourth Amendment's prohibition against unreasonable searches and seizures (Abril, Levin, and Del Riego, 2012), and the constitutional right to privacy. However, for public employees, the boundaries of permissible employer conduct pursuant to these constitutional rights were delineated by the courts long before the "information age" and the concomitant complex legal, moral, and practical issues arising in the modern technological workplace and social arena. Nevertheless, the courts today will have to apply these seminal constitutional principles to public employment to determine the extent of employee constitutional rights in the context of social media and the workplace.

First, for online communication to be constitutionally protected pursuant to the First Amendment, the communication must rise to the level of "speech." The recent federal district court case of *Bland v. Roberts* (2012) is particularly instructive, as well as disturbing for First Amendment speech jurisprudence in the social media realm. In *Bland*, plaintiff employees of the sheriff's department expressed their support for a political candidate opposing the sheriff for reelection. That support included the "liking" of the candidate on his Facebook page. The sheriff won reelection, learned of the plaintiffs' support for his opponent, and fired the employees. They sued, contending that the "liking" was a "statement," and thus was constitutionally protected speech. The court disagreed, however, ruling that the "liking" was not an "actual statement" that could be constitutionally protected. The court explained its reasoning: "Simply liking a Facebook page is insufficient. It is not the kind of substantive statement that has previously warranted constitutional protection. The Court will not attempt to infer the actual content of (plaintiff's) posts from one click of a button on (the candidate's) Facebook page. For the Court to assume that the Plaintiffs made some specific statement without evidence of such statements is improper. Facebook posts can be considered matters of public concern; however, the Court does not believe Plaintiffs...have alleged sufficient speech to garner First Amendment protection" (*Bland v. Roberts*, 2012, p. 10). The case is now under appeal. A key issue on appeal is whether "liking" someone is the equivalent of traditional speech or is merely akin to applause or a sign of acknowledgement and/or approval like a "thumbs-up" gesture.

Assuming speech is present, traditionally, the courts have used a "balancing" test to determine whether a constitutional principle has been contravened by a public sector employer. Hearing and Ussery (Part I, 2012) relate that the courts in these public sector free speech cases focus on the purpose of the employee's speech, to wit, whether the employee was speaking as a member and on behalf of the public or merely as an employee on behalf of himself or herself. Consequently, the legal challenge will be to ascertain constitutionally in the context of social media at what point the individual public sector employee's right and interest in maintaining a "private" self and engaging in "free" expression are outweighed by the public sector employer's right and interest in monitoring and managing the workplace (Abril, Levin, and Del Riego, 2012; Hearing and Ussery, Part II, 2012). Regarding privacy, Abril, Levin, and Del Riego (2012, pp. 72-73) explain that the "courts have generally held that employees do not have a reasonable expectation of privacy in the workplace, especially if using hardware provided by the employer or if the employer has communicated to employees that they may be monitored (by written policy or otherwise). The Supreme Court also has recognized that employers have a legitimate interest in monitoring their employees, especially for reasonable work-related reasons. As a result of this legal validation, employee monitoring and surveillance have become a common practice."

One recent public sector Supreme Court case is instructive. In *City of Ontario, California v. Quon* (2010), a city police officer contended the city violated his Fourth Amendment right by obtaining and reviewing transcripts of personal text messages he sent using a pager provided to him by the city for work-related purposes. The transcripts obtained by the city indicated a very large number of personal texts, some of which were sexually explicit. The police officer was disciplined for inappropriate and excessive pager use. The Supreme Court upheld the city, explaining that the search was reasonable, necessary, and justified for work purposes, particularly to determine which communications were personal and not work-related, and thus were not to be paid by the city and the taxpayers (*City of Ontario, California v. Quon*, 2010). The *City of Ontario, California* case is, of course, a government employer constitutional

law decision, but it does provide some guidance for private sector social media workplace disputes. The employee in the case was not an employee at-will, meaning the government employer had to provide a reason - and one sufficient factually and constitutionally - for the job sanction. Most employees in the private sector, however, are employees at-will.

B. Employment At-Will Doctrine

The employment at-will doctrine is a fundamental and critical principle of employment law in the United States for private sector employees. The doctrine holds that if an employee is an employee at-will, that is, one who does not have any contractual provisions limiting the circumstances under which the employee can be discharged, then the employee can be terminated for any reason – good, bad, or morally wrong, or no reason at all – and without any warning, notice, or explanation. The employment at-will doctrine can engender a legal but immoral discharge, but not an illegal discharge; that is, the discharge of the employee at-will in violation of some other legal provision, the prime example being the Civil Rights Act of 1964.

There is the concern that including social media protection as part of civil rights laws would make too much of an inroad into the traditional employment at-will doctrine and the employer's concomitant freedom to manage its workforce. Accordingly, if an employee is an employee at-will, and the employee is discharged for his or her postings on social media, the employee may not have any recourse under the traditional employment at-will doctrine. The employee may have a valid wrongful discharge case only if he or she can directly link the social media-based discharge to another statutory or common law legal doctrine. Two common law doctrines, furthermore, are regarded as "exceptions" to employment at-will. They are the contract-based "implied contract" doctrine and the tort-based "public policy" doctrine, the latter of which has important free speech and association elements as well as a whistleblower protection component. There are also the common law torts of invasion of privacy, intentional infliction of emotional distress, defamation, as well as the tort of negligence, all of which can be applicable in a social media employment based dispute (Cavico, Mujtaba, Muffler, and Samuels, 2013).

However, in addition to the aforementioned tort, public policy, and implied contract exceptions to employment at-will, there are significant statutory laws principles that can protect the employee and that can convert the employee's discharge into a wrongful discharge case. These statutes and common law principles certainly can have applicability to social media policies and practices in the public and the private sector workplace; and these laws will apply to all the terms and conditions of employment and not "merely" discharge.

C. Statutory Laws

In addition to the common law, it is incumbent on employers to be cognizant of the legal ramifications and risks pursuant to statutory law – federal and state - of making social media-based employment decisions. The use of social media and the Internet in the employment context is not without legal risk for employers due to the prevalence of statutory laws that can impact the workplace, including social media-based employment determinations. Consequently, employers who want to use social media to make hiring and firing decisions as well as to monitor employees must be aware of the risks of liability pursuant to statutory laws, in particular anti-discrimination law, labor law, and electronic privacy statutes. Employers also must be keenly aware of statutory developments, especially regarding electronic privacy protection laws.

1. Civil Rights Laws

Civil rights laws in the United States make it illegal for an employer to discriminate against an employee or job applicant because of a person's race, color, religion, sex, national origin, age (40 or older), and disability (Equal Employment Opportunity Commission, Prohibited Employment Policies/Practices, 2011). Civil rights laws are enforced in the United States primarily by the federal government regulatory agency – the Equal Employment Opportunity Commission (EEOC). Congress has delegated to the EEOC the power to interpret, administer, and enforce Title VII of the Civil Rights Act of 1964. The EEOC is permitted to bring a lawsuit on behalf of an aggrieved employee, or the aggrieved employee may bring a suit himself or herself for legal or equitable relief. The Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA), it must be stressed, are federal, that is, national laws. Since the U.S. is a federal system, it accordingly must be noted that almost all states in the U.S. have some type of anti-discrimination law – law which may provide more protection to an aggrieved employee than the federal law does.

The Civil Rights Act allows any person who is aggrieved by a violation of the statute to institute a civil action in any court of competent jurisdiction for any and all legal redress which will effectuate the purposes of the statute. The EEOC itself actually may go to court on behalf of the complaining employee, or the employee may also choose to be represented by private legal counsel. Regardless, in either situation, the *prima facie* case is the required initial case that a plaintiff employee asserting discrimination must establish. Basically, *prima facie* means the presentment of evidence which if left unexplained or not contradicted would establish the facts alleged. Generally, in the context of discrimination, the plaintiff employee must show that: 1) he or she is in a class protected by the statute; 2) the plaintiff applied for and was qualified for a position or promotion for which the employer was seeking applicants; 3) the plaintiff suffered an adverse employment action, for example, the plaintiff was rejected or demoted despite being qualified, or despite the fact that the plaintiff was performing his or her job at a level that met the employer's legitimate expectations; 4) after the plaintiff's rejection or discharge or demotion, the position remained open and the employer continued to seek applicants from people with the plaintiff's qualifications. These elements, if present, give rise to an inference of discrimination. The burden of proof and persuasion is on the plaintiff employee to establish the *prima facie* case of discrimination by a preponderance of the evidence (*Gul-E-Rana Mirza v. The Neiman Marcus Group, Inc.*, 2009). Regarding the employment relationship, the most important civil rights statute on the federal level in the United States is Title VII of the Civil Rights Act of 1964.

a. Title VII of the Civil Rights Act of 1964

The Civil Rights Act of 1964 is of prime importance to all employers, managers, employees, job applicants, and legal professionals in the United States. This statute prohibits discrimination by employers, labor organizations, and employment agencies on the basis of race, color, sex, religion, and national origin (Civil Rights Act, 42 U.S.C. Section 2000-e-2(a)(1)). Regarding employment, found in Title VII of the statute, the scope of the statutory legal provision is very broad, encompassing hiring, apprenticeships, promotion, training, transfer, compensation, and discharge, as well as any other "terms or conditions" and "privileges" of employment. The Act applies to both the private and public sectors, including state and local governments and their subdivisions, agencies, and departments. An employer subject to this act is one who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year (42 U.S.C. Section 2000e(b)). One of the principal purposes of the Act is to eliminate job discrimination in employment (Cavico and Mujtaba, 2008). This Act was amended in 1991 to allow for punitive damage awards against private employers as a possible remedy (*Civil Rights Act of 1991, Public Law 102-166, as enacted on November 21, 1991*). This amendment gives employers even more incentive to conform their workplace employment policies to the law and thus to avoid potential costly liability in this area of employment law. Liability pursuant to the Civil Rights Act can be premised on two important legal theories – disparate treatment and disparate impact.

b. Disparate Treatment v. Disparate Impact

There are two important types of employment discrimination claims against employers involving the hiring, promotion, or discharge of employees – disparate treatment and disparate (or adverse) impact – that must be addressed since they can arise in a social media-based lawsuit. "Disparate treatment" involves an employer who intentionally treats applicants or employees less favorably than others based on one of the protected classes of color, race, sex, religion, national origin, age, or disability (Cavico and Mujtaba, 2009). The discrimination against the employee is willful, intentional, and purposeful; and thus the employee needs to produce evidence of the employer's specific intent to discriminate. However, intent to discriminate can be inferred. So, for example, when the employee is a member of a protected class, such as a racial minority, and is qualified for a position or promotion, and is rejected by the employer while the position remains open, and the employer continues to seek applicants, then an initial or *prima facie* case of discrimination can be sustained. The "disparate treatment" doctrine was articulated by the U.S. Supreme Court case of *McDonnell Douglas Corp. v. Green* (1973) and modified by *Community Affairs v. Burdine* (1981) and *St. Mary's Honor Center v. Hicks* (1993). The analysis for a "disparate treatment" claim involves a shifting burden of proof as follows: (1) first, the complainant must put forth credible evidence to establish a *prima facie* case of discrimination; (2) then if such evidence is established, the defendant employer must next articulate, through admissible evidence, a legitimate, non-discriminatory explanation or reason, such as a business necessity, for its actions; and finally (3) the burden shifts to the plaintiff employee to establish that the employer's proffered reason was merely a pretext to hide discrimination (Cavico and Mujtaba, 2008; Mahajan, 2007; *McDonnell Douglas*, 1973,

pp. 802-04; *Burdine*, 1981, pp. 252-56). If the plaintiff employee cannot offer any evidence to show that the defendant employer's articulated, facially neutral reason for the termination was a fake one and a subterfuge to mask discriminatory intent, the employee's case cannot be sustained. One major problem for applicants and employees is that the employer actually may be acting subconsciously to discriminate, for example, failing to hire a pregnant applicant, which fact was learned on social media, because of worries that the employee would soon be taking maternity leave (Kwoh, 2012).

Although the EEOC does not have a distinct set of social media policies yet, the agency does have policies regarding employer pre-employment inquiries which are very relevant to the employer's use of social media to screen employees (EEOC, Prohibited Employment Policies/Practices, Pre-employment Inquiries, 2012). The EEOC states that generally, any information obtained or requested by the employer during the pre-employment process should be limited to information essential to determining whether an individual is qualified for a position; moreover, the EEOC regards information concerning race, color, sex, national origin, and religion irrelevant in such job determinations. Accordingly, the agency warns that any inquiries about organizations, clubs, societies, and lodges of which the applicant may be a member, or any other similar type questions, which might indicate the applicant's race, color, sex, national origin, religion, as well as age, disability status, or ancestry, should generally be avoided. Moreover, employers, for similar reasons the agency counsels, should not seek out a photograph of an applicant (which if needed later for identification purposes can be obtained after an offer of employment is made) (EEOC, Prohibited Employment Policies/Practices, Pre-employment Inquiries, 2012).

There are now some social media civil rights cases. Although a public sector case, as well as one in which the employee's claims were deemed to be without merit, the case of *Marshall v. Mayor and Alderman of the City of Savannah, Georgia* (2010) is instructive. In *Marshall* (2010), a firefighter for the city was disciplined for conduct detrimental to the department for posting work-related pictures as well as department training and recruitment material on her personal MySpace account, which also included personal modeling photos of the firefighter, some of which were sexually provocative. The essence of the plaintiff employee's case was that she was not given the same opportunity as male firefighters were to remove offending material from her site without sanction by the department. The case, though unsuccessful, nonetheless emerges as an illustration of a social media-based, disparate treatment, gender discrimination lawsuit. Another civil rights social media case, involving religion, is the federal district court case of *Gaskell v. University of Kentucky* (2010), where the plaintiff job applicant contended that he was rejected for a director of the university observatory position due to his religious beliefs, particularly his belief in "creationism," which a member of the search committee discerned by accessing the plaintiff's personal website. The case, however, was ultimately settled for \$125,000 (Jatana, Sandoval, and Glyer, 2012, p. 15).

The other legal avenue claimants may travel to prove their employment discrimination claims is called "disparate impact," or at times "adverse impact." Disparate impact as a legal doctrine was first solidified in case law by the U.S. Supreme Court case of *Griggs v. Duke Power* (1971), further refined by the Court in *Albemarle Paper Co. v. Moody* (1975); codified in statute by the Civil Rights Act of 1991 (Civil Rights Act of 1991); and reaffirmed by the Supreme Court in *Raytheon Co. v. Hernandez* (2003). Pursuant to this theory, it is illegal for an employer to promulgate and apply a neutral employment policy that has a disparate, or disproportionate, negative impact on employees and applicants of a particular race, color, religion, sex, or national origin, unless the policy is job related and necessary to the operation of the business, or, in the case of age, the policy is based on a reasonable factor other than age (Equal Employment Opportunity Commission, Prohibited Employment Policies/Practices, 2011). This disparate impact legal doctrine does not require proof of an employer's intent to discriminate. Rather, "a superficially neutral employment policy, practice or standard may violate the Civil Rights Act if it has a disproportionate discriminatory impact on a protected class of employees" (Cavico and Mujtaba, 2008, p. 501). Accordingly, such a practice will be deemed illegal if it has a disproportionate discriminatory impact on a protected class and the employer cannot justify the practice out of legitimate business necessity (Mahajan, 2007). It is important to point out that the EEOC maintains that federal and state equal opportunity laws do not clearly prohibit employers from making pre-employment inquiries that relate to, or disproportionately screen out, applicants and candidates based on race, color, sex, national origin, or religion, but nevertheless that such inquiries can be used as evidence of the employer's intent to discriminate unless the inquiries can be justified by some business purpose (EEOC, Prohibited Employment Policies/Practices, Pre-employment Inquiries, 2012).

c. Age Discrimination in Employment Act (ADEA)

Social media policies and practices by the employer also can be challenged pursuant to the Age Discrimination in Employment Act (1967), but only if the employer's social media policy and practices were based on, implicates, or functions to discriminate based on age (and the employee is over 40 years of age). As with the other protected characteristics, the EEOC specifically states that ascertaining information during the pre-employment stage regarding age is irrelevant in determining whether a person is qualified for a position (EEOC, Prohibited Employment Policies/Practices, Pre-employment Inquiries, 2012). Therefore, any employer pre-employment social media search concerning a job applicant must be done very carefully to exclude the applicant's age or appearance as "aged" as a decision-making criterion.

d. Americans with Disabilities Act (ADA)

Similar to redress on Title VII and the ADEA, if the employer's social media policies and practices can be linked to a disability, then an applicant or employee may be able to utilize the Americans with Disabilities Act to secure redress from discrimination. Social media policies and practices, therefore, can be challenged pursuant to the Americans with Disabilities Act, but only if the employer's social media policy was based on, implicates, or functions to discriminate based on disability. That is, as with Title VII and the ADEA, the employee or applicant will need evidence – direct or inferential, that the determination not to hire or promote him or her was based on and motivated not by merely posting on social media but a legally recognized disability. The EEOC, it must be emphasized, explicitly prohibits employers from making pre-employment "inquiries" about disabilities (EEOC, Prohibited Employment Policies/Practices, Pre-employment Inquiries, 2012). Consequently, the employer's searching of social media and ascertaining that a job applicant who was not hired has a legally recognized disability could trigger legal liability under the ADA.

An employer's height and weight requirements, moreover, could trigger the ADA. The Equal Employment Opportunity Commission, however, advises that "normal deviations" in height or weight, which are not the result of any physiological defect or disorder or physical abnormality, are not disabling impairments covered by the Americans with Disabilities Act (Equal Employment Opportunity Commission, Notice Concerning the Americans with Disabilities Act Amendments Act of 2008, 2011). Being overweight, therefore, is not as a general rule a disability; however, severe obesity, defined as body weight more than 100% over the norm, is an impairment (Equal Employment Opportunity, Commission, Notice Concerning the Americans with Disabilities Act Amendments Act of 2008, 2011). For weight to be considered a disability, one must be "morbidly" obese; and emphasizes that the purpose of the ADA is to protect the truly disabled, and thus the statute should not be used as a "catch-all" for all types of discrimination. Social media-based discrimination also may rise to the level of a disability protected by the ADA when a person is deemed to have an impairment due to a "stigmatic" condition, for example, severe burns. Such impairment does not by itself substantially limit a major life activity as required by the ADA; however, such a condition is deemed by the EEOC to be an impairment because the negative attitudes and reactions of others to the condition render it a substantially limiting to the person afflicted. Consequently, such a person, the EEOC states, may be continuously denied employment due to the employers' fears about negative reactions from customers, clients, or co-workers. Such a person would thus have a "disability" and would be protected by the ADA (Equal Employment Opportunity Commission, Notice Concerning the Americans with Disabilities Act Amendments Act of 2008, 2011). Accordingly, as with Title VII and the ADEA, unless the social media-based job determinations adverse to the employee or job applicant can be connected to a disability or an impairment pursuant to the ADA, the social media-based decision-making by the employer is legal. In addition to lawsuits based on employers violating the aforementioned civil rights statutes, federal civil rights laws also allow a lawsuit by an employee against his or her employer for harassment as well as for retaliating against the employee for seeking to vindicate rights protected by the civil rights statutes.

e. Harassment

In the United States, harassment is construed to be a form of employment discrimination and thus illegal (Gelms, 2012). Accordingly, civil rights laws on the federal, that is, national, level make it illegal to harass an employee due to the employee's race, color, religion, sex, and national origin, pursuant to Title VII of the Civil Rights Act of 1964, age (40 or older), pursuant to the Age Discrimination in Employment Act of 1997, and disability, pursuant to the Americans with Disabilities Act of 1990. It is also illegal in the United States for an employer to harass an employee because he or she has complained about discrimination or harassment, filed a charge of discrimination, or participated in an employment discrimination investigation, proceeding, or lawsuit (EEOC, Prohibited Employment

Policies/Practices, 2012). Each of the states in the United States may also have comparable civil rights laws protecting employees from harassment as well as discrimination, of course, in employment. State laws, moreover, can grant an employee more protection than the federal laws do. For example, Title VII of the federal Civil Rights Act, though prohibiting discrimination and harassment based on an employee's gender, has not been interpreted by the courts in the U.S. to extend protections to employees based on their "gender identity," that is, employees who are gay, lesbian, transgenders, or sexually transitioning. However, many states in the U.S. now by virtue of their state civil rights laws have extended employment protection based on one's sexual orientation or gender identity (Cavico, Muffler, and Mujtaba, 2012).

According to the Equal Employment Opportunity Commission (EEOC), the federal agency in the U.S. empowered to enforce civil rights laws, illegal harassment is unwelcome conduct that is based on one of the aforementioned protected characteristics (EEOC, Prohibited Employment Policies/Practices, Harassment, 2012). Harassment becomes illegal when: 1) suffering the offensive conduct becomes a condition of continued employment; or 2) the conduct is so severe or pervasive that a work environment was created that is to a reasonable person intimidating, hostile, or abusive (EEOC, Prohibited Employment Policies/Practices, Harassment, 2012). Harassment can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. Harassment can also consist of offensive jokes, slurs, epithets, name-calling, ridicule or mockery, insults or put-downs, offensive objects or pictures, and threats, intimidation, and physical assault. However, the EEOC relates that the law does not make illegal simple teasing, off-hand comments, or isolated incidents that are not very serious (EEOC, Prohibited Employment Policies/Practices, 2012). Similarly, petty slights and annoyances as well as isolated incidents (unless extremely serious) do not rise to the level of illegal actions. Nonetheless, if the harassment is so frequent or severe that it creates a "hostile or offensive work environment," or if it causes the aggrieved employee to suffer an adverse employment action, such as a demotion or a discharge, then the harassment is illegal. Gelms (2012, p. 253) indicates that the courts, based on the preceding factors, will use a "totality of the circumstances" test to determine if social media harassment is actionable as a civil rights wrong. Yet to complicate matters, Gelms (2012, p. 253) points out that the Supreme Court, "notably...made no reference to the location or timing..." of the wrongful conduct. Gelms (2012, p. 259) also notes that certain U.S. Courts of Appeal "have expressly indicated that harassment conducted outside the physical walls of the workplace is part of the totality of circumstances for purposes of a hostile work environment claim." Yet, "these courts have not clearly defined what harassment beyond the office's 'four walls' should be considered" (Gelms, 2012, p. 259). Moreover, to even further complicate matters, Gelms (2012, p. 262) indicates that "several federal appellate courts have categorically excluded evidence of extra-office harassment in reviewing a hostile work environment claim." Nonetheless, Jatana, Sandoval, and Glyer (2012, p. 15) provide an illustration of a social media-based harassment situation: "Take, for example, a supervisor wanting to 'friend' a co-worker on Facebook. If the employee accepts the friendship request and opens communication with the supervisor outside the workplace, any inappropriate remarks or conversations between the two, even though outside work hours or the workplace, may lead to a harassment claim." An actual case example of such a Facebook scenario is the federal district court case of *Garvin and Murphy v. Siouxland Mental Health Services, Inc.* (2012), where a female supervisor asked a subordinate employee to be a Facebook "friend"; whereupon the supervisor sent Facebook messages and a picture with sexual overtones, and then in a Facebook chat stated that she would like to have a sexual relationship with the employee. The court held that the Facebook communication formed part of the employee's evidence of sexual harassment, and that there was sufficient evidence of a sexually hostile workplace based on the harassment (*Garvin and Murphy v. Siouxland Mental Health Services, Inc.*, 2012). Another example of harassment in terms of a hostile work environment involving social media is the federal district court case of *Targonski v. City of Oak Ridge* (2012). The case is interesting because the plaintiff employee's Facebook postings perhaps undercut her claims of harassment. In *Targonski*, the plaintiff, a police officer, sued the city employer for harassment based on another police officer spreading rumours that the plaintiff wanted to engage in lesbian sex, and other officers continually asking the plaintiff if the rumours were true. However, what undercut the plaintiff's case were her postings on Facebook expressing her desire for a female friend to join her naked in a hot tub as well as discussing naked Twister. Plaintiff's Facebook "friends" also made postings about female orgies involving plaintiff. The defendant city contended that the plaintiff could not have been offended by the rumours because she was saying the very same things on Facebook. The plaintiff, nonetheless, rejoined that her Facebook postings were "obviously jokes" and they were not humiliating or embarrassing to her because they were "between friends," whereas the rumours and questions occurred in the workplace. The federal district court judge agreed with the plaintiff, saying her argument had "some substance," and allowed the case to go to a jury. However, the

judge did note that the jury would have “ample opportunity to consider the Facebook evidence and reach its own conclusions” (*Targonski v. City of Oak Ridge*, 2012, p. 29).

Vicarious (or imputed) liability applies to civil rights wrongs encompassing harassment (*Debord v. Mercy Health Systems of Kansas, Inc.*, 2012; *Garvin and Murphy v. Siouland Mental Health Services, Inc.*, 2012; Gelms, 2012). Jatana, Sandoval, and Glycer (2012, p. 15) underscore that “anti-harassment laws can be particularly challenging because social media expands the employer’s liability outside the workplace and outside work hours.” Hudson and Roberts (2012, p. 777) add that “employees are increasingly harassing coworkers through electronic means rather than making comments around the office or in meetings.” Significantly, pursuant to statute, EEOC guidelines, and court interpretation, an employer is *automatically* liable for the harassment committed by its managers and supervisors if the harassment is directed at a subordinate employee who suffers a tangible, negative, employment action, such as a discharge, a failure to hire or promote, or a loss of wages (EEOC, Prohibited Employment Policies/Practices, Employer Liability for Harassment, 2012; Gelms, 2012). This liability is absolute; there is no defense. However, if the manager’s or supervisor’s harassment, for example, in the form of a hostile or offensive work environment, does not result in some sort of tangible job loss or harm, the employer has a defense if it can establish that: 1) the employer reasonably tried to prevent the harassment; 2) the employer promptly corrected the harassing misconduct; and 3) the employee reasonably failed to take advantage of any preventive or corrective opportunities provided by the employer (Gelms, 2012; Cavico and Mujtaba, 2008). An illustration is the federal district court case of *DeBord v. Mercy Health Systems of Kansas, Inc.* (2012), where the employee, who worked in the radiology department, accused her supervisor, the director of the department, of improperly touching her by putting his “unusually cold hands” on the back of her neck or **bear** arms and rubbing her back. Although the employee stated that these actions happened about three times a week, the employee never contacted administration. The offended employee sued her employer on vicarious liability principles for the sexual harassment; but the court ruled that since the employee did not suffer any job harm or loss due to the harassment, the employer acted reasonably to prevent and respond to sexual harassment, and the employee did not take advantage of the employer’s preventative opportunities, the employer was not vicariously liable for the supervisor’s harassment (*DeBord v. Mercy Health Systems of Kansas, Inc.*, 2012). Furthermore, an employer will be liable for the harassment conduct of its non-managerial and non-supervisory personnel if the employer knew, or should have known, about the harassment and then failed to take prompt and appropriate corrective action (Gelms, 2012).

An illustration of a social media-based harassment case – a racial harassment one - is the federal district court case of *Amira-Jabbar v. Travel Services, Inc.* (2010). In *Amira-Jabbar* (2010), a co-worker made allegedly offensive racial comments about the plaintiff employee on a social networking site, the co-worker’s personal Facebook page. The comments in the posting also included a photo of the plaintiff and other co-workers at a work-related function. The plaintiff employee sued the employer, contending it was liable because it permitted employees to post comments and photos on social media sites during company time for company purposes. Ultimately, the harassment case was dismissed since the court did not construe the harassment as sufficiently offensive and hostile, in particular because the comments were off-hand and isolated, as well as for the fact that the employer promptly investigated the matter, took remedial action, and blocked employee access to social media sites on company computers. The case, though, emerges as a “warning sign” for employers to have an anti-harassment element as part of their social media policies, and to carefully police them. Nevertheless, Gelms (2012, p. 272) expresses a concern “that the lack of clear boundaries regarding online communications...encourages harassers to engage in conduct that they might have refrained from within the walls of the workplace.”

Yet another legal dimension to harassment brings in the criminal law. In the United States, states typically have had laws making harassment, stalking, and bullying a crime; and now these laws are being applied to online communications (Hudson and Roberts, 2012; Corbett, 2010; Henderson, 2009). The emergence of the Internet, social media, Facebook, and other forms of electronic communication has given rise to new forms of harassment, bullying, and stalking, and consequently new crimes – cyber-bullying, cyber-harassment, and cyber-stalking. Cyber-bullying is typically used in the context of children; it occurs when the Internet, cell phone, or other electronic devices are used by a child to threaten, torment, harm, humiliate, or harass another child. However, adults can also be guilty of cyber-bullying (Henderson, 2009). Cyber-stalking and cyber-harassment, however, involve adults and thus have workplace ramifications. Generally, cyber-harassment is the use of the Internet, a computer, or electronic device to make unwanted communications to harass another person by alarming, threatening, annoying, or bothering a person and by causing a reasonable person emotional distress, causing one to be intimidated or frightened, or putting a

person in reasonable fear or apprehension of offensive physical contact or bodily injury or harm. If the harassment develops into a course of conduct, that is, a series of acts over a period of time, which also evidences a continuity of purpose, the more serious infraction of cyber-stalking may occur (Corbett, 2012; Humphrey, 2011; Henderson, 2009). Cyber-harassment and cyber-stalking are crimes that are usually punishable on the state level in the United States, typically as misdemeanors for the first offense, and then as felonies for continued or more harmful transgressions (Corbett, 2012; Humphrey, 2011; Henderson, 2009; Cavico and Mujtaba, 2008). Corbett (2012) and Henderson (2009) relate that cyber-stalking can be covered under separate stalking laws. Many states have amended their bullying, harassment, and stalking statutes to encompass electronic forms of this wrongful conduct (Corbett, 2012; Humphrey, 2011; Henderson, 2009). Hudson and Roberts (2012, p. 777) indicate that Texas in 2009 amended its criminal code to prohibit sending electronic communications with an intent to harm or defraud any person; and that Delaware goes further by prohibiting any electronic communication that a person knows is likely to cause annoyance or harm. However, Henderson (2009, p. 388) points out that “since state boundaries do not limit the Internet, federal anti-harassment statutes may also be necessary to sufficiently curb the problem.” Accordingly, employees as well as employers and people generally now must be keenly aware that social media, social interactions online, electronic communications, and work using the Internet may also give rise to criminal as well as civil liability in the United States.

f. Retaliation Doctrine

Pursuant to civil rights laws, it is also illegal for an employer to retaliate against an employee because he or she filed a discrimination lawsuit, filed a charge of discrimination, testified, assisted, complained about discrimination, or participated in any employment discrimination investigation, proceeding, hearing, or lawsuit (*Garvin and Murphy v. Siouxland Mental Health Services, Inc.*, 2012; Title VII of the Civil Rights Act of 1964, Section 2000e-3(a), 2011; Equal Employment Opportunity Commission, Prohibited Employment Policies/Practices, 2011). Specifically, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, as well as the Americans with Disabilities Act, have anti-retaliation provisions; and, significantly, that an aggrieved employee can prevail in a retaliation lawsuit even if the employee cannot sustain the underlying discrimination claim. The anti-retaliation doctrine also protects employees who opposed any practice that is an unlawful employment practice pursuant to Title VII (Title VII of the Civil Rights Act of 1964, Section 2000e-3(a), 2011). Once again, it must be emphasized that for a successful retaliation claim it is not necessary for the plaintiff employee to prevail on the underlying legal claim involving the employer’s use of social media to make a negative job determination; but the underlying claim, even if it proved to be without merit, must be at least arguably connected to a protected characteristic under civil rights laws.

An illustration of a social media based retaliation case is the federal district court decision in *Yancy v. U.S. Airways, Inc.* (2011). In *Yancy*, three airline workers, including a supervisor, posted a photo on Facebook of a co-worker, a customer service agent, hunched over her desk sleeping, with part of her buttocks and part of her thong underwear exposed. The employee claimed she had a medical condition that explained why she was crouching over her desk. The airline conducted an inquiry and the three employees were disciplined, but not fired. The employee, dissatisfied that they were not terminated, sued for sexual harassment due to the photograph. The employee was then temporarily suspended. Consequently, she sued for retaliation. However, the court did not find that retaliation was present because her employer had a good reason to temporarily suspend her while it investigated a very vulgar text message, containing the picture of a penis tattooed to look like a snake, which she allegedly sent to her supervisor (*Yancy v. U.S. Airways, Inc.*, 2011).

2. State and Local Sexual Orientation and Gender Identity Anti-Discrimination Statutes

A UCLA School of Law study in 2009 estimated that the U.S. workforce is comprised of 8.157 million lesbian, gay, bisexual, or transgender individuals (Sung 2011). The online digital silhouette of these individuals can be misused by employers vetting current employees and job applicants. Social media sites also can reveal an individual’s sexual preference via posting of photos of same-sex marriage ceremonies, the use of the “freedom flag,” imagery of the “rainbow” color scheme on “wallpaper” personal webpages, and the display of equality slogans and logos on websites. Regarding sexual orientation discrimination and social media, Jatana, Sandoval, and Glycer (2012, p. 15) point out that the “vast majority of social network users post private information online, including their sexual orientation.” This information can have unintended consequences as was the case where a part-time instructor was terminated by his employer, a Catholic college in Philadelphia, when he revealed on his Internet blog that he was in a

committed long-term same-sex relationship for about 15 years, which clearly met with his employer's displeasure (Associated Press, 2011). Moreover, a snooping employer's job investigating for such self-identifying imagery has become much easier on Facebook. In the summer of 2012, Facebook introduced the "status" icon option showing two males and two females in silhouetted formal wedding attire to allow their users to show their commitment in a same-sex relationship. Facebook took this step following Apple's popular iOS 6 operating system adding same-sex emoticons for its users (ABC News, 2012). Facebook and Apple have received accolades in recognizing the legitimacy of these types of relationships, but unfortunately such diversity has not been fully embraced by all U.S. companies in their workforce.

Employers must be mindful that discrimination against workers or job applicants based on their sexual preference may invite litigation. Although this area of law is quickly evolving, a current "snapshot" reflects a patchwork of state and municipal protections afforded to workers from sexual preference discrimination (Cavico, Muffler, and Mujtaba, 2012, p.9). While it is clear that Title VII of the Civil Rights Act of 1964 has no prohibition against discrimination based on sexual orientation or preference, there are a collection of federal administrative orders that afford protections of civilian federal employees from workplace discrimination based on their sexual preference (Cavico, Muffler, and Mujtaba, 2012 p. 4). With the elimination of the "don't ask, don't tell" policy in the United States' military ranks, the hiring, firing, or sanctioning of any federal or military member based upon sexual preference would be illegal. Thus, investigating federal and military members' online activities by the government in order to reveal the individual's sexual preference is ill-advised.

California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia prohibit sexual orientation and sexual preference discrimination by statute (Reeves and Decker, 2011, p. 64). Additionally, there has been a proliferation of local municipal codes and ordinances around the country which prevent this type of discrimination in the workplace within their specific geographic boundaries (Cavico, Muffler, and Mujtaba, 2011 p.11). Many of these municipal codes and ordinances exist in states, such as Florida, which do not prohibit discrimination in the workplace based on sexual preference. In light of the foregoing cobbled state and local ordinances, employers are best advised that they "surf" the internet and social media at their own risk when their purpose is to determine the sexual preference of job applicants or workers. Consequently,

Internet savvy employers therefore have access to a wealth of information about job applicants and employees online that likely would have been unavailable to them prior to the Internet age. But, as the saying goes, be careful what you wish for, as such information gathering on employees and job applicants necessarily results in learning more than an employer should or otherwise may be entitled to as part of an application process, including details regarding an employee's or applicant's protected characteristics. Discovering this information and thereafter using it as a basis for making any employment decision may run afoul of discrimination laws and give rise to termination and failure-to-hire claims (Jatana, Sandoval, and Glyer, 2012, p. 15).

3. National Labor Relations Act

Social media obviously makes it easier for employees to communicate with each other, and thus perhaps to complain about and to express their views on company policies and practices, management, coworkers, and work conditions. Employees' use of social media, therefore, may give rise to labor law issues. Employee social media postings and communications related to work may be protected by federal labor law even if the employees have only at-will status. However, employers who have entered union bargaining agreements and/or have unionized workforces especially must be very mindful of the effects of the National Labor Relations Act of 1935 (NLRA) (29 U.S.C. Sections 151-169) and its limitations on employers ability to enforce "social media" policies against union members. The paramount statute in the United States regulating labor relations is the National Labor Relations Act, which is also known as the Wagner Act. Section 7 of the NLRA grants employees the right to self-organization, to assist, form, or join labor unions, to bargain collectively with representatives of their own choosing, and, most importantly for the purposes herein, "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (29 U.S.C. Section 157). Section 7 of the NLRA (29 U.S.C. Section 157) thus protects a worker's right to engage in concerted activities, which are activities by and between coworkers to improve their wages and working conditions. Section 8(a)(1) of the NLRA, moreover, prohibits an employer from interfering, coercing, or restraining

employees in the exercise of their Section 7 rights (29 U.S.C. Section 158). The Supreme Court, in addition, has ruled that no restrictions can be placed on the rights of the employees to discuss organization and unionization among themselves and to solicit members to form or join a union (*NLRB v. Babcock & Wilcox Company*, 1956). Section 8(a)(1) of NLRA, therefore, prohibits an employer from interfering with employees as they engage in concerted activity. Any company policy that is too broad and consequently unreasonably tends to chill workers in the exercise of their Section 7 rights can be subject to a NLRA complaint (*Lafayette Park Hotel*, 1998, p. 825). This traditional labor relations legal principle has been applied to employer's modern-day social media policies (NLRB Memorandum OM 12-59, May 30, 2012). Furthermore, general company policies that are ambiguous in the terms or application and contain no limiting language to avoid violating Section 7 rights will be considered unlawful under the NLRA (*University Medical Center*, 2001, pp. 1320-22). These general labor relations policies and principles have also been applied to social media company rules (NLRB Memorandum OM 12-59, May 30, 2012). Accordingly, employees have the right under federal labor law to discuss self-organization and to collectively challenge workplace policies and practices and to seek to change them for their mutual benefit. Section 7 and Section 8, therefore, can protect employees who engage in protected "concerted activity" by communicating online by means of social media. Social media labor law issues can arise, therefore, in two scenarios: first, employer social media policies and practices that are accused of violating employees' rights under Section 7; and second, social media communications by employees that are asserted to be protected concerted activity. One critical question, of course, is what exactly constitutes protected "concerted activity" by employees utilizing social media or other online communications.

The National Labor Relations Board, the federal agency which implements and enforces the NLRA, did institute a complaint against an employer in Colorado, Emergency Medical Services Corporation of Greenwood Village, Colorado, for discharging an employee in violation of the NLRA. The employee, a medical technician at a medical transportation company, was frustrated that her supervisor would not let her seek the assistance of a union representative in preparing a response to a customer complaint about the employee. The employee made a derogatory post on Facebook referring to her supervisor with an abbreviation for a psychiatric patient. The employee's comments elicited responses from co-workers, which produced more negative comments about the supervisor. The employee was terminated. However, the NLRB ruled that the employer's enforcement of its social media policy, found in the employer's handbook, interfered with the employee's right under the NLRA because the employee's comments on Facebook amounted to "protected concerted activity" (Hearing and Ussery, Part I, 2012; Jatana, Sandoval, and Glycer, 2012, p. 14; Platt, 2012, pp. 30-31). The NLRB found that a social media policy by an employer was overbroad since it prohibited "inappropriate discussions" about the company, its management, or employees, and thus the prohibition could encompass protected concerted activity (Platt, 2012, p. 32; Smith, 2012, p. 4).

In another Section 7 case, *Hispanics United of Buffalo, Inc.* (2011), the NLRB Administrative Law Judge found that a Buffalo nonprofit organization unlawfully discharged five employees after they posted comments on Facebook concerning working conditions, including work load and staffing issues, because the postings on Facebook were protected concerted activity. The ALJ found that the employees' Facebook discussion was protected concerted activity within the meaning of Section 7 of the National Labor Relations Act. The communication involved a conversation among coworkers about their terms and conditions of employment, including their job performance and staffing levels, which is protected activity.

Platt (2012, pp. 31-32), in addition, discussed two cases that were resolved by means of an Advice Memorandum from the NLRB's Office of General Counsel: One involved an employee who worked for a collection agency, who posted a Facebook comment with an expletive complaining that the supervisor had reassigned her without good cause. The posting produced expressions of support online by other employees who added their negative comments and criticisms of the employer and discussed the possibility of instituting a class action suit against the company. The Board's General Counsel found this online activity to be protected concerted activity because the initial statement and the discussion it produced from co-workers clearly involved complaints about working conditions and the employer's treatment of its employees. The second case involved an employee who worked for home improvement store chain who made a comment on her Facebook page that included an expletive and the name of her employer. Several people responded to the comment, including a co-worker who liked the comment. The employee then added a comment that her employer did not appreciate its employees, but her co-workers did not respond to that comment. The employee was terminated due to these Facebook comments. The Board's General Counsel found the discharge to be legal, ruling that the employee was not protected by the NLRA, because when she made the post she had no particular audience in mind

and her post contained no language indicating that she wanted to initiate or motivate employees to engage in any group action. Platt (2012, p. 32), therefore concluded “in sum, concerted activity exists where the employee’s social media posting raised concerns over wages, hours or other terms and conditions of employment and co-employees expressed support for the issues raised in the employee’s social media posting. But where the employee is merely ‘gripping’ about something that happened at work, it is not concerted activity.”

The most recent NLRB legal advice comes from the agency’s Office of General Counsel in the form of legal memorandum. On May 30, 2012, the Office of General Counsel to the National Labor Relations Board authored a legal memorandum dissecting seven (7) recent “social media” policies of employers which have been subject to labor complaints (NLRB Memorandum OM 12-59, May 30, 2012). Six of the seven company policies were determined to contain provisions that were in part overbroad and unlawful under the NLRA. For example, in reviewing a motor vehicle manufacturer’s social media policy, the NLRB’s general counsel explained that the employer’s policy instructing employees be sure their posts are completely accurate and not to reveal non-public information on a public site was unlawful. This was based on the logic that the term ‘completely accurate and not misleading’ is overbroad because it could be “reasonably interpreted to apply to discussions about, or criticism of, the employer’s labor policies and its treatment of employees that would be protected by the Act [NLRA] so long as they are not maliciously false...Moreover, the policy does not provide any guidance as to the meaning of this term by specific examples or limit the term in any way that would exclude Section 7 activity” (NLRB Memorandum OM 12-59, May 30, 2012, pp. 6-7). Another one of these policies that was interpreted as unlawful was a health care provider’s social media policy. That policy was also scrutinized by the NLRB general counsel and interpreted to be unlawful under the NLRA when it required employees not to comment on any legal matters, including pending litigation and disputes. The NLRB’s general counsel rationalized that since the policy’s language was overbroad and could unlawfully prohibit employees from commenting on labor claims against the employer pending or contemplated by the workers, it was in violation of the NLRA (NLRB Memorandum OM 12-59, May 30, 2012 p. 10).

In the seventh case, Walmart’s revised policy was approved as lawful under the NLRA. In this case the employee worked as a “greeter” for Walmart. The employee maintained a Facebook account at home that was open to the public and identified himself as a Walmart employee. He had 1800 Facebook friends, some of whom were co-workers. On July 12, 2011 he posted the following on his Facebook “wall”:

The government needs to step in and set a limit on how many kids people are allowed to have based on their income. If you can’t afford to feed them you shouldn’t be allowed to have them.... Our population needs to be controlled! In my neck of the woods when the whitetail deer get to be too numerous we thin them out!.. Just go to your nearest big box store and start picking them off.... We cater too much to the handicapped nowadays! Hell, if you can’t walk, why don’t you stay the F@*k home!!!!

A customer read the post and complained to Walmart who terminated the employee three weeks later. The NLRB found that the aforementioned employee’s communication was not “protected” as a Section 7 communication, and thus ruled against the charging party. However, more interestingly, during the processing of this particular complaint, Walmart revised its “social media” policy; and the NLRB “gave its blessing” on its legality under the NLRA (*Walmart Case No. 11-CA-067171*, May 30, 2012). This policy is attached hereto as “**Appendix A**” for the reader to understand how to properly frame a “social media” policy in conformity with labor law. Nonetheless, Danaher (2012, p. 11) warns that “while employers may assume that the easiest way to assure full compliance with Section 7 is simply to use the exemplar policy in its totality, those employers should understand that company policies are not one-size-fits-all. A more practical solution would be to review the exemplar policy carefully, and then tailor its core concepts to fit the values and existing needs of the specific employers.”

Smith (2012, p. 4) further explains that social media activity by employees may not be protected as concerted activity “where it is best characterized as an individual complaint about working conditions specific to the employee, and is not directed to co-workers, or meant to induce group action, or when the employee’s comments are ‘maliciously false,’ or inappropriate comments about an employee’s clients.” Jatana, Sandoval, and Glycer (2012, p. 14), based on NLRB decisions as well as a 2011 report from the agency’s General Counsel as well as Advice Memorandum from the Counsel, offer some counsel as to social media conduct by employees that would *not* be protected: 1) comments that did not pertain to the terms and conditions of employment; 2) messages to relatives and not co-workers; 3) not

discussing a posting with another employee; 4) not having co-workers responding to a post; 5) vulgar references; and 6) individual gripes. Furthermore, Jatana, Sandoval, and Glyer (2012, p. 14) advise that the NLRB could find employer social media policies containing the following language to be unlawful: 1) prohibiting employees from disparaging remarks, inappropriate language or pictures, language of a general offensive nature, or insensitive, rude, discourteous language or behavior; 2) prohibiting the use of “any social media that may violate, compromise, or disregard the rights and reasonable expectations of privacy or confidential information of any person or entity”; 3) prohibiting postings that constitute harassment, defamation, or embarrassment to the employer or co-workers; 4) prohibiting statements that lack truthfulness; 5) prohibiting employees from harming the reputation or goodwill of the employer or co-workers; and 6) prohibiting employees on their own time from using their own social media to discuss the employer’s business. Jatana, Sandoval, and Glyer (2012, p. 14) explain that the preceding employer social media policies, without further definition and illustration, could be deemed overbroad, and thus illegal, because they “would have the potential of chilling employees in exercising their Section 7 rights.” Similarly, Platt (2012, p. 32), in an analysis of Board decisions and pronouncements, warns employers against “overbroad policies” with “overbroad language,” such as prohibitions against “harassment,” “unprofessional conduct,” “disparaging comments,” “inappropriate comments,” “insubordination,” and “disrespectful comments.” Forbidding the employees to discuss unionization on social media would, of course, be unlawful. Fleming and Miles (2012, p. 20) advise that “employers and human resource managers should be cognizant of that fact that an employee’s actions of complaining about his employer or supervisor on social media sites may constitute protected concerted activity under the NLRA.” Furthermore, Danaher (2012) emphasizes that even a company’s policy that employees who were uncertain that their social media postings violated company policy, and who then should check with the employer to see if they were appropriate postings, was deemed to be a violation of the law, since a rule that requires employees to secure permission from the employer as a precondition to engaging in activities protected by Section 7 violated the NLRA. Moreover, Fleming and Miles (2012, p. 20) warn that “also employers must recognize that postings on social media sites made by a single employee that could possibly solicit or invite responses from other employees may constitute concerted activity.” Finally, Hearing and Ussery (Part I, 2012, p. 35) note that regarding the meaning of protected concerted activity, “while the NLRB has yet to address the issue in the context of an employer’s utilization and oversight of social networking efforts, one could anticipate the board’s treatment of these virtual electronic bulletin boards in the context of unlawful interference, surveillance or prohibition of solicitation.”

4. Federal Wage and Hour Laws

Federal wage and hour laws also can have relevance to social media and employment. As noted by Hearing and Ussery (Part I, 2012), wage and hour issues can arise in two ways. First, the employee, perhaps a telecommuting employee, may contend that he or she did work for the employer by means of social media, such as work-related posts on social networking sites, for which the employee has not been compensated. Conversely, the employer, by means of monitoring of social media sites (presumably with prior notice to the employees), may contend that the employee is not entitled to compensation because the postings on social media were not work-related. As such, Jatana, Sandoval, and Glyer (2012, p. 13) point out that today “many employers are struggling with measures to ensure that their employees are not using Facebook or sending tweets while on the clock.” In one unusual case, an apparently very angry employer, upset over the employee’s use of the employer’s computer system and the Internet for personal reasons on the employer’s “time,” sought to seek criminal sanctions against the employee pursuant to an anti-hacking statute, the federal Computer Fraud and Abuse Act, which was designed to target “hackers” who access computers to steal information. The federal district court, however, stated that it would not interpret the criminal statute to encompass employee misconduct in the private sector, that a “rule of leniency” required a narrow statutory interpretation by the judiciary, and that it would be up to the legislative body to rule otherwise (*Lee v. PMSI, Inc*, 2012, p. 6).

5. Occupational Safety and Health Act

The federal Occupational Safety and Health Act (OSHA) also can have social media and employment ramifications, especially pertaining to workplace violence. Generally, OSHA requires employers to provide employees with a workplace free from hazards that can cause death or serious bodily harm (Occupational Safety and Health Act, Section 5(a)(1), 2012). Consequently, pursuant to the statute, an employer may have a legal duty to protect employees and other people from harm caused by employees that the employer knew, or should have known, posed a risk of harm to others (Jatana, Sandoval, and Glyer, 2012). The failure to guard against workplace violence may be a violation of this

statutory obligation (as well as the commission of the common law tort of negligence). Accordingly, the employer's use of social media to screen out potentially dangerous applicants and to discharge potentially dangerous employees can help to fulfill the employer's legal duty to have a safe workplace for employees, as well as clients, customers, and contractors.

6. State Lifestyle Discrimination and Freedom of Association Laws

Recognizing the underlying potential unfairness of social media-based employment determinations by employers under the guise of the employment at-will principle, state governments have tried to fill the void in this area due to the difficulty of employees in sustaining a lawsuit pursuant to federal statutes and the common law. Often this situation is typical in the area of employment law, where "local" jurisdictions act as experimental laboratories for pressing, progressive social change to address their local populace's concerns. For example, in the void of federal level protections, many state and local jurisdictions have taken the lead in outlawing discrimination in employment based on sexual orientation, preference, and gender identity (Cavico, Muffler, and Mujtaba, 2012, pp. 9-13, 2012). As such, in addition to federal civil rights laws in the United States, there are state statutes that can impact social media policies and practices. A few states, such as California, Colorado, Connecticut, New York, and North Dakota, now have very broad statutes protecting the rights of employees to engage in lawful activities outside of the workplace. These statutes typically forbid employers from prohibiting employees to engage in lawful activities and to have associations unless the activity or association conflicts with the employer's business interest or harms its reputation (Abril, Levin, Del Riego, 2012; Davidson and Forsythe, 2011). These policies have been used in the context of "office romance" (Cavico, Samuels, and Mujtaba, 2012). Although these statutes were not created with employee social media use in mind, they may be interpreted to protect an employee's use of social media as part of the employee's statutory right to live his or her off-duty life free from unwanted employer intrusion, interference, and reprisal.

a. State Statutes

California

The California law prohibits the discharge, demotion, or suspension of employees for lawful conduct which occurs during non-working hours, outside of the workplace (California Labor Code Sections 98.6 and 96(k) (2011)). However, the courts have explained that this law "does not set forth an independent public policy that provides employees with any substantive rights, but rather, merely establishes a procedure by which the Labor Commissioner may assert, on behalf of employees, recognized constitutional rights" (*Barbee v. Household Automotive Finance Corp.*, 2003; *Grinzi v. San Diego Hospice Corp.*, 2004).

For example, in *Barbee* (2003), an employee who was terminated for dating a subordinate alleged that his privacy rights and rights under Section 96(k) had been violated, as his relationship was lawful and conducted during non-working hours away from the workplace. However, the court summarily adjudicated the case, reasoning that Section 96(k) is not an original source of employee rights, but merely provides a supplemental procedure for asserting employee claims for which a legal basis already exists elsewhere in the law. The court explained that employees already have the right to pursue wrongful termination claims based on constitutional rights violations; Section 96(k) merely allows the Labor Commission to also act on behalf of employees to defend existing public policies (*Barbee*, 2003). In this case, the employee would have had to assert recognized constitutional rights in order to succeed under Section 96(k). Since he could not do so, his wrongful termination claim was not viable (*Barbee*, 2003).

Similarly, in *Grinzi* (2004), an employee who claimed to have been terminated because of her membership in an investment group alleged that her termination was a violation of her First Amendment rights and her rights under Sections 96(k) and 98.6 (*Grinzi*, 2004). The court rejected her argument, reasoning that common law causes of action, such as wrongful termination, cannot be broader than the statute on which they depend. Consequently, the plaintiff would need to allege that the termination violated a recognized constitutional right. The employee, however, had only alleged rights under the First Amendment, which prevents the government from interfering with free speech, but does not apply to private employers (*Grinzi*, 2004).

Thus, under the case law, neither Section 96(k) nor Section 98.6 supports a public policy against a private employer's termination of an employee for lawful conduct during non-working hours off the employer's premises

unless such conduct is already protected (*Grinzi*, 2003; *Barbee*, 2004). In this way, one will likely see that these statutes will not be useful in asserting wrongful termination claims arising out of social media activity, unless the social media activity is protected elsewhere in the law.

Colorado

Colorado has one of the broadest lifestyle discrimination statutes in the United States (Colo. Rev. Stat. § 24-34-402.5 (2011); Roche, 2011; Jackson, 1996). Its statute provides that it is a discriminatory or unfair employment practice to fire an employee for engaging in any lawful activity off the premises of the employer during nonworking hours (Colo. Rev. Stat. § 24-34-402.5). However, there are a few exceptions, to wit: the employer may terminate the employee if the lawful activity (1) relates to a bona fide occupational requirement, (2) is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer, or (3) is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest (Colo. Rev. Stat. § 24-34-402.5).

The statute likely provides protection for terminations based on smoking tobacco, employee dating, political or social affiliation, dangerous sports, and sexual activity, including homosexual activity, which takes place outside the job (*Evans v. Romer*, 1994); *Ozer v. Borquez*, 1997); *Marsh v. Delta Airlines*, 1997; Roche, 2011).

However, the statute will not provide protection if the lawful activity fits into one of the exceptions listed above (Colo. Rev. Stat. § 24-34-402.5). Accordingly, the courts have explained that the wrongful discharge statute should be analyzed in two parts: Did the employer terminate an employee for participation in a lawful activity? If so, was there a statutory exception to justify that termination (*Marsh*, 1997)? For example, in *Marsh* (1997), Michael Marsh was fired after a letter that he wrote that was critical of his employer was published in the newspaper. Marsh argued that his termination violated Colorado's statute because the writing of the letter was a lawful off-duty activity. However, his employer claimed that the termination was justified under the exception to the statute. The court agreed with the employer, finding that Marsh's letter to the editor breached the bona fide occupational requirements of an implied duty of loyalty covered in the statute (*Marsh*, 1997). The court reasoned:

The wrongful discharge statute, [§ 24-34-402.5](#), was created to protect employees in their "off-the-job-privacy." ...More specifically, the law was meant to provide a shield to employees who engage in activities that are personally distasteful to their employer, but which activities are legal and unrelated to an employee's job duties. In application, this statute should protect the job security of homosexuals who would otherwise be fired by an employer who discriminates against gay people, members of Ross Perot's new political party who are employed by a fervent democrat, or even smokers who are employed by an employer with strong anti-tobacco feelings. See *Evans v. Romer*, 882 P.2d 1335, 1346-47 (Colo. 1994). The one common thread that links all of these examples is that the statute shields employees who are engaging in private off-the-job activity, that is unrelated to the employees job duties, from termination for participation in the non-work related activities.

This statutory shield, however, is not absolute. The fact that the Colorado legislature provided three exceptions to the general rule reflects the fact that the legislature recognized that the policy of protecting an employee's off-the-job privacy must be balanced against the business needs of an employer. By providing exceptions to the statute's general rule, the legislature indicated that it did not intend this privacy statute to provide a sword to employees thereby allowing employees to strike indiscriminate public blows against the business reputation of their employer. Accordingly, I find that one of the bona fide occupational requirements encompassed within the scope of [Colo. Rev. Stat. § 24-34-402.5\(1\)\(a\)](#) is an implied duty of loyalty, with regard to public communications, that employees owe to their employers (*Marsh*, 1997, p. 1460).

On the other hand, in *Gwin* (1996), an employer was found to have violated the statute for terminating an employee after the employee demanded a refund of money that he had paid to participate in a voluntary sales seminar related to his job (*Gwin v. Chesrown Chevrolet*, 1996). Thus, one can see that the statute applies to lawful, off-duty conduct, even if work-related, unless the statute fits squarely into one of the statutory protections listed above. The court in *Watson v. Public Service Co.* (2008) found that the statute applies to lawful, off-duty conduct, even if work-related.

Accordingly, this broad statute will likely protect online activity unless the employer can clearly show that the activity fits into one of the statutory exceptions.

Connecticut

The Connecticut statute provides that any employer “who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages” (Conn. Gen. Stat. § 31-51q (2006)).

Unlike California, Connecticut applies First Amendment protection to both public and private employees (*Schumann v. Dianon Systems*, 2012; *Cotto v. United Technologies Corp.*, 1999). However, if the employee's activity does not fall within the purview of a constitutional guarantee, the statute will not afford protection (Conn. Gen. Stat. § 31-51q; *Schumann* 2012). In determining whether an employee's free speech rights have been limited, Connecticut has employed the standard set forth by the United States Supreme Court (*Schumann*, 2012; *Connick v. Myers*, 1983; *Pickering v. Board of Education*, 1968). A court thus must balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the employer, in promoting the efficiency of the services it performs. Whether an employee's speech addresses a matter of public concern is determined by the content, form, and context of the speech, based on the circumstances of the case as a whole.

Most recently, in *Schumann* (2012), the Connecticut Supreme Court added another layer to this test by clarifying that a newer Supreme Court case, *Garcetti v. Ceballos* (2006), would apply to private employees, because it had been argued that *Garcetti* should only apply to public employees (*Schumann*; 2012; *Garcetti v. Ceballos*, 2006). *Garcetti* (2006) provided that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for first amendment purposes, and thus the speech is not constitutionally protected. In *Schumann* (2012), the dispute arose from a laboratory doctor's statements concerning the safety of a new test and the proposal of a new set of diagnostic reporting terms, as well as his refusal to use the new terms in connection with the tests that he performed. The court explained that although the analysis requires particularized balancing based on the unique facts presented in each case, whether the employee's speech is constitutionally protected is a question of law subject to “independent” de novo review (*Schumann*, 2012). Accordingly, the *Schumann* (2012) court reversed the earlier court's decision, finding that the doctor's speech in its entirety was extraordinarily disruptive to his employment and therefore would not be constitutionally protected. Although the *Schumann* (2012) case did not involve the Internet, the court explained that it agreed with the reasoning of another federal court district court decision, *German v. Fox* (2007), which applied the *Garcetti* (2006) test to a case where the director of public relations for a private, nonprofit organization that promotes travel in southwestern Virginia claimed that his employment had been terminated in retaliation for numerous e-mails he had sent to various state officials and employees criticizing the location and facilities of a temporarily relocated welcome center (*Schumann*, 2012; *German v. Fox*, 2007). Accordingly, one might expect that social media cases in Connecticut will undergo the same analysis as one has seen in the case law thus far.

New York

The New York statute prohibits employers from making employment determinations based on an applicant's legal recreational activities, political activities, union membership, or consumption of legal products, while outside of work, provided that the applicant's conduct does not meet one of the exceptions, most notably, conflict with the legitimate business interests of the employer (N.Y. Lab. Law §§ 201(d)(2) and 201(d)(3) (2011)). As to the first part of the test, legal recreational activities might appear to create broad employment protection; in particular, the statute defines recreational activities as “any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material” (N.Y. Lab. Law § 201(d)(1)(b)). However, New York case law has made clear that not all legal, unpaid, off-duty activity is considered recreational (*McCavitt v. Swiss Reinsurance America Co.*, 2001; *Bilquin v. Roman Catholic Church*, 2000; *State v. Wal-Mart Stores, Inc.*, 1995). For example, in *McCavitt* (2001), the plaintiff was involved in a personal relationship with a co-employee. He alleged that his employer denied him a promotion and discharged him

from employment largely because he had been dating this coworker. Thus, he asserted that his termination violated [New York Labor Law, Section 201-d](#). The employer filed a motion to dismiss, arguing that romantic dating was not a protected "recreational activity" under [Section 201-d](#). The district court agreed with defendant, and granted the plaintiff's motion to dismiss. The plaintiff appealed. The Second Circuit Court of Appeals found no persuasive evidence that the highest court in the state would hold that romantic dating was a "recreational activity" under the New York statute. Accordingly, the dismissal was affirmed (*McCavitt*, 2001).

Similarly, in *State v. Wal-Mart Stores, Inc.* (1995), the court found that a dating relationship was not a recreational activity (*Wal-Mart Stores, Inc.*, 1995). In this case, Wal-Mart's fraternization policy prohibited dating between a married employee and another employee, other than his or her own spouse. The court reasoned that dating is an activity that involves the pursuit of romance, and thus is not recreational (*Wal-Mart Stores, Inc.*, 1995). Despite the seeming narrowness in the court's evaluation of dating, there is a good chance that social media activity which is unrelated to dating would be protected. This assertion is because the statute specifically lists "hobbies" as well as the viewing as television, movies and similar material within the definition of recreational activities (N.Y. Lab. Law §§ 201(d)(1)(b)). It is reasonable to argue, therefore, that blogging and other aspects of posting online could be considered a hobby and/or similar to watching television. On the other hand, the claim would still need to meet the second part of the test, as there is an exception to employee protection if the employer can show that the applicant's conduct conflicted with a legitimate business interest of the employer (N.Y. Lab Law § 201(d)(3)).

North Dakota

Under North Dakota law, it is a discriminatory practice for an employer to make employment decisions based on an employee's participation in lawful activity off the employer's premises during nonworking hours, unless the activity is in direct conflict with the essential business-related interests of the employer (N.D. Cent. Code § 14-02.4-03 (2012)). "The broad provisions precluding employer discrimination for lawful activity off the employer's premises during non-working hours were initially enacted in 1991 to expand the law prohibiting employment discrimination and preclude employers from inquiring into an employee's non-work conduct, including an employee's weight and smoking, marital, or sexual habits" (*Hougum*, 1998). However, in 1993, the legislature enacted the additional language prohibiting discrimination for lawful activity which is not in direct conflict with the essential business-related interests of the employment (*Hougum*, 1998). Thus, the lawmakers provided a compromise between the employment at-will doctrine and the protected status of lawful activity off the employer's premises. As a consequence, the outcome of a claim under this statute often turns on whether the activity in question is in direct conflict with the essential business-related interests of the employer (*Hougum*, 1998; *Clausnitzer v. Tesoro Ref. & Mktg. Co.*, 2012).

For example, in *Clausnitzer* (2012), Clausnitzer's former employer asserted that it terminated Clausnitzer because he had violated the company's policy which prohibited driving a company vehicle with a blood alcohol content exceeding .04 percent (*Clausnitzer*, 2012, p. 666). Clausnitzer argued that he was improperly terminated for engaging in a lawful activity because he was under the presumptive limit for driving under the influence under state law and was driving the company vehicle during off-duty hours when the incident leading to his termination occurred. Without addressing whether the activity was lawful, off-duty, or off-premises, the Supreme Court of North Dakota found that the activity was in direct conflict with the essential business-related interests of the employer (*Clausnitzer*, 2012). In a similar case, an employer terminated an employee after learning that she had been involved in a car accident with her own vehicle after drinking approximately two beers during nonworking hours (*Olson*, 1985). The employee had allegedly signed an agreement with her employer "to refrain from the consumption of alcohol, both on and off the job." In this case, the Supreme Court of North Dakota found that the off-duty consumption of alcohol was not shown to pose a threat to the employer's business interests (*Olson* 1985, p. 288). In another case, the North Dakota Supreme Court refused to hold as a matter of law that an employer had the right to terminate an employee after he was arrested for masturbating in a public restroom (the charge was ultimately dismissed) (*Hougum*, 1998, p. 814). The court remanded the case to the lower court to determine the outcome of the factual dispute (*Hougum*, 1998).

b. Conclusion

The gist of these statutes is that an employer should not have a say in the employee's personal life and lifestyle outside of the workplace. Thus, in the social media context, one would expect legal outcomes to be based on factual

circumstances which may differ from case to case. In some cases, the activity in question may be deemed to be in direct conflict with the business interests of the employer; but in others it may not. Accordingly in a state that has one of the aforementioned freedoms of lawful activity, association, or lifestyle discrimination statutes, the employer must be prepared to demonstrate how the employee's online communications or postings conflict with its business interests or harm its reputation. Hudson and Roberts (2012, p. 795) thus advise that any "monitoring of off-duty conduct should only be used when there is a strong, legitimate work related purpose and not for conducting fishing expeditions into employees' personal lives." Crane (2012) is concerned that these statutes and related statutory proposals are vague and overbroad and thus could encompass any employee activity that the employer finds objectionable, and thus they give little protection to employees for their social media and social networking activities. Yet notwithstanding the existence of these statutes, Abril, Levin, and Del Riego (2012, pp. 93-94) conclude that "employers who can prove a legitimate business interest in regulating their employees' off-duty conduct are generally given a free pass."

7. Electronic Communications Privacy Statutes

The Electronic Communications Privacy Act (ECPA) was enacted by Congress in 1986 in order to establish privacy protections and standards for the rapidly developing electronic communications and computer fields and the Internet. A major purpose of the statute was to protect employees' privacy. The statute makes it a legal wrong – criminally as well as civilly – to intercept or access electronic communications – whether stored, in transit, at the point of transmission, or after receipt – as well as to intercept or access email, whether stored or in transmission (Abril, Levin, and Del Riego, 2012; Cavico and Mujtaba, 2008). There are four important exceptions in the ECPA, however: 1) Employers can access the stored email communications of employees who use the employer's electronic communication system. 2) Government and law enforcement agencies can obtain electronic communications during an investigation of suspected illegal activity (though pursuant to a valid search warrant). 3) The important "business extension" exception to the statute allows employers to monitor employees' electronic communications made in the ordinary course of business (but which does not permit the employer to monitor the employees' personal communications. 4) When the employer obtains the employees' consent to having their electronic communications intercepted by the employer, the employer can avoid liability under the ECPA (Abril, Levin, and Del Riego, 2012; Cavico and Mujtaba, 2008). Moreover, Abril, Levin, and Del Riego (2012, p. 80) point out that the statute "does not apply to communications made through an electronic communication system that is readily accessible to the general public." As such, Abril, Levin, and Del Riego (2012, p. 80) conclude that "it appears, then, that if an employee makes her digital information accessible to the general public, her employer is not prohibited from monitoring, viewing, or intercepting such communication."

The ECPA was updated by the Stored Communication Act (SCA), which prohibits the intentional access of stored communications, such as email and Internet accounts, without authorization or acting beyond authorization (Abril, Levin, and Del Riego, 2012; Fleming and Miles, 2012; Hearing and Ussey, Part II, 2012; Jatana, Sandoval, and Glyer, 2012). The Act also prohibits an electronic communications service provider from disclosing data stored, carried, or maintained on the site to third parties (Venezia, 2012, p. 29). Jatana, Sandoval, and Glyer (2012, p. 14-15) as well as Abril, Levin, and Del Riego (2012, pp. 82-83) report on a federal district court case, *Pietrylo v. Hillstone Rest. Group* (2008), where an employee, a server in a restaurant, created an account on MySpace for the restaurant workers, current and former, to "vent" about their jobs. The account was private and required an invitation to join and a password to access. While at the house of a manager, one of the group members showed the manager the website. The manager then asked for and obtained the password from that group member and accessed the site without any invitation. The site included comments of a sexual nature regarding management and customers, jokes about the restaurant's policies, and references to violence and illegal drug use. Based on the information on the site, the manager terminated two employees, who instituted suit against the restaurant for violating federal and state SCA statutes as well as for invading the employees' common law right of privacy. A jury found intentional SCA violations for accessing the group site without authorization, but did not find that the restaurant had violated the employees' common law right of privacy. As such, Jatana, Sandoval, and Glyer (2012, p. 15) advise that "employers who want to avoid risk should...refrain from accessing the personal email accounts of employees by utilizing password information stored on the company's computers." Another case is the federal appeals case of *Konop v. Hawaiian Airlines, Inc.* (2002), where the court held on very narrow grounds (as well as contrary to legislative history of the statute) that the employer violated the SCA even when an authorized user voluntarily gave the employer the password to the website because the employer

obtained access without itself being an intended technical “user” of that system. Nonetheless, despite the strained construction, Hudson and Roberts (2012, p. 785) thus conclude that “to avoid violating the SCA, the employer needs to gain access through proper means and should be an intended user of the service.” Similarly, Crane (2012, p. 667), in examining the communication privacy statutes and pertinent case law, concludes that for an employer to be held liable under the SCA the employer must have either gained unauthorized access to the employee’s password protected social media site or “coerced” an authorized user of the employee’s protected site to give the employer log-on information or show the employer the employee’s private site.

Furthermore, Venezia (2012, p. 29) points out that although there are exceptions for the government to obtain subpoenas for information in criminal matters, there are no exceptions in civil cases. Similarly, Smith (2012, p. 10) warns that the SCA may present problems for employers as plaintiffs during the discovery stage of a lawsuit involving social media: “Seeking to subpoena data directly from Facebook, Twitter, or other social media may in many instances run afoul of the Stored Communications Act....The SCA prohibits Facebook from disclosing the contents of a user’s Facebook account to any non-governmental entity, even pursuant to a valid subpoena or court order. The most Facebook can provide is the basic subscriber information for a particular account. If a Facebook user deletes content from their account, Facebook will not be able to provide that content.”

Several states also have promulgated laws designed to protect employee privacy rights concerning electronic communications in the workplace (Hearing and Ussery, Part II, 2012). To illustrate, Jatana, Sandoval, and Glycer (2012, p. 14) report that California has three statutes that are “ancillary” to the SCA, to wit: the Consumer Protection Against Computer Spyware Act, the Information Practices Act, and the California Privacy Protection Act. Moreover, in California, legislation has been introduced to prohibit employers in the state from asking for Facebook passwords from job applicants and current employees, to prohibit employers from accessing job applicants’ and employees’ social media accounts, and to prevent employers from requiring log-ins or print-outs of social media content for their review (Afram, 2012). Connecticut has a statute that requires employers to post in a conspicuous manner a statement regarding the kinds of electronic monitoring used by the employer; and the statute also imposes monetary penalties for infractions. Delaware has passed a similar law which mandates that employers provide prior notice of monitoring of telephone communications, email, and Internet usage (Hearing and Ussery, Part II, 2012). As these statutes are applied by the courts to workplace social media disputes, the courts will begin establish legal norms and precedents as to proper and improper workplace intrusions into the private lives of employees. Furthermore, in some states, for example, Maryland, Illinois, Massachusetts, and California, there are legislative proposals that would prohibit current employees and/or job applicants for asking for employees’ social media passwords and login information (Afram, 2012; Ramasastry, 2012). The Massachusetts proposal would prohibit employers from being designated as a “friend” of a job applicant in order to view his or her Facebook profile and content (Afram, 2012).

On the federal level, there is a proposed law – the Social Networking Online Protection Act (2012) – that is designed to prohibit employers from requiring or requesting that employees provide a user name, password, or other means for accessing a personal account on any social networking website. The Bill, H.R., 5050, was sponsored in April of 2012 in the U.S. House of Representatives by Representative Elliot Engel (D-N.Y) and has nine cosponsors. The Bill was referred to the House Committee on Education and the Workforce. Specifically, the Bill makes it “unlawful for any employer (1) to require or request that an employee or applicant for employment provide the employer with a user name, password, or any other means for accessing a private email account of the employee or applicant or the personal account of the employee or applicant on any social networking website; or (2) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against, any employee or applicant of employment because (A) the employee or applicant for employment refuses or declines to provide a user name, password, or other means for accessing a private email account of the employee or applicant or the personal account of the employee or applicant on any social networking website; or (B) such employee or applicant for employment has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding” (Social Networking Online Protection Act, Section 2(a), 2012). Regarding enforcement, the Bill also provides for civil penalties of up to \$10,000 as well as injunctions for violations, as determined by the Secretary of Labor (Social Networking Online Protection Act, Section 2(b), 2012). The Bill, as of the writing of this article, has not been reported out of committee and thus has not been voted on by the House or the Senate. The organization, GovTrack.us (www.GovTrack.us/congress/bills), which follows federal legislation and rates the chance of success for bill passage, for example, by ascertaining the number of co-sponsors and whether they are from the majority or minority party, indicates that the chance of success for H.R. 5050, the Social

Networking Online Protection Act, to be enacted into law is 1% (yes, one percent!). Finally, no law requires employers to disclose their social media information-gathering and acquisition policies.

8. Conclusion to Statutory Laws

Social media-based employment determinations can have several statutory legal implications pursuant to federal and state statutes. Employers can contravene federal and state privacy and communication protection statutes when they improperly obtain information regarding job applicants and employees on social media sites. Employers can also violate federal and state anti-discrimination and harassment laws if they discriminate against a job applicant or employee based on information regarding a protected characteristic derived from the employer accessing social media sites or if social media is used to harass an employee. Regarding harassment, Gelms (2012, p. 269) underscores that “as social media becomes increasingly entangled with individuals’ professional lives, courts may consider certain social media communications part of the totality of circumstances test for purposes of a Title VII hostile work environment claim.” Moreover, employees’ online communications could be deemed to be protected by state freedom of association or lifestyle statutes as well as federal labor law if in the latter case the online communications are deemed to be protected concerted activity. Also, it should be noted that U.S. Senators Charles Schumer (D-NY) and Richard Blumenthal (D-Ct) have asked the Justice Department to institute an investigation into whether employers asking for social media passwords during job interviews violates any federal laws. However, in addition to statutory law, whether federal or state, there is another body of law, tort law, which is based on the old common law, but which nonetheless today can have legal ramifications in employment social media situations.

D. Conclusion to Legal Considerations

The predominant legal conclusion is that the law regarding social media in employment is plainly an evolving legal area. The role of the courts, legislative bodies, and regulatory agencies will be to create and further delineate the boundaries of the law in response to the advancement of technology and the proliferation of social media in U.S. society today. The law, evidently, is in an unsettled but evolving state; but legal resolution of social media employment disputes eventually must be made. Hearing and Ussery (Part II, 2012, p. 20) well state how difficult the legal challenge will be to ascertain social norms, workplace norms, and reasonable expectations of privacy and expression: “Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of these devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own.” At the least, one can say that for an employer to monitor and investigate social media without authority or consent, or in a deceptive or coercive manner, or to improperly restrain workers’ rights under labor law or lifestyle statutes, or as a means to discriminate, or for non-work-related purposes are likely illegal practices. However, there certainly appears to be a good deal of latitude when it comes to the legality of employer social media policies and practices.

Yet, even if a practice is legal, it is not necessarily moral, which brings the analysis in this article into the realm of ethics, which is a branch of philosophy. Plainly it is difficult to make legal determinations and predictions in an evolving area of the law. However, ascertaining the morality of social media use in employment emerges as an even more arduous task. Nevertheless, the consideration of the morality of social media use in employment will also have to be addressed ethically by managers and human resources professionals.

IV. Ethical Considerations

The subject of social media-based employer decision-making raises very controversial and important moral issues. One ethical issue involves the morality of employers accessing social media to investigate employees and job applicants. Another related ethical issue involves the morality of the employer using information obtained on social media in employment decision-making. Thus, even if legally obtained, is it moral to make decisions in employment and to not hire applicants or to sanction employees based on their postings on social media? Moreover, assuming it is legal but immoral to make employment determinations based on online postings and communications on social media, should civil rights laws then be ethically promulgated or other laws passed or amended to incorporate social media communication as a protected lifestyle, speech, privacy, or associational characteristic?

Now, at first instance, many people may decry social media-based job determinations as “morally wrong.” Nonetheless, determining whether an action, rule, or law is moral or immoral, right or wrong, or just or unjust perforce brings one into the realm of ethics, which is a branch of philosophy, and then logically to ethical theories, ethical principles, applied ethics, and ethical reasoning to moral conclusions. In ethics discussions, the authors will apply four major ethical theories – Ethical Egoism, Ethical Relativism, Utilitarianism, and Kantian ethics – to the subject of social media-based employer decision-making to determine if such discrimination in employment is moral. These ethical theories were chosen because they represent the essence of ethics as a branch of philosophy in Western Civilization, which obviously is not the only civilization, but it is one that the authors are the most familiar with, including, of course, the ethics component to Western knowledge and thought, as opposed to Confucian ethical principles and the application thereof, which, although most interesting and intriguing to learn and to apply, practically would be beyond the scope of the authors’ objectives for this article. These four Western theories also were selected because they are reason-based ethical theories; as such, the authors assume that the readers of this article possess intellect, reason, and logic, and thus will be quite “comfortable” in following the authors’ ethical “train of thought,” though, of course, perhaps not agreeing with their ultimate moral conclusions. Furthermore, religion-based ethical theories were not chosen because not all the readers will be of the same religion and, for that matter, some may have no religion at all; and, moreover, bringing in a religious-based ethical component to the article would be to expand the article beyond the authors’ aims. So, the focus is on Western ethics and the first ethical theory to examine in the context of social media discrimination is Ethical Egoism.

A. Ethical Egoism

The ethical theory of Ethical Egoism also harkens back to ancient Greece and the Sophists and their teachings of relativism and promotion of self-interest. This ethical theory maintains that a person ought to promote his or her self-interest and the greatest balance of good for himself or herself (Cavico and Mujtaba, 2009; Mujtaba, 2014). Since this theory is an ethical theory, one thus has a moral obligation to promote one’s self-interest; and so “selfishly” acting is also morally acting; and concomitantly an action against one’s self-interest is an immoral action; and an action that advances one’s self-interest is a moral action. An ethically egoistic person, therefore, will shrewdly discern the “pros” and “cons” of an action, and then perform the action that performs the most personal good, which also is the moral course of action. However, the Ethical Egoists counsel that one should be an “enlightened” ethical egoist; that is, one should think of what will inure to one’s benefit in the long-run, and accordingly be ready to sacrifice some short-term pain or expense to attain a greater long-term good – for oneself, of course. Also, the prudent ethical egoist would say that as a general rule it is better, even if one has a lot of power as well as a big ego, to treat people well, to make them part of “your team,” and to “co-op” them. Why should one treat people well? One reason is certainly not because one is beneficent, but rather because one is “selfish.” That is, one is treating people well because typically it will advance one’s own self-interest in the long-term to do so. One problem with ethical egoism is that one’s own “good” must be defined. What exactly is one maximizing? Is it one’s knowledge, power, money, pleasure, comfort, prestige, success, or happiness? Ethical egoists agree that people ought to pursue and advance their own good; but they disagree as to the type of good people should be seeking (Cavico and Mujtaba, 2009).

Attempting to ascertain the appropriate legal and ethical boundaries for social media policies certainly emerges as a challenging task for employers due to the advancement of technology, the ever-growing use of social media, and the unique issues presented at this intersection of employment practice, law, and ethics, as well as the fact that the law is in a state of flux. Employers as well as people generally surely can benefit from social media. As explained by Hearing and Ussery (Part I, 2012, p. 35): “Businesses are getting in on the action as well, utilizing social networking platforms as a virtual cost-free resource to distribute information about products and services, develop brand recognition and public awareness, and promote open discussion between the company and its potential customers.” Smith (2012, pp.3-4) also states that “Corporate America is well aware of the growing audience of and marketing opportunities of social media. Coca-Cola has more than 32 million Facebook fans, for example. Social media offers companies a greater ability to engage with their customers, foster goodwill, listen to feedback, prevent misinformation, and even manage crises.” Similarly, Jatana, Sandoval, and Glyer (2012, p. 13) relate that “some employers use social media as a channel to build business with potential clients or monitor competitors. In fact, 79% of *Fortune* 500 companies use Twitter, Facebook, YouTube, or corporate blogs to communicate with customers and shareholders.” Employers also can use social media to investigate and screen job applicants as well as to monitor employees during working hours. Of

particular concern to the employer is the employee use of social media during work hours for personal reasons. “However, with social networking sites such as Facebook and Twitter so readily available to the public, employers can now track their employees’ activities during working hours. For example, employers who see that an employee is constantly using social media during work hours could have grounds for reprimanding the employee for wasting company time and, in an effort to increase productivity, make it known that the company tracks Internet usage.” Accordingly, there are many egoistic reasons for a business to utilize social media, to wit: to manage the business; to readily connect to and communicate with many people worldwide; to market and to advertise freely and at low or no cost; to target a specific market; and perhaps in order to keep up with the competition.

In addition to the benefits of social media for employers, there are, of course, potential deleterious consequences too. Employers can be concerned that employees might divulge trade secrets or confidential information on social media. As such, Smith (2012, p. 4) warns that “exacerbating this is the fear that social media has desensitized people to the fact that disclosure of formerly private information because so much of it is done voluntarily – and so easily. When taken with the tendency of social media users – especially younger ones – to blur the line between social life online and work, crucial proprietary information can be out the door almost before the employee knows of it.”

Moreover, employees also might post derogatory and defamatory material about the company online, thereby harming the employer’s economic interests, brand, image, and reputation. Regarding reputation, Smith (2012, p. 4) declares that “social media provides an enormous mouthpiece for presenting a negative opinion, presenting challenges to the target to respond.” When the “target” is one’s business, Smith (2012) recommends that the employer engage in “reputation management” by monitoring online activity to detect negative postings and potential threats, for example, from current and former employees, and to respond promptly to them.

Employers are also concerned that employee social media communications might result in litigation for the employer, for example, when an employee’s postings result in the defamation or harassment of other employees. These legitimate concerns have prompted many employers to consider monitoring employee and job applicant use of social media as well as restricting employee use of social media. Yet employers certainly do not want to be sued; and consequently until the legal intersection of social media and employment is more clearly visible, employers should proceed with the utmost caution, especially when attempting to prohibit all social media activity or requiring access to the employees’ and job applicants’ social media sites. Employers, therefore, certainly have egoistic reasons to promulgate social media policies; but they must act prudently and now must keep abreast of legal developments and seek out legal guidance from attorneys, as the courts, legislative bodies, and regulatory agencies surely will be developing this new field of employment law.

B. Ethical Relativism

Ethical Relativism as an ethical theory also harkens back to ancient Greece and the philosophical school of the Sophists as well as the philosophical school of the Skeptics. Ethical relativists deny that there are any objective, universal moral rules which one can construct an absolute moral system. Ethical relativists deny that there are moral rules applicable to all peoples, in all societies, and at all times. There thus are no universal moral standards by which to judge an action’s morality; rather, morality is merely relative to, and holds for, only a particular society at a particular time. “When in Rome, do as the Romans,” said the ethical relativists. Morality, therefore, is a societal-based notion; it is nothing more than the morality of a certain group, people, or society at a certain time. What a society believes is right is in fact right for that society; the moral beliefs of a society determine what is “right” or “wrong” in that society. However, different societies may have different conceptions of what is right or wrong. What one believes is right, the other may believe as wrong. Consequently, the same act can be morally right for one society but morally wrong for another. Since pursuant to ethical relativism there are no moral standards which are universally true for all peoples, in all societies, and at all times, and since there is no way to demonstrate that one set of beliefs is true and the other false, the only way to determine an action’s morality is to determine what the people in a particular society believe is right or wrong at a given time. Of course, ascertaining exactly what a society is a daunting challenge. Even within a homogeneous society, there are diverse cultures, subcultures, social classes, kinship, and work groups; and in a heterogeneous society there will be many smaller sub-societies that co-exist. All these components of society may reflect different standards, mores, customs, and beliefs, including moral standards and beliefs. Yet pursuant to the doctrine of ethical relativism, one must attempt to find the pertinent “society” and then try to ascertain that society’s moral beliefs; but when one does ascertain the societal beliefs,

standards, and practices regarding morality, one simply has to conform and adopt, and one will be acting morally, at least according to the ethical theory of ethical relativism (Cavico and Mujtaba, 2009).

Social media norms and their use in employment are based on, measured by, and often dictated to, by societal beliefs and norms. Accordingly, pursuant to Ethical Relativism, what a particular society deems to be appropriate for social media use in relationship to employment *is* the social media standard or norm for that society. The ethical dilemma is that social norms regarding privacy affect moral decisions regarding social media; but the increased access to, and prevalence of, information effectuated by the advancement of technology and the development of social media have also influenced social norms. Social norms regarding social media, moreover, are continually evolving, and as with the legal system “playing catch-up.” Accordingly, although it is difficult to precisely define “society” in a heterogeneous culture such as the United States, as well as difficult to determine social norms regarding social media, especially in employment situations, nonetheless, one can safely say that a prevailing societal norm is that patently offensive material posted on social media not related to working conditions which harms the employer or other employees morally justifies the discharge of the employee. Thus, the employer would be acting in conformity with societal norms and thus also acting morally pursuant to Ethical Relativism. Moreover, if there is a societal consensus that information on social media is in fact “public,” then pursuant to Ethical Relativism it would be moral for the employer to investigate such information, even without the consent of the job applicant or employee, and consequently to use that information in employment decision-making. Social norms regarding the morality of social media use and policies will directly influence the law, particularly legal interpretations as to privacy and speech protections online. The moral problem for the Ethical Relativist is that the social norms regarding permissible online conduct are not yet firmly established. Society may become less free if the norms allow employer intrusion into what society regards as, in essence, a public sphere. Yet, Abril, Levin, and Del Regio (2012, p. 111) posit that society actually may become more free because of the “...social acceptance of certain types of disclosures or skeletons in the closet...and because business and society in general will necessarily become more forgiving of unseemly personal disclosures eventually, because so many individuals will have online evidence of some purportedly inappropriate behavior.” So, perhaps not only the law, but also societal norms will have to be “updated” and established to reflect the present technological realities of social media and the Internet.

C. Utilitarianism

Utilitarianism is a major ethical theory in Western civilization; it was created principally by the English philosophers and social reformers Jeremy Bentham and John Stewart Mill. Their goal was to develop an ethical theory that not only was “scientific” but also would maximize human happiness and pleasure (in the sense of satisfaction). Utilitarianism is regarded as a consequentialist ethical theory, also called a teleological ethical theory; that is, one determines morality by examining the consequences of an action; the form of the action is irrelevant; rather, the consequences produced by the action are paramount in determining its morality. If an action produces more good than bad consequences, it is a moral action; and if an action produces more bad than good consequences it is an immoral action. Of course, ethical egoism is also a consequentialist ethical theory. The critical difference is that the Utilitarians demand that one consider the consequences of an action not just on oneself, but also on other people and groups who are affected directly and indirectly by the action. The scope of analysis, plainly, is much broader, and less “selfish,” pursuant to a Utilitarian ethical analysis. In business ethics texts and classes, the term “stakeholders” is frequently used to indicate the various groups that would be affected by a business decision. Furthermore, the Utilitarians specifically and explicitly stated that society as a whole must be considered in this evaluation of the good and/or bad consequences produced by an action. The idea is to get away from a “me, me, me” mind-set and consider other people and groups affected by an action. Utilitarianism is a very egalitarian ethical theory since everyone’s pleasure and/or pain gets registered and counted in this “scientific” effort to determine morality. Yet, there are several problems with the doctrine. First, one has to try to predict the consequences of putting an action into effect, which can be very difficult if one is looking for longer-term effects. However, the Utilitarians would say to use one’s “common storehouse of knowledge,” one’s intelligence, and “let history be your guide” in making these predictions. Do not guess or speculate, but go with the probable or reasonably foreseeable consequences of an action. Also, if one is affected by an action, one naturally gets counted too, but if that same one person is doing the Utilitarian analysis, there is always the all-too-human tendency to “cook the books” to benefit oneself. The Utilitarians would say that one should try to be impartial and objective in any analysis. Next, one now has to measure and weigh the good versus the bad consequences to ascertain what prevails and thus what the ultimate moral conclusion will be. The

Utilitarians said that not only was this ethical theory “scientific,” but it was also mathematical (“good old-fashioned English bookkeeping,” they called it). But how does one do the math? How does one measure and weigh the good and the bad consequences? And for that matter how does one measure different types of goods? The Utilitarians, alas, provided very little guidance. Finally, a major criticism of the Utilitarian ethical theory is that it may lead to an unjust result. That is, the “means may justify the ends.” Since the form of the action is irrelevant in this type of ethical analysis, if the action produces a greater overall good, then the action is moral, regardless of the fact that some bad may be produced in this effort to achieve the overall good. The good, though, outweighs the bad; accordingly, the action is moral; and the sufferers of the bad, who perhaps were exploited or whose rights were trampled, got counted at least. Such is the nature of Utilitarianism (Cavico and Mujtaba, 2009). After determining the action to be evaluated, the next step in the Utilitarian analysis is to determine the people and groups, that is, the stakeholders, affected by the action. In the context herein the action is: “Is it moral to make decisions in employment based on social media? The next section will designate and discuss the affected stakeholders.

1. Stakeholder Analysis

a. Job Applicants and Employees

There are a variety of stakeholders, or constituent groups, that are affected by social media. Social media certainly can affect employment opportunities. Job applicants and employees are two principal stakeholders as they are directly affected. The effect can be deleterious. Social media policies can cause concern because they facilitate the judging of employees and job applicants based on characteristics and qualities perhaps unrelated to job performance. Even worse for the employee or candidate, he or she can be wrongfully judged based on personal information derived from social media which may not have any bearing to work performance. A job applicant surely would feel that he or she was treated unfairly if denied a position for which the applicant was qualified, but did not get due to information unrelated to the position that the employer derived from social media. Moreover, employer social media policies and practices may reflect certain prejudices, and consequently adversely affect the individuals against whom they are enforced. Employees and job applicants have legitimate interests in having a personal life as reflected on social media on their own terms without undue employer intrusion and interference. As emphasized by Abril, Levin, and Del Riego (2012, p. 90): “Employer restrictions on off-duty speech and conduct are troubling in that they squelch expression and individual autonomy and may compromise the employee’s right to a private life, especially when restrictions are unilaterally imposed after employment commences.” Employees also could feel stress and suffer health problems if they felt that the employer’s social media policies are too invasive and intrusive and treat them with disrespect.

Nevertheless, job applicants and employees, and particularly the latter if they are employees at-will, must be very careful of what they post on social media. Their employment as well as continued employment may be at stake, and there is also the possibility of being sued for harassment, the intentional tort of defamation, or for the disclosure of trade secrets or confidential information. Venezia (2012, p. 30) has some good advice for job applicants and employees (and for that matter anyone): “First always be cautious of what you post on the Internet. Once the message is posted, it exists in some form forever and can likely be captured by anyone who truly wants to see it. Before you post, ask yourself whether you would like to be attributed with your comment during your next family party or court proceeding.” Also, job applicants should be prepared for employer password requests so that employers can access their social media sites. As noted, this employer tactic is not illegal – yet. Accordingly, based on the state of the law, employees and job applicants should take care that their social media sites and accounts are professionally proper so as to avoid negative employment repercussions. On one hand, if employers are too demanding and too intrusive in their requests for applicants’ social media information, applicants might be hesitant to apply to an organization, thereby reducing employment opportunities, and doing so for the very large segment of the population that uses social media; yet, on the other hand, employees and applicants may make their social media sites so “clean” so as to be sterile and useless.

b. Employers and Managers

Employers are granted certain discretion pursuant to the employment at-will doctrine and even civil rights laws on how they run their businesses. Employers can make employment decisions based on justifiable reasons and legally obtainable sources of information. Not all discrimination is illegal. Employers, for example, can discriminate against and thus not hire applicants who are deemed to be fraudulent, reckless, incompetent, unqualified, unethical, or

immoral. Managing a workforce in an efficient, effective, and profitable manner is surely a legitimate interest. In U.S. society, in addition to preventing employment discrimination, invasions of privacy, and restrictions on expression, a very important counter-balancing objective is respecting the employer's prerogatives to operate its business in a manner the employer deems appropriate to create jobs, hire suitable people, manage its workforce, generate profits, and contribute to society. In particular, employers have a legitimate interest in using lawfully obtained social media information to make hiring decisions as well as preventing, policing, and controlling potentially harmful online activity by employees. Employers are rightfully concerned about bad publicity, harm to reputation, disclosure of confidential information, and lawsuits resulting from defamation and harassment. As emphasized by Abril, Levin, and Del Riego (2012, pp. 70-71), "given the ease and low cost of widespread information dissemination online, digital communication can be a powerful tool for disgruntled employees seeking to harm their employers by divulging intellectual assets or tarnishing their employers' names or products." Employers, therefore, can have valid reasons to seek to gain access to an employee's social media account in order to investigate any alleged improper disclosure or disparagement.

Employers also want to protect themselves by using social media to screen unfit applicants and to discharge incompetent, harassing, or potentially violent employees. In the latter case, the screening of a potentially dangerous candidate or the removal of such an employee will produce a safer work environment, which of course is beneficial not only to the employer, but also the employer's employees, clients, and customers. Since many people reflect on their work life online, employers can use social media to determine the suitability of personnel for the organization. However, if an employer is too intrusive, job applicants may seek employment elsewhere, and current employees may lose trust in the organization and its management, and thus not be so "open" in their social media postings or perhaps self-censor them so as not to conflict with perceived management expectations and company standards.

Moreover, as emphasized in the legal analysis, an employer's social media policy is not automatically illegal unless the policy violates Title VII, the NLRA, and/or other statutory laws and the common law. Employers could have very practical, and quite rational, business reasons for making job determinations based on employees' and job applicants' social media communications and online postings. Hearing and Ussery (Part I, 2012, p. 35) emphasize that "...employers have very real and practical legal obligations to monitor employee performance and conduct, and that those obligations extend into the information and communication realm made possible by advancing technology. Failure to adequately do so can lead to significant consequences."

Yet broadening civil rights, labor, and other laws to encompass more social media protections for employees and job applicants would certainly undermine employers' discretion to establish social media policies and standards. Employers are also concerned about being mired in frivolous social media lawsuits. When the goal of enhancing employees' lifestyle, association, and communication rights encroaches too much on other important goals, such as employer's autonomy of decision-making, some in society will speak up about the potential "excesses" of employment law. Employers, therefore, in the form of image, customer satisfaction, profitability, and success, surely can benefit from having the discretion to hire and to keep qualified employees. However, given the legal latitude, if the employer is too intrusive and invasive in its social media policies, the employees may become stressed out and resentful as well as suffer health and morale problems, thereby resulting in a loss of productivity for the employer. The objective for the employer, therefore, is to promulgate legal, moral, and effective social media policies and apply them fairly.

c. Women, Minority Group Members, and Gays and Lesbians

Social media standards and requirements can have even more severe adverse consequences for women, minority group members, and gays, lesbians, transgenders, and sexually transitioning people. Information derived, perhaps secretly, from social media sites can be used to discriminate against these oftentimes vulnerable people. Such discrimination of course will have adverse consequences, but it may be hard to prove and, in the case of gays, lesbians, transgenders, and sexually transitioning people, actually may be permissible legal discrimination (at least under federal some states' laws). Abril, Levin, and Del Riego (2012, pp. 88-89) thus warn that "by covertly obtaining personal candidate information to which they would not otherwise be privy, employers may be more likely to discriminate illegally and less likely to get caught."

d. Customers and Clients

Customer and clients are naturally part of society and thus generally would subscribe and conform to the societal norm that posits what is proper social media behavior for employers as well as employees. However, if customers do not like the fact that a particular employer investigates employee and job applicant social media use, and then makes job determinations on the basis of social media investigations, even though “voluntarily” agreed to by employees and job applicants, then these customers can choose not to use, support, or do business with these “immoral” employers. Conversely, customers might be offended by employee postings on social media that display a poor attitude towards customers as well as postings that portray the employer in a “bad light.” Furthermore, if the employer’s social policies are too intrusive on the employees’ personal lives, the employees might feel stressed out and violated, consequently suffer poor morale and health problems, and thereby offer poor customer and client service.

e. Legal System

Social media and employment is an unsettled, evolving, and rapidly growing area of the law, complicated by the advancement of technology and the ever-expanding use of social media. Consequently, legislative bodies, regulatory agencies, and the courts will have to “play catch-up” with technology as well as social mores, and will have to try to do so quickly in order to resolve pressing legal issues and to set forth more clearly the parameters of appropriate employment policies regarding social media. The courts will have an even more difficult time to resolve these issues due to the case-by-case nature of judicial decision-making, exacerbated by the uniqueness of social media employment disputes caused by the unique nature of many workplaces and thus the distinct facts attendant to the dispute, as well as the extremely fast-paced and highly technical nature of the social media technology.. If communications on social media were more legally protected under labor, civil rights, and other laws, judges would have to interpret and apply any broadened social media legal standards, and as a result make determinations of legal and illegal employer conduct on a case-by-case basis, which could emerge as a herculean judicial undertaking. By narrowly construing the present law, and thus allowing employers to make job determinations based on social media information, the courts may be thinking in terms of their own judicial “convenience” and the efficiency of the legal system. With social media, the difficulty of defining protected communications suggests expanded coverage would produce much litigation in which the principal issue would be whether the plaintiff employee’s or job applicant’s communications were covered. The result could be inconsistent court decisions based on subjective standards of protected communications. Nevertheless, the law and thus the legal system must “catch up” with technology and the social media “explosion” – in employment and otherwise. So, the increased use of social media and its integration into people’s lives, including their “work lives, make it very likely that the courts as well as legislative bodies will be kept very busy confronting and trying to resolve social media workplace disputes.

f. Social Media Websites

Employers’ use of social media websites to screen, investigate, and monitor employees is a “two-edged sword” for the owners of the websites. That is, the fact that employers are using the sites shows how much they are being used by people; and now they also are being used by business for employment purposes, which is certainly positive for the sites. Yet, the more employers ask employees and job applicants for passwords and login information, and particularly if employers search the sites without consent, and then make employment determinations based on information derived from the sites, people may become fearful of posting any information on the sites or may not use the sites at all, which certainly would be detrimental to the social media websites and their stakeholders.

g. Society

Society in the U.S. today certainly places a premium on speech, privacy, and association. Yet society as a whole, along with employers and the legal system, are also concerned about being mired in frivolous social media-based employment lawsuits, especially by “eccentric” employees. Allowing employers to make job determinations based on social media emphasizes the value of economic efficiency in permitting employers to establish and manage their businesses as they deem proper and profitable. There is also the concern that in the highly competitive global economy, new employment laws will over-regulate business and drive businesses out of the country and deter others from entering. Yet social media standards in the workplace can harm society by restricting speech and association as well as privacy and also by undercutting more pertinent employment factors, such as academic, career, or personal accomplishments. Not allowing lawsuits for social media-based job determinations could lead to increased efforts by employers to further suppress employee speech and association and to further regulate employee social relations.

Employees and applicants might feel hesitant to fully “connect” with family, friends, and co-workers. The personal and social elements to one’s work life could be substantially lessened. Employees and applicants could be so intimidated that would be reticent to express their true selves online out of a fear of losing a job or job opportunity. Social media is premised on the idea of sharing information openly and thereby fostering a sense of a “virtual” community. Creating this online community will be impeded if employers improperly use social media in a punitive fashion since people will be fearful to express themselves fully and honestly. The degree of social interaction in society would thereby be negatively impacted.

2. Utilitarian Conclusion

In examining the consequences of employer social media policies, as required by the Utilitarian ethical theory, and measuring and weighing these consequences, the result appears to be that there are more good consequences than bad in allowing the employer to make in a legal manner employment determinations based on employee and job applicant’s postings and communications on social media; and thus pursuant to Utilitarianism social media-based decision-making in employment is moral. Yet in ethically weighing the advantages and disadvantages of accessing and using social media information to make job determinations, employers, in particular, must be very careful to act in a consistent, non-intrusive, and non-discriminatory manner; otherwise, the “bad” consequences, especially in the form of legal liability, will prevail over the “good” – and not just egoistically for employers but overall for Utilitarians.

Nevertheless, regardless of any Utilitarian moral conclusion based on a perceived “greater good,” many academics, practitioners, and civil rights, union, and employee advocacy groups are troubled by a teleological business-oriented approach to social media policies, standards, and practices in employment. One of these “academics,” at least historically, would be Immanuel Kant.

D. Kant’s Categorical Imperative

The German professor and philosopher, Immanuel Kant, condemned Utilitarianism as an immoral ethical theory. How is it logically possible, said Kant, to have an ethical theory that can morally legitimize pain, suffering, exploitation, and injustice? Disregard consequences, declared Kant, and instead focus on the form of an action in determining its morality. Now, of course, since Kantian ethics is also one of the major ethical theories in Western civilization, a huge problem arises since these two major ethical theories are diametrically opposed. Is one a Kantian or is one a Utilitarian? (Or is it all relative as the Sophists and Machiavelli stated?) For Kant, the key to morality is applying a formal test to the action itself. This formal test he called the Categorical Imperative. “Categorical” meaning that this ethical principle is the supreme and absolute and true test to morality; and “imperative” meaning that at times one must command oneself to be moral and do the right thing, even and especially when one’s self-interest may be contravened by acting “rightly.” The Categorical Imperative has several ways to determine morality. One principal one is called the Kingdom of Ends test. Pursuant to this Kantian precept, if an action, even if it produces a greater good, such as an exploitive but profitable overseas “sweatshop,” is nonetheless disrespectful and demeaning and treats people as mere means, things, or as instruments, then the action is not moral. The goal, said Kant, is for everyone to live in this “Kingdom of the Ends” where everyone is treated as a worthwhile human being with dignity and respect. Related to the Kingdom of Ends precept and also part of the Categorical Imperative is the Agent-Receiver test, which asks a person to consider the rightfulness of an action by considering whether the action would be acceptable to the person if he or she did not know whether the person would be the agent, that is, the giver, of the action, or the receiver. If one did not know one’s role, and one would not be willing to have the action done to him or her, then the action is immoral. Do your duty, said Kant, and obey the moral “law,” based on his Categorical Imperative (Cavico and Mujtaba, 2009).

As a general moral rule, for an employer – private sector or for that matter public – to intrude into an employee’s or job applicant’s private life on social media without permission or in a surreptitious or coercive manner would be immoral pursuant to the Kingdom of Ends test as well as the Agent-Receiver test of Kantian ethics. An employer’s unjustified, arbitrary, and invasive investigation of social media content without authority or consent is an affront to a person’s dignity, security, and privacy and thus would be immoral pursuant to Kantian ethics. Moreover, if a social media policy allowed employers to explicitly or implicitly discriminate against job applicants and employees based on their race, color, sex, religion, national origin, age, or disability, or their gender identity, even if the latter is not legally protected, then the standard would be immoral pursuant to the Agent-Receiver test of Kantian ethics, regardless of authority or consent to secure the information. Social media monitoring also would be immoral pursuant to Kantian

ethics if the monitoring and information derived therefrom were not related to the job or position in question. That is, to use social media in making hiring and employment determinations, when social media communication or content is not relevant to the employee's ability to do the job, would be disrespectful, demeaning, and unfair to job applicants and employees, again, regardless of consent. As such, Abril, Levin, and Del Riego (2012, p. 87) warn that "the danger of 'social media background checks' is that personal information presented out of context or inaccurately may lead employers to judge candidates unfairly without their knowledge or without providing an opportunity for rebuttal. Worse yet, the surreptitious quality of the information search may be a backdoor to illegal discrimination."

However, if the requirements of a particular job or business are the controlling criteria, and the information online is readily accessible by the public, then social media can be construed as a legitimate factor in business determinations to a rational person. That is, if the job applicant's or employee's information on social media is publicly available and not protected by passwords and login profiles, then morally the employer can research and use the information, though obviously not in a discriminatory or arbitrary fashion. If the employer is harmed by the employee's social media posting which harms the company, or an applicant's posting reveals a lack of qualification or character on the part of the applicant, one can make a reasoned argument that social media employment decisions sanctioning employees are not arbitrary, irrational, or unfair, and thus not immoral according to Kantian ethics. Pursuant to the Agent-Receiver, it would be reasonable for the rational person to expect that people, including employers, would view publicly available social media information, and also reasonable that the employers would use the information for legitimate business reasons, as employers would with traditional "background checks." One can further argue that when an image for the business is at stake, it would be disrespectful to the employer by not taking into account its legitimate business needs and thereby encroaching on the employer's justifiable autonomy to hire, staff, and manage its business. Social media postings thus can be a legitimate factor in hiring employees that one must be cognizant of – ethically as well as legally.

Therefore, initially, based on a Kantian ethical analysis, one would say that it is not morally wrong to differentiate and to make job determinations in employment based on social media information. So, in certain limited circumstances, where communication or content on social media is essential, directly related to, and has an adverse effect on, the company's brand or image, the functions of the job, or interpersonal relations at work, making job determinations, including not hiring or discharge, could be construed as moral pursuant to Kantian ethics, since perhaps the people doing the postings are simply not qualified or suitable for, or no longer qualified or suitable for, the job. The fact that the information cannot be obtained from other sources, or perhaps not without difficulty, makes the Kantian "moral case" stronger. A rational person, therefore, would recognize that the employer has a moral right to discharge an employee who uses social media to denigrate the employer's products, services, or personnel or to engage in clearly offensive online conduct that is detrimental to the employer's reputation, image, and brand. The fact that the information is critical to advance a legitimate interest of the employer should satisfy ethically a rational Kantian.

However, in order to treat the employee with dignity and respect, the employer must inform the employee that it has secured information from social media that will be used in an employment determination, inform the employee of the content, and then let the employee explain the situation and correct any information which is inaccurate. As explained by Hudson and Roberts (2012, p. 795), "in some cases, derogatory statements made over social media may appear unprovoked and disparaging; however, the employer may find, through its investigation, that the violating employee has been subjected to severe discrimination or harassment by another employee made subject of the violating post. Illegal and improper decisions can be prevented if the employer investigates and works through the corrective action process, as it does with other employer policies, before taking any action against the employee." To allow the employee to "correct the record" is to treat the employee with dignity and respect, which is the way any rational person would want to be treated.

Yet, violation of a person's privacy can also be deemed immoral pursuant to Kantian ethics. If an employer's social media search is overly intrusive and done without consent and consequently invades an employee's or job applicant's personal privacy, the employer is not treating that person with the respect and dignity one deserves as a rational human being. If one's right to privacy is violated by social media screening or monitoring, applicants and employees are treated as mere "means" to an end, which is the employer's sole benefit, and thus people as rational human beings are not treated with dignity, respect, value, and as worthwhile "ends." For example, information on social media which is not willingly provided by the employee, which is of a very personal nature, especially if intimate or sensitive or health-related, and which is not related to job performance, should not be viewed by the employer, let alone used. To do so would be to intrude on the personal life of a person, likely cause one emotional distress and

humiliation, and be disrespectful and demeaning. Not to hire or to fire a person based on such a social media search would be immoral under Kantian ethics.

Another very difficult Kantian moral issue arises when the employer requires as a precondition to employment that the prospective employees reveal their user names and password identification on social media sites used by the employees. Such a requirement seems at first instance to be immoral, especially due to an element of undue pressure and coercion, particularly since the employer is in a superior economic position vis-à-vis the typical employee, and especially regarding a job applicant in a “tight” economy. Yet if the employer can make a reasoned argument that the information is needed by the employer as part of a traditional “background check” or to monitor the sites to ensure compliance with workplace policies relating to legitimate concerns, such as hiring suitable employees, preventing harassment, retaliation, and defamation, the protecting confidential information, and complying with wage and other labor laws, and that the information will be used in a non-discriminatory manner, one may say that the employer is acting morally pursuant to the Agent-Receiver Test since a rational person would find the policy acceptable regardless of his or her status as employer, employee, or job applicant. A rational person, moreover, in this omnipresent information-age, would scrutinize carefully his or her social media postings to make sure there is no inappropriate material to jeopardize employment opportunities or continued employment.

E. Ethical Conclusion

Balancing the legitimate interests of employers and employees and job applicants, as well as drawing the proper ethical boundary between moral and immoral conduct regarding social media use is a very difficult undertaking indeed. Employers have legitimate business interests to manage their companies; and employees have legitimate interests to have private off-duty activities. For the employer, hiring people and keeping qualified employees who obey the employer’s legitimate social media policies certainly can be said to advance the self-interest of the employer, which would make the practice moral pursuant to Ethical Egoism. Not hiring people or discharging employees who violate proper company policies and harm the company surely can be construed as a societal norm, which would make the practice moral pursuant to Ethical Relativism. Furthermore, an argument can be made that legitimate and fair employer social media policies and practices achieve more good consequences than bad, which would make social media-based job determinations moral pursuant to Utilitarianism. Finally, for Kantian ethics, there quite rightly are concerns that an employer’s intruding into an employee’s or applicant’s personal life, as reflected on social media, could impinge on the employee’s freedom, privacy, and dignity and thus be immoral. However, by focusing on the employer and the essential business needs of the employer to hire and to staff its business with personnel who will obey company policy and not harm the company by social media postings, one can make a reasoned argument that, assuming consent is given or the information is truly public, making job determinations based on social media is fair and moral pursuant to Kantian ethics. So, ethically, one can conclude that social media monitoring, investigation, and job decision-making by the employer generally is moral if the information is directly related to job performance and consent is obtained or the information is truly public (and of course the employer’s policies and practices are otherwise legal).

V. Practical Considerations and Recommendations for Employers and Employees

Social media clearly has become a prevalent and powerful communications and information-sharing medium that has fundamentally changed the way people communicate and interact. People, personally, and as employees as well as employers, use social media today at home, while travelling, and in the workplace. There are, plainly, legal, ethical, and practical implications for employers and employees regarding the use of social media in employment. First and foremost, employers must be keenly aware of the legal implications of technology, including social media, of course, in the workplace in order to minimize and hopefully obviate their legal risks. In particular, employers must be very cognizant of any decision-making based on information derived from social media. Since the courts and legislative bodies are just beginning to address the legal ramifications to social media use and employment, the astute and prudent employer must keep abreast of legal developments in this rapidly evolving field.

The proactive and prudent employer, therefore, should first consult with legal counsel and then have an explicit, specific, and uniform social media policy, and a policy that is in conformity with the law, attuned to legal developments, as well as consistent with the organization’s culture and current societal moral standards. Accordingly, Abril, Levin, and Del Riego (2012, p. 114) advise a social media policy with a “high level of detail,” specifically regarding the following:

- types of communications involved, such as computers, cell phones, text messages

- nature of the online site, such as blog or chat room
- location of the message sender, that is, employer premises as opposed to home
- time of message, that is, employer time or non-work time
- ownership of the hardware, software, and operating systems used for transmission
- and type of transmissions prohibited, such as the harassment or defamation of co-workers, revealing confidential and proprietary information, and unauthorized statements using the company name, logo, or affiliation.

Fleming and Miles (2012) provide the following recommendations to employers:

- Establish a social media policy that specifically sets forth the company's rules regarding employee use of social media, both within and outside the workplace; and utilize legal counsel in this endeavor (p. 20).
- In particular, the policy should specifically set forth the circumstances by which employees can be disciplined or discharged for violating the policy (p. 21).
- The policy should also establish "clear and cogent procedures for monitoring and obtaining information contained on these social media networking sites" (p. 21).
- Appoint a social media officer and implement social media strategies to aid in policy development and implementation as well as "legal positioning" (p. 20).

Hudson and Roberts (2012) offer the following advice as to proper employer social media policies and procedures:

- First, the employer should utilize a broad and general definition of "social media" in its social media policy (p. 769).
- The policy should not be overbroad so as to violate federal labor law or state lifestyle or off-duty conduct statutes (p. 778).
- The social media policy should prohibit discrimination, harassment, and retaliation by means of social media when a hostile work environment is created (p. 776).
- The policy should state expressly, clearly, and exactly the employee's expectation of privacy regarding the employee's use of personal social media during working times and on employer-owned equipment and systems (p. 786).
- The policy also should state the employee's expectation of privacy when using social media outside of working times and on the employee's own equipment and systems (p. 786).
- The policy should state that the employee has no reasonable expectation of privacy concerning social media postings and communications that are accessible to the general public, regardless if made during working or non-working times (p. 784).
- The policy should prohibit the disclosure on social media of the employer's proprietary and confidential information, non-public information, and trade secrets (p. 782).
- The policy should prohibit the unauthorized use of copyrighted materials, such as trademarks, service marks, logos, symbols, products, or services (p. 782).
- The policy should state that no employee has any authority to represent the employer on social media unless that authority has been expressly granted by the employer (p. 772).
- The policy should inform employees that the employer will monitor use of social media during working hours while the employees use employer-owned equipment (p. 793).
- The policy must have disciplinary components, and must be consistently and equally applied like any other employer policy (p. 795).
- The policy should include a statement that it in no way was designed or intended to be used as a means to interfere with the employees' rights under labor law to engage in concerted activities, such as the right to discuss working conditions (p. 780).
- The employer should train its employees regarding the social media policy and try to make the employees understand the policy, the rationales therefor, and how the policy applies to them (p. 791).
- In particular, regarding training, "to avoid liability, the employer should ensure the HR department is proficient with the Policy's rules. The HR department employees are typically tasked with making employment decisions about information found, inadvertently discovered, or reported by employees over social media" (p. 792).

- The employer needs to carefully and thoroughly investigate alleged violations of the social media policy and have a “corrective action process” whereby the employee can explain the postings or communications (p. 795).

Specifically, Hudson and Roberts (2012, p. 775) suggest the following as a policy option for personal social media use during working times: “...to restrict the personal use of social media during working hours to specific times and places. Many employers have taken this approach because it recognizes the operational realities of the workplace. This approach acknowledges and recognizes that most employees access their personal social media accounts during working hours but limits the use so that it does not affect the employee’s work performance. Under this option, the Policy should specify the time(s) and place(s) that employees are allowed to access social media. For instance, the employer might allow access during meal or rest periods.” Generally, Hudson and Roberts (2012, p. 781) advise that “overly broad prohibitions should be avoided, and the employer should consider the relationship of any prohibition to a business specific need.” Nevertheless, an employer has the right to prohibit all personal use of social media during working times. When contemplating provisions for a social media policy, the employer, of course, must be keenly aware of existing laws and, especially in the evolving context herein, legal developments.

As a general legal rule, an employer can make job determinations based on information derived properly from legal sources, including generally from social media, but an employer must be very careful since a social media standard or the application of a standard or the use of information derived from social media might be connected to a Title VII or ADEA or ADA protected category, thereby triggering a civil rights discrimination lawsuit. Jatana, Sandoval, and Glyer (2012, p. 15) warn that the convergence of social media and the “protected categories” of civil rights laws in the U.S. could present a “Pandora’s Box” for employers, to wit: “Employers who use the social media and the Internet may find themselves in an uphill battle arguing that while they had information concerning the employee’s or applicant’s protected characteristics, such information did not play a factor in the decision making process.” Furthermore, Jatana, Sandoval, and Glyer (2012, p. 15) emphasize that “it is entirely possible and likely that an employee can point to an employer or supervisor’s knowledge of a protected characteristic (i.e., pregnancy or religion) and argue that he or she was terminated based on that characteristic. If the employee can point to a time at which the employer learned about any such information through the employee’s social networking site..., this information could potentially provide a strong basis for the employee’s wrongful termination claim.” So, a basic step to protect employees and applicants who might be adversely affected by employer-imposed social media policies and practices is to recognize the discriminatory potential of those policies, particularly those that serve as proxies for discrimination based on suspect categories, such as gender and race, and by all means to enforce these social media policies and standards in a fair, uniform, and consistent manner. Obviously, there could be discrimination issues if the employer selectively asks for social media information from some job applicants but not others.

Employers, therefore, can and must take precautions to preclude social media-based discrimination lawsuits, including the crafting of appropriate social media policies. The employer must make sure that discriminatory elements are not built into the standard or that the standard is applied in a discriminatory manner. Most importantly, men and women, blacks and whites, and people of different ages, races, religions, sexual orientation, and nationalities must be treated in a comparable and fair manner. The employer’s management, especially the human resource department, must be trained properly so that information obtained from social media pertaining to job applicants and employees is not used illegally to discriminate against them. Social media policies, standards, and practices cannot be used as a pretext for impermissible discrimination or as a means for harassment, by the employer or co-workers, or grounds for retaliation. Such harassment, retaliation, discriminatory treatment, or discriminatory impact is illegal and immoral. The policy also should warn employees that any unlawful social media conduct, such as defamation, discrimination, harassment, or retaliation, involving the employer and its stakeholders, and even if committed while not at work, is strictly prohibited and will subject the employee to sanctions, including and up to termination. There are also a variety of ways that employers can use to monitor their businesses on the Internet. An employer could always Google or Bing its business name or check online review sites. Moreover, there are also tools the employer can use, such as Social Mention (socialmention.com) and Brand Monitor (brandmonitor.thismoment.com) where an employer can enter its business name to see if someone is commenting on its business, as well as Google Alerts, which will notify the employer via email each time the business is mentioned online (Cunningham, 2012).

Employers who access their employees’ social media sites and accounts without permission or authorization risk legal liability based on violating the right to privacy and federal statutes, particularly if they use the information to

make employment determinations. Employers, therefore, should have clear and communicated policies regarding technology use, access, communications, surveillance, searches, and monitoring. To reduce the risks of lawsuits, employers should have written policies specifying the circumstances in which passwords or other login information will be required, who will have access to the social media sites, and the purposes for which social media information will be used. The employer should always attempt to seek written consent from the employee or job applicant unless the information is public, but in any case there must legitimate, work-related reasons to access and use social media information.

As underscored by Hearing and Ussery (Part I, 2012, p. 35): “In the private employment setting, the legal obligations and challenges presented by advancing technology and emerging social media can often be resolved through thoughtful expansion of traditional workplace policies and established practices.” Such policies, for example, can shape the reasonable expectations of the employees, particularly regarding privacy and the limits of expression, to the advantage of the employer. So, if necessary, when the employer gives the employees and job applicants notice that such potentially intrusive activities will be conducted, it then will be much more difficult for an employee to claim a “reasonable” expectation of privacy. Accordingly, if the scope of one’s privacy expectation is demarcated by the employer, an employer’s intrusion on that expectation as part of an appropriate work-related investigation, for example, to ascertain work-related misconduct, or for other work-related purposes, will likely be deemed “reasonable” and thus legal and moral. However, if the employer does have an explicit social media policy but does not enforce it, or enforces it irregularly, the employer will be vitiating any argument it can make about the reasonableness of the employees’ expectations.

Employers should forbid access to any social media sites on the company’s own computers unless prior permission is obtained. Employer social media policies also should forbid the employees from posting comments about and pictures of themselves, as well as co-workers, which identify the employees as employees of the company, for example, by means of narrative, or a company uniform or logo, on social media sites, even if done on the employees’ own computer and on the employees’ own time, unless prior written permission is obtained. Moreover, the employer must strictly prohibit any comments or illustrations on social media regarding the company, its management, employees, as well as customer and competitors, which are retaliatory, harassing, discriminatory, and/or defamatory. At the least, assuming notice, the employer must monitor employee computer use for improper social media postings on the employer’s own computers. Furthermore, when a matter is brought before the employer that an employee on his or her own time and own computer has used social media to harm the employer or co-workers, the employer is then obligated – legally and morally – to promptly and fairly investigate the matter and to take suitable remedial action. In order to be fair to the employee, the employer must give the employee the opportunity to respond to the information that the employer has derived from social media, particularly if the employer is using it for a job determination, and also to give the employee the opportunity to correct any inaccurate information.

In addition, Venezia (2012, p. 30) has some very good and practical advice for employers: “Businesses should ask their insurance provider about coverage. Be sure that your commercial general liability insurance policies cover social media related risks. You cannot take for granted that your coverage flows with updated technology.” Finally, employers must be cognizant of the fact that there soon may be more federal as well as state laws restricting the employer’s use of social media, particularly with regard to requiring employees and job applicants to provide their passwords or other login information to their social media sites.

However, since there is not yet legislation directly prohibiting the employer’s use of social media, including the requiring of passwords, job applicants and employees, especially employees at-will, must be aware that they may be confronted with a very difficult decision, that is, to accede to the employer’s request and perhaps lose some privacy and Internet freedom, or to refuse the request and perhaps lose out on a job opportunity or even lose a job. It seems prudent, therefore, for job applicants and employees to have a frame of mind that today there is really not much that is truly private on social media anymore, and consequently that just about anything that a person posts on social media ultimately will be discovered. However, with this realization, the astute job applicant as well as the current employee may be able to use social media in a networking sense to help search for job opportunities. So, for employers as well as employees, the old maxim, “to be forewarned is to be forearmed,” certainly applies in the social media and employment context herein.

VI. Summary and Conclusion

Social media plainly has permeated modern culture and thus clearly has become an integral part of the way people communicate on a daily basis – in the United States, globally, and in the workplace. Social media-based decision-making in employment consequently has emerged as a controversial, and complicated, legal, ethical, and practical concern. The law in the U.S., however, affords employees and job applicants only some protection for their communications and postings on social media. Perhaps a social media discrimination claim may be connected to a protected category under civil rights law, and thus converted into a discrimination claim based on race, color, sex, or any other protected characteristic under civil rights laws, then an aggrieved plaintiff employee or applicant may have a viable cause of action. Similarly, if the employees' social media use can be construed as "concerted activity" pursuant to federal labor law, such use also may be protected. The public policy doctrine as well as tort law may also provide some legal redress, as may federal and state communication privacy statutes as well as state lifestyle protection statutes. However, if a job applicant or employee cannot bring his or her social media-based lawsuit under federal or state statutory laws or the common law, that person will not have legal redress. Moreover, the courts may be reticent to expand their interpretations of existing laws and legal doctrines until social norms are more clearly established as to proper restrictions and intrusions in employment for social media use. Based on the foregoing legal analysis, it is evident that an employer cannot access an employee's social media account by deception or with the lack of an employee's or job applicant's consent. Yet if permission is obtained and the employer is granted authorized access, or if the information online is truly public and thus readily accessible to the public at large, then the employer can access the information and use it in job decision-making (though, of course, not in a discriminatory manner). Social media decision-making by employers, therefore, is as a general rule legal.

Nevertheless, the ethical issue then emerged as to whether the social media-based job decision-making by the employer, even if legal, is moral. Pursuant to the ethical analysis herein, the authors conclude that social media discrimination in employment can be moral under certain ethical theories and limited circumstances. The ultimate conclusion to the analysis conducted for this article is that social media-based decision-making by the employer is as a general rule legal and moral. Nonetheless, there is still very little legal guidance, or for that matter agreement as to societal moral norms, let alone clear legal standards and rules. Accordingly, this is an area of employment law where business managers can "lead by example" with forward-thinking, balanced, and fair written policies, which are applied consistently, especially since the legal system does not yet offer much protection to many workers and job applicants who use social media.

The prevalence and use of computers, the Internet, and social media and social networking are surely going to continue and grow; and concomitantly so are the legal, ethical, and practical implications in the employment sector and beyond. Social, economic, and technological changes entail the recognition of new rights, as well as responsibilities, and the legal system must grow and develop to address and meet the challenges posed by the intersection of social media and employment. The law of social media and employment is a developing one, of course; but there are lessons to be learned for employers, managers, employees, and job applicants. Accordingly, and in particular, employers must take heed of legal developments at this intersection of law and technology, and thus take care that they develop reasonable, fair, and balanced social media policies that do not infringe on job applicants or employees' legal and moral rights. Certain points are clear; that is, social media now is a permanent, integral, and ever-growing, part of modern life; and social media will present further legal, ethical, and practical challenges in the workplace and for the legal system. The intersection of social media and employment law is a dangerous one indeed, as there are few "traffic markers" – legally as well as morally. Accordingly, the authors, by taking a wide analytical view of this field, have attempted to provide some clarity, direction, and guidance to employers, managers, employees, and job applicants, as well as to the legal, human resource professional, and academic communities, so that legal, ethical, and practical standards can be created that preserve the autonomy, freedom, and dignity of all the parties rapidly approaching the social media workplace intersection.

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Appendix A – Wal-Mart Social Media Policy

Social Media Policy

Updated: May 4, 2012

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules - Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful - Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolve work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Be honest and accurate - Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

Post only appropriate and respectful content

- * Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- * Respect financial disclosure laws. It is illegal to communicate or give a “tip” on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- * Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- * Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as “The postings on this site are my own and do not necessarily reflect the views of [Employer].”

Using social media at work - Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited - [Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts - Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information - If you have questions or need further guidance, please contact your HR representative.

AUTHOR BIOGRAPHIES

Frank J. Cavico is a Professor of Business Law and Ethics at the H. Wayne Huizenga School of Business and Entrepreneurship of Nova Southeastern University in Ft. Lauderdale, Florida. He has been involved in an array of teaching responsibilities, at the undergraduate, master's and doctoral levels, encompassing such subject matter areas as business law, government regulation of business, constitutional law, administrative law and ethics, labor law and labor relations, health care law, and business ethics. In 2000, he was awarded the Excellence in Teaching Award by the Huizenga School; and in 2007, he was awarded the Faculty Member of the Year Award by the Huizenga School of Business and Entrepreneurship. He holds a J.D. from the St. Mary's University School of Law and an LL.M from the University of San Diego, School of Law; and is a member of the Florida and Texas Bar Associations. He is the author and co-author of several books and numerous law review and management journal articles.

Bahaudin G. Mujtaba is Professor of Management and Human Resources at the H. Wayne Huizenga School of Business and Entrepreneurship of Nova Southeastern University in Ft. Lauderdale, Florida. Bahaudin is the author and coauthor of several professional and academic books dealing with diversity, ethics, and business management, as well as numerous academic journal articles. During the past twenty-five years he has had the pleasure of working with human resource professionals in the United States, Brazil, Bahamas, Afghanistan, Pakistan, St. Lucia, Grenada, Malaysia, Japan, Vietnam, China, India, Thailand, and Jamaica. This diverse exposure has provided him many insights in ethics, culture, and management from the perspectives of different firms, people groups, and countries.

Stephen C. Muffler is a full-time attorney and member of the Florida Bar since 1993 and an adjunct professor of Business Law and Ethics at the H. Wayne Huizenga School of Business and Entrepreneurship of Nova Southeastern University in Ft. Lauderdale, Florida since 1999. He was awarded the Adjunct Professor of the Year at H. Wayne Huizenga School of Business and Entrepreneurship of Nova Southeastern University in 2007. He was a former legal assistant to the Florida Bar's ethics enforcement branch in Miami Florida and former Special Public Defender for the 17th Judicial Circuit, in and for Broward County Florida. His civic service has included being the Chairman of the City of Fort Lauderdale's Citizen Police Review Board and the Executive Director of the City of Key West's Citizen Review Board, both of which investigate and/or review administrative complaints against municipal police officers. He has authored and co-authored various articles on legal & ethical topics, and occasionally lectures by invitation to national and local organizations on various law and professionalism issues. He holds a J.D. from Nova Southeastern University and an LL.M from the University of Miami, School of Law.

Marissa Samuel teaches business law and ethics courses at the H. Wayne Huizenga School of Business and Entrepreneurship of Nova Southeastern University. In addition to teaching, Marissa practices law with a focus on small business clients. Marissa possesses a J.D. degree from Columbia University School of Law, an M.B.A from Columbia Business School, and a B.S. in Industrial & Labor Relations from Cornell University. Prior to teaching, Marissa practiced corporate law at McDermott, Will & Emery. Marissa's research interests include labor and employment law, human resource management, and the economic improvement of developing countries.

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