

## Social Media and Employment-At-Will: Tort Law and Practical Considerations for Employees, Managers and Organizations

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### 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. 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. This article, therefore, is a legal and practical examination of social media in employment. The authors in this article focus on the law of tort and how tort law can apply to social media employment disputes. However, the authors briefly address other legal doctrines that can apply to social media. The authors also provide recommendations, comments and observations for modern-day workers, managers, and business organizations operating in a social media world.

**Key Words:** social media, social networking, Facebook, LinkedIn, Twitter, employment-at-will, electronic communication, tort, policy, emotional distress, invasion of privacy, defamation.

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### I. Introduction

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, courts as well as legislative bodies are now just beginning to address legal

claims caused by social media and employment. Moreover, the extensive use of social media in the workplace 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 and practical issues. This article, therefore, is a legal and practical examination of social media in employment. There are many types of laws that can, have, and will be applied to social media disputes in the workplace, to wit: constitutional law, especially the free speech rights of public sector employees, case law, especially the common law tort of invasion of privacy, statutory law, especially the civil rights acts, and regulatory law, particularly the decisions of the National Labor Relations Board concerning the rights of employees to use social media. All these types of laws must be examined to determine how they apply, and could apply, to social media in the workplace. For this article, the authors address case law ramifications of social media in employment by first examining the fundamental employment-at-will doctrine and then seeing how public policy and tort law limitations to that doctrine apply to employees who are discharged for social media use. The authors will provide case illustrations of legal principles being applied to social media workplace disputes as well as hypothetical case examples.

## 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 a 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).

YouTube 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 (Fleming and Miles, 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. Fleming and Miles (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 (Fleming and Miles, 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 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 5<sup>th</sup> 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).
- The discharge of a nurse on grounds of dishonesty concerning Family Medical Leave Act claims was upheld by a court when Facebook postings appeared regarding her Mexican vacation, her grandchildren, and her trips to Home Depot (Lineberry v. Jessica Richards and Detroit Medical Center, 2013, p. 15).
- An appellate court in Illinois upheld the dismissal of a tenured first grade teacher who posted on her Facebook page that her students, who were primarily African American and Latino, should be able to attend a “scared straight” program and that “I am not a teacher – I’m a warden for future criminals!” (In Re Tenure Hearing of O’Brien, 2013).
- An employee of the water-taxi service in Ft. Lauderdale, Florida was fired for posting a video on You Tube 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**

The authors provide the legal analysis by 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 and tort law limitations on employment at-will. However, the authors are well aware that other bodies of law, such as federal statutory law, especially civil rights law and labor law as well as state lifestyle discrimination statutes are applicable to this topic. Federal and state laws that protect electronic communications as well as proposed federal and state laws are also germane to this topic. The area of social media in employment is thus a big legal “pie”; and the authors herein examine one “slice” - the law of tort to determine its applicability to the social media employment disputes. In particular, the public policy exception to employment at-will, 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. Employment At-Will Doctrine and Exceptions Thereto**

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.

### **1. Implied Contract Exception**

An initial point that must be made is that if an employee does have a contract with his or her employer, and the contract includes a provision that the employee will only be terminated after a showing of "good cause" or "just cause," then the employee has an express contract (oral or written, though preferably the latter!), and thus the employee is not an at-will employee (Cavico and Mujtaba, 2008). An example in the private sector would be a private university professor with "tenure," which does not (or is not supposed to) mean life-time employment, but rather that the professor has the right to continued employment subject to termination for and after a demonstration of good cause.

Contracts, however, in addition to being express can be implied. That is, even though there is no express contractual provision regarding termination, the courts may construe the employment relationship and setting, past personnel practices of the employer, and especially the statements, actions, and policies of the employer, in order to require a showing of good cause for a discharge. The courts, in particular, will look at any company codes of conduct or ethics as well as handbooks or manuals to see if there is any language pertaining to permanency of employment, limitations on discharge, notice or warnings, disciplinary procedures, corrective measures, rehabilitation steps, or even language that the employee will be treated fairly and with dignity and respect. Such statements and actions may be enough for a court to say that there is an implied contract that the employee at-will be discharged only on a showing of good cause. Nevertheless, establishing an implied contract is a difficult undertaking for employees. Many employers have (or should have from the employer's perspective) conspicuous statements in their employment materials that the employee's status is at-will, subject to termination at any time without notice or reason, and that the at-will status of the employee cannot be modified except by an express written agreement with the president of the company or other high level official, thereby obviating the implied contract "exception." There is, however, another important common law exception to the employment at-will doctrine that can have applicability to social media cases – the "public policy" exception. The authors will address three aspects of public policy: speech, association, and whistleblowing.

### **2. Public Policy Exception**

First, what is the "public policy" doctrine? This doctrine is a tort-based, common law doctrine which is adhered to, though in varying degrees, by virtually all states in the U.S. The public policy doctrine maintains that an employee, even an at-will employee, cannot be discharged for engaging in an activity that public policy encourages. Conversely, an employee cannot be discharged for refusing to engage in an activity that public policy discourages, such as illegal or unethical conduct (Cavico and Mujtaba, 2008). The exact definition of "public policy" is not clear, but generally the concept includes activities that protect and promote the health, safety, and welfare of the citizens and residents of a state, as well as activities that encourage lawful and ethical conduct. Ultimately, the high court of each state, the state supreme court, will decide for the state what "public policy" means on a case-by-case basis, though the courts are guided by the state's constitution, statutes, legislative history, and prior judicial decisions (Cavico and Mujtaba, 2008). "Classic" cases of public policy violations would be the discharge of an employee for serving on a jury, filing a Worker's Compensation claim, filing a safety report with government regulators, testifying truthfully in a legal manner regarding the employer, or refusing to lie to government investigators.

#### **a. Speech as Public Policy.**

The public policy doctrine has been interpreted by the courts to protect the constitutional equivalent of free speech rights in the private sector workplace. The leading case is the federal case of *Novosel v. Nationwide Insurance Company* (1983), where the U.S. Court of Appeals held that freedom of expression involves a "compelling societal

interest” which rises to the level of public policy (p. 901). However, although speech and expression are paramount rights in the U.S. legal system, they are not absolute rights - in the workplace or otherwise - for public policy as well as constitutional purposes. So, the *Novosel* court enunciated a four part inquiry to determine whether employee speech triggers the public policy tort: 1) Does the speech prevent the employer from efficiently carrying out its responsibilities? 2) Does it impair the employee’s ability to carry out his or her own responsibilities? 3) Does it interfere with essential and close working relationships? 4) Does the time, manner, or place where the speech occurs interfere with business operations? This test certainly has applicability to employee speech on social media for public policy tort purposes; but only by seeking answers to these questions in specific social media employment cases can a proper balance between the parties be achieved. However, not all courts are willing to expand their state’s public policy doctrine to include a freedom of speech component. For example, the Supreme Court of Idaho, in *Edmondson v. Shearer Lumber Products* (2003), upheld the dismissal of an employee at a lumber mill who publicly criticized his employer’s management of local national forest. The court ruled that an employee does not have a public policy cause of action against his or her private sector employer who terminates the employee for engaging in “free” speech which in the public sector might be constitutionally protected (*Edmondson*, 2003, p. 739). Moreover, even when a court is willing to interpret public policy to encompass speech protections in the private sector, not all speech will be protected. To illustrate, in *Wiegand v. Motiva Enterprises, LLC* (2003), the federal district court upheld the dismissal of a Texaco gas station supervisor who maintained a website for the sale of Neo-Nazi materials and articles. The company terminated the supervisor for violating its code of conduct that required as a “core value” the “respect for all people” (*Wiegand*, 2003, p. 466). Although the court did say that the public policy doctrine contained a free speech element, the supervisor’s speech was “commercial hate speech” which would not be protected constitutionally and thus was not protected by the public policy doctrine either (*Wiegand*, 2003, p. 476). When it comes to free speech - by virtue of public policy or constitutionally, employers and employees must recognize that “the Internet allows individuals to disseminate a message to many people at once. With very little or limited resources, an individual is able to reach out to the entire world. With that ability comes some responsibility for what is disseminated and a balancing of the legal rights of the publisher and the rest of the world” (*Venezia*, 2012, p. 26).

#### **b. Association as Public Policy**

The public policy exception to the employment at-will doctrine has been interpreted by the courts to encompass employer attempted infringements on the personal freedom of employees, including engaging in personal relationships and having certain lifestyles outside of the workplace. The aforementioned *Novosel v. Nationwide Insurance Co.* (1983) case also stands for the proposition that the protection of other important constitutional freedoms, such as freedom of association, extends to the private sector workplace by virtue of the public policy doctrine. Not all courts, however, will construe public policy to include a freedom of association right in an employment context. For example, in *Trumbauer v. Group Health Coop. of Puget Sound* (1986), the plaintiff employee, an office assistant, was discharged because his relationship with a supervisor violated the employer’s anti-nepotism policy. The plaintiff employee contended that his dismissal violated public policy because it infringed on his freedom of association supported by the state constitution; but the court did not find any recognizable public policy against discrimination based on social relations (*Trumbauer*, 1986, p. 549). Similarly, the Supreme Court of Oregon, in *Patton v. J.C. Penney Co.* (1986), in the context of “office romance,” upheld the dismissal by the retailer of an employee who dated a co-worker, saying that any interference with the employee’s “personal lifestyle” did not cause a public policy freedom of association violation. However, today, several states have lifestyle discrimination or freedom of association statutes which can apply to social media use - for workplace romance or otherwise.

#### **c. Whistleblowing as Public Policy**

Disclosing wrongdoing by one’s company or one’s organization, which is commonly referred to as “whistleblowing” or “blowing the whistle,” is one of the most difficult decisions that an employee may have to make. In addition to government agencies and “traditional” media, there are now many other outlets, such as social media, for the employee to disclose wrongdoing. Yet the whistleblowing employee may find himself or herself exposed to great risk - practically as well as legally, especially in the latter case if the employee is an employee at-will who uses social media to “blow the whistle.” The public policy doctrine, however, may provide some legal redress for the whistleblowing employee (*Cavico*, 2004).

Before discussing whistleblowing as grounds for the public policy tort, it first should be mentioned that several states have whistleblower protection statutes that will protect the employee’s job (but rarely grant tort damages) if the



employee discloses wrongdoing by the employer or co-workers. However, these statutes are consistent in requiring that the employee disclose legal, as opposed to ethical, violations as the predicate for the whistleblowing and, most importantly in the social media context, that the employee make the disclosures by reporting to an appropriate government agency, or perhaps internally, but not “just” to the media. So, if an employee “blows the whistle” on his or her employer on social media, the employee might not be protected in the states that do have whistleblower protection statutes as reporting to some sort of government entity is a uniform requirement of the state statutes (Hudson and Roberts, 2012; Cavico, 2004). Nevertheless, since there is a lack of case law dealing with whistleblowing on social media, the prudent employer should be cautious about retaliating against a whistleblowing employee who makes his or her report of wrongdoing on social media (Hudson and Roberts, 2012).

However, in addition to whistleblower protection statutes, there is the aforementioned separate and distinct common law tort of public policy, which has been construed to have a whistleblower protection element. Whistleblowing has been ruled by the courts to be an activity protected by the public policy exception to the employment at-will doctrine. The courts have construed public policy as favoring the disclosure of wrongdoing, for example, the reporting of criminal and fraudulent conduct, safety violations, because the public benefits from the disclosure (Cavico, 2004). Nevertheless, although one could (and perhaps should) assume that whistleblowing is properly motivated, as Abril, Levin, and Del Riego (2012, p. 90) underscore: “Even a well-intentioned employee but reckless employee can tarnish an organization by disseminating potential evidence of the organization’s negligence, immorality, or incompetence.” Although the courts naturally have more leeway in interpreting a common law, judicially-created doctrine as opposed to a statute, the predicate for a public policy whistleblowing claim typically involves the employee reporting actual legal violations as opposed to unethical conduct. Moreover, the courts generally have required that the whistleblowing be done externally to an appropriate government or law enforcement agency, though some courts have allowed the whistleblowing to be done internally, that is, to other employees, particularly management employees, within the organization, and be protected. External whistleblowing to the media has not been protected pursuant to the public policy doctrine; and today “media” very well could encompass social media too. So, if an employee is contemplating “blowing the whistle” on his or her employer’s wrongdoing, the authors stress that the employee should consult with an attorney to see, first, if his or her state has a whistleblower protection act that protects private sector employees, and then the employee must follow closely the requirements of the statute. Second, if the state does not have such a statute, then the employee must be advised by legal counsel if the state courts’ interpretation of the public policy doctrine would encompass the employee’s contemplated whistleblowing. In either situation, the employee is well advised not to disclose the wrongdoing on social media, at least until the employee makes the report to the appropriate government agency and fulfills any other legal requirements, so that the whistleblowing is protected by statute or the common law public policy doctrine.

## **B. Tort Law Limitations on Employment At-Will**

The common law in the form of tort law may have relevance to social media workplace disputes. A tort is a civil wrong against a person or his property for which money damages are the main remedy. Tort law is divided into two major branches – intentional torts, based on purposefully acting in a wrongful manner, and negligence, based on acting in a careless manner and causing harm (Cavico and Mujtaba, 2008). There are three intentional torts that could pertain to social media workplace disputes: invasion of privacy, intentional infliction of emotional distress, and defamation. It is important to point out that even though an employer may have a right to discharge an employee for violating a workplace policy, especially if the employee is merely an employee at-will, the manner of the discharge may give rise to these separate and independent torts, thereby converting the discharge into a “wrongful discharge” (Cavico and Mujtaba, 2008). Of course, these torts are based on the old English common law, going back to the “olden times” of King William the Conqueror and King Henry II, known as the Father of the Common Law, but nonetheless it is the function of the courts today in a very modern and advanced technological setting to apply these traditional legal principles to determine when tort violations occur in the context of social media and employment.

### **1. Invasion of Privacy**

The intentional tort of invasion of privacy protects the right to maintain one’s private life free from unwanted intrusion and unwanted publicity. Invasion of privacy is a broad legal doctrine which consists of four distinct invasions of a person’s privacy and personality. These four privacy torts are: 1) appropriation of a person’s name or likeness for commercial purposes; 2) intrusion into a person’s private life, private affairs, or seclusion; 3) “false light,” that is, the publication of facts which places the aggrieved party in a “false light”; 4) the public disclosure of private facts about

the aggrieved party (even if the facts are true). Regarding the intrusion tort, it must be emphasized that the aggrieved party is held to a reasonableness standard; that is, only a reasonable expectation of privacy is protected by the tort (Fleming and Miles, 2012; Cavico and Mujtaba, 2008). However, as pointed out by Abril, Levin, and Del Riego (2012, pp. 64-65), “the reasonable expectation of privacy analysis, which is endemic to privacy jurisprudence, is firmly rooted in the experience of physical space and its surrounding normative circumstances.”

Nevertheless, the common law intentional tort of invasion of privacy, particularly in the form of an unreasonable “intrusion” into a person’s private life, can have applicability in the context of employer-employee relations and social media. As such, when employers are conducting monitoring, surveillance, and investigations – on social media, the Internet, email, or otherwise – employers must be careful not to intrude on the employees’ private “space” or private life. Of course, if the employer has the employee’s consent to search social media by means of a voluntarily given password or login information, the employer will be in a very strong legal position. However, regarding social media, even with employee consent, Hearing and Ussery (Part II, 2012, p. 20) pose a critical legal as well as practical question: “Can there be a reasonable expectation of privacy in social media which, by design, was created to disseminate information to the masses”? Similarly, Smith (2012, p. 4) asks: “The concept of information – any information – being private is almost obsolete to many people. If they have access to it, what’s so bad about others having it”? These questions, of course, have direct relevance to the privacy tort for the private sector as well as constitutional interpretations of privacy for the public sector. Nevertheless, the prudent employer should only monitor and investigate employees’ and job applicants’ social media postings and communications when they do not have a reasonable expectation of privacy regarding their social media use. Also, it again should be noted that the aforementioned Electronic Communication Privacy Act allows the employer to monitor the employee’s use of the employer’s email system. Nevertheless, Jatana, Sandoval, and Glycer (2012, p. 14) warn employers that “while employees typically do not have a reasonable expectation of privacy for content posted on public social networking sites, use of social media may still conflict with a variety of privacy laws if the information is obtained in an unlawful manner.” Similarly, Miles and Fleming (2012, p. 11) advised that “employers must be careful when monitoring employees’ social media activities outside the scope of employment because this type of behavior could be viewed as highly offensive to a reasonable person, especially when there is no justifiable business reason to do so.”

A recent case illustration of the invasion of privacy tort in the social media context is the Texas appeals decision of *Sumien v. Carflite* (2012). In *Sumien*, two employees, emergency medical technical personnel, were discharged from their ambulance employer based on improper comments regarding patients, the company, and co-workers made on one of the employee’s Facebook “wall.” The sister of the company’s compliance officer, who was a Facebook “friend” of one of the employees, saw the postings, was offended, notified her sister, and complained in writing to the company. The discharged employees contended that the company invaded their privacy and committed the intentional tort of invasion of privacy. The state appeals court, however, disagreed with the plaintiff employees, explaining that they had not satisfied a key element of the tort, to wit, that their employer committed an unwarranted intrusion on their seclusion or private affairs or concerns (Bland, 2012, pp. 4-5). Another illustration would be the aforementioned federal case of *Pietrylo v. Hillstone Rest. Group* (2008), where a jury did not find that the restaurant employer had committed an invasion of privacy tort by a manager accessing a work-related MySpace account without permission, but the jury did find that federal and state Stored Communications Act were violated. Employers, of course, have always utilized “background checks” on prospective employees, but usually with the consent of the job applicant. Those background checks now can have a social media component. However, if there is a consensus in society that information on social media is truly in the “public” sphere, then the employer may have the liberty to investigate social media, even without consent, for example, in a background check of a job applicant, without fear of a tort lawsuit for invasion of privacy. Accordingly, societal determinations as to what information is deemed to be “private” as opposed to “public” ultimately will help the legal system determine whether the privacy tort will be applicable to social media in the employment context.

## **2. Intentional Infliction of Emotional Distress**

The tort of intentional infliction of emotional distress arises when a person purposefully acts in an extreme, outrageous, or atrocious manner, and thereby causes the aggrieved party to suffer severe emotional distress. The wrongful conduct must be conduct that goes beyond all bounds of decency tolerated by a civilized society. Mere indignities and annoyances are insufficient. Business examples of this tort are not too frequent, but they do occur, usually in a situation where the employee is discharged in an abusive, threatening, humiliating, mocking, and disrespectful manner in full view of his or her co-workers (Cavico and Mujtaba, 2008). Perhaps regarding social media this tort could be violated if

an employer investigates a job applicant's or employee's social media use too extensively and intrusively to discover lawful sexual behavior, sexual orientation, or gender identity, in an effort to identify people who have what the employer regards as "deviant" or "undesirable" lifestyles, and then the employer takes a negative job action. In such a case, the requirements of outrageous or atrocious conduct for the tort could be deemed to be present. Nonetheless, it is questionable whether current societal norms would construe an employer's monitoring and investigating employees' or job applicants' social media use as sufficiently "outrageous" for the tort of intentional infliction of emotional distress to be sustained. Although not a tort infliction of emotional distress case, the decision in the case of *Robinson v. Jones Lang LaSalle Americas, Inc.* (2012) is instructive. In *Robinson*, the plaintiff claimed emotional distress damages as part of her employment discrimination suit against her defendant employer. Against the plaintiff's objection, the judge allowed the discovery of all the plaintiff's social media communications and postings that were relevant to her emotional distress claim. The judge reasoned that the "court recognized that social media can provide information inconsistent with a plaintiff's allegation that defendant's conduct caused her emotional distress by revealing alternate sources of that emotional distress or undermining plaintiff's allegations of the severity of that distress" (*Robinson*, 2012, p. 4).

The federal district court case of *Karissa Reid v. Ingerman Smith LLP* (2012), though principally a sexual harassment case, is illustrative of an important evidentiary point regarding emotional distress damages, that is, postings, comments, and photographs on social media, even private social media content, by a party to a lawsuit can contradict that party's claim of emotional distress. In the aforementioned case, even though the party claiming emotional distress had privacy settings that allowed only "friends" to see her posting, the party, plaintiff in the lawsuit, had no justifiable expectation that only her friends would see the content. "In fact," as the court related, "the wider (h)er circle of 'friends,' the more likely (her) posts would be viewed by someone (s)he never expected to see them" (*Karissa Reid v. Ingerman Smith LLP*, 2012, p. 5). There is, the court explained, a "lower expectation of privacy for social media" (*Karissa Reid v. Ingerman Smith LLP*, 2012, p. 5).

### 3. Defamation

Defamation is an intentional tort with business ramifications; and a tort that can adversely impact not just employers but employees too. In order to sustain the tort of defamation an aggrieved plaintiff must prove the following elements: 1) false and defamatory language by the defendant; 2) "of or concerning" the plaintiff, that is identifying the plaintiff to a reasonable reader, listener, or viewer; 3) "publication" or communication of the defamatory language to a third party; and 4) resulting injury to the reputation of the plaintiff (*Cavico and Mujtaba*, 2008). At a basic level, the statements must be false; they must be defamatory; the defamatory statements must adversely affect and harm the victim's honesty, integrity, virtue, or reputation within the community (*DeBord v. Mercy Health System of Kansas*, 2012; *Cavico and Mujtaba*, 2008). Although protected to a limited degree by a qualified privilege, employers have been sued for defamation for false negative statements about employees on job references (*Hearing and Ussery*, Part I, 2012; *Cavico*, 1999).

Today, both employers and employees must be careful not to commit defamation by means of social media (*Hearing and Ussery*, Part I, 2012). The use of social media would certainly fulfill the "publication" requirement to the tort. So, if the employer communicates on social media, on a website, or through a global email that an employee was discharged because the employee was a thief, a cheat, a liar, or incompetent, and those statements are in fact not true, the tort of defamation may be found. *Hearing and Ussery* (Part I, 2012, p. 35) thus warn employers that "the advent of social media poses foreseeable issues in this (defamation) context, the most obvious factual scenario involving a critical post on a social networking site by a supervisor concerning a current or former employee." Similarly, if an employee goes on social media and accuses his or employer or supervisor of illegal or unethical behavior, the tort also may be found, assuming again those statements are false. Furthermore, the employee can harm his or her employer by posting defamatory comments about the company or fellow employees on social media websites. In the case of *DeBord v. Mercy Health System of Kansas* (2012), an employee of the radiology department was terminated because she posted on her Facebook account during work hours, using her cell phone, statements that indicated that her boss, the director of radiology, put extra money in her paycheck and the checks of other employees that her boss liked, and also that her boss was a "snake" and creepy. The termination was upheld by the court. Moreover, her boss sued the former employee for the tort of defamation, saying that the Facebook comments falsely accused him of falsifying time records and paying employees for time they did not work. The boss, however, lost on his defamation claim because the court ruled that he had not provided sufficient evidence of the harm to reputation element of defamation (*DeBord v. Mercy Health System of Kansas*, 2012).

Moreover, anyone who repeats or republishes defamatory material is just as liable as the original publisher. This rule is called the “repetition rule” and holds that each repetition is a separate publication for which the victim can recover damages (Cavico and Mujtaba, 2008). The “repetition rule” clearly is applicable to defamatory statements on the Internet and social media. In particular, messages intended for one recipient on social media may be readily forwarded (carelessly as well as purposefully) to others for whom the material was not intended. However, it must be pointed out that Internet Service Providers (ISP) by virtue of a federal statute, the Communications Decency Act of 1996, are not deemed to be re-publishers of content provided by other suppliers, even, as determined by the courts, if the ISP becomes aware of the defamatory content and does not remove the offensive statements (Cavico and Mujtaba, 2008). There are two major limitations on the tort of defamation. One, as emphasized, is that the defamatory statements must in fact be false. Therefore, truth is an absolute defense to a lawsuit for defamation. Second, defamation is based on facts, that is, factual statements that are false and defamatory. As such, as a general rule, defamation cannot be premised on the communication of a mere opinion, even a very derogatory one (Sandal Resorts International Limited v. Google, 2011; Cavico, 1999). An illustration is the case of Sandal Resorts International Limited v. Google (2011), where an email sent to multiple recipients accused a resort of poor treatment of native Jamaicans by hiring Jamaicans for merely menial jobs and for not compensating them commensurate to the financial support they provided to the resort. The court ruled these statements not to be defamatory because they were merely the expression of the writer’s opinions and not assertions of fact (Sandal Resorts International Limited v. Google, 2011). Moreover, abusive “opinionated” language by an employee regarding a supervisor on social media that the employee does not like his or her supervisor, has a low opinion of the supervisor, or calls the supervisor vulgar names, generally cannot form the basis of a defamation lawsuit (though the language may result in the employee’s discharge unless otherwise protected, for example, by labor law). However, an opinion may imply the existence of underlying facts, such as accusing the supervisor of incompetence, and thus be regarded as sufficiently factual for defamation to be present, even though stated as an “opinion” (Cavico and Mujtaba, 2008).

#### **4. Negligence**

Torts are divided into intentional torts and the tort of negligence. Negligence is an old common law tort based on a person acting not intentionally to cause harm but rather in a careless manner which causes harm to a person (Cavico and Mujtaba, 2008). The essence of negligence is the “reasonable person” test; that is, a person can be deemed liable for negligence if a person has a duty to act and that person acts in an unreasonable manner, thereby breaching that duty of care (and assuming causation and damages are present) (Cavico and Mujtaba, 2008). Generally, Abril, Levin, and Del Riego (2012, p. 70) relate that “failure to uncover an obvious flaw in an employee’s background or character could lead to negligent hiring and negligent retention.” So, as with intentional torts, the tort of negligence can arise in the social media and employment context. For example, assuming the employer obtains information from social media or the Internet in a lawful manner regarding a job applicant or employee, the employer first has a legal obligation to act reasonably to verify the source and accuracy of the information; and then the employer has a legal duty to use this information, such as evidence that an applicant or employee is incompetent, in a reasonable, careful, and prudent manner; and if the employer fails to do so, the employer may be liable for the tort of negligence, specifically negligent hiring or retention or negligent supervision, if others are harmed (Jatana, Sandoval, and Glyer, 2012). The New Jersey Supreme Court case of *Blakey v. Continental Airlines, Inc.* (2000) is instructive. In *Blakey* (2000), the employer was found directly, and not vicariously, liable pursuant to state anti-discrimination law when it was put on notice of online harassment, but the employer took no action to stop the harassing employees from posting such messages. Another illustration would be a case of workplace violence where the employer learns by means of social media that a job applicant or employee has a propensity for violence and thus poses a risk of harm to other employees or customers, clients, or the public; but the employer fails to act or take precautions to prevent the harm (Jatana, Sandoval, and Glyer, 2012). However, as a “reasonable person” under traditional negligence law, the employer must take heed that information found on social media sites is unverified.

The prevalence of technology today and the widespread use of social media have engendered many new tort issues for employers as well as employees to consider. These common law tort doctrines and principles are, of course, not new, but their expected emergence in the context of social media, particularly at the intersection of social media and employment, presents new legal risks for both employers and employees. Ultimately, the courts will have to decide these tort, social media, and workplace issues and render some “rules of the road” for employers and employees at the intersection of tort law and social media.



### **C. Statutory Exceptions to Employment At-Will**

Although the focus of this article is on the common law of tort and the application of tort law to social media workplace disputes, it would be remiss of the authors not to at least briefly and generally discuss certain major areas of statutory law that can be applied to social media workplace controversies and which can protect employees from the at times harsh consequences of being a “mere” employee at-will. Title VII of the federal Civil Rights Act protects employees from discrimination based on the protected categories of race, color, sex, national origin, and religion regarding all the terms and conditions of employment, including, of course, discharge. So, if an employer obtains information regarding an employee or job applicant from social media, even if in a legal manner, but uses the information, say the employee’s race or religion, in a discriminatory manner to not hire or to terminate the employee then there will be a social-media based civil rights violation pursuant to Title VII. Similarly, if the employer obtains information from social media regarding the employee’s age or disability and uses the information in a discriminatory manner, the Age Discrimination in Employment Act and the Americans with Disabilities Act may be triggered. And if the discriminatory decision was to terminate the employee then even an employee-at will would have a legal case for wrongful discharge based on the protections of the civil rights statutes against discrimination in employment. Harassment, whether sexual, racist or color-based, ageist, or based on national origin or disability, is also illegal in the workplace pursuant to civil rights laws. As such, if the harassment is conducted outside of the physical realm of the workplace on social media sites and modalities such hostile, offensive, and abusive “virtual” conduct can form the basis of a harassment claim – and not “just” a civil rights claim but a criminal law one too. Although an employee’s or job applicant’s sexual orientation or “gender identity” (encompassing gay, lesbian, transgender, and sexually-transitioning people) is not yet protected by federal civil rights laws, there now are many states as well as local government entities that will protect people regarding employment based on their sexual orientation and will also protect against harassment (Cavico, Muffler, and Mujtaba, 2012). Consequently, in those states and local government entities if an employer learns, again even if by legal means, the sexual orientation or transgender or sexually-transitioning status of a job applicant or employee and uses that information not to hire or to fire or to otherwise discriminate against the applicant or employee then a state or local civil rights violation will ensue.

Another very important statutory area of the law that can impact social media policies and practices in the workplace in the United States is the federal National Labor Relations Act (NLRA). In particular to the purposes here, Section 7 of the NLRA grants employees the right to engage in “concerted activities” for collective bargaining purposes as well as their “mutual aid or protection” (NLRA, 29 United States Code, Section 157). Concerted activities thus encompass unionization solicitations and campaigns as well as conduct by co-workers who seek together to improve their wages and working conditions. Section 8(a)(1) of the NLRA, furthermore, prohibits an employer from interfering with the right of employees to engage in concerted activities (NLRA, United States Code, Section 158). The key point is that these traditional labor law principles can be applied to modern-day social media policies and practices in the workplace. Accordingly, the critical question for the courts and the National Labor Relations Board, the federal agency that enforces federal labor law, will be to ascertain what exactly constitutes protected “concerted activities” by employees who use social media and other online communications to discuss, complain, and seek to better workplace conditions. One point is clear; that is, to discharge an employee at-will for seeking with fellow workers by means of social media to improve working conditions very likely would be construed as a federal labor law violation pursuant to the NLRA and thus a wrongful discharge.

Several states also have statutes, typically called “lifestyle discrimination” laws, which seek to protect the rights of employees to engage in lawful activities and conduct outside of the workplace. Moreover, these statutes generally forbid employers from prohibiting employees to engage in legal 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 statutes have been used in the context of “office romance”; but they were not created with the use of social media in mind (Cavico, Samuels, and Mujtaba, 2012). Nonetheless, another important question for the courts will be to decide how these lifestyle and association statutes protect employee activities and associations conducted online by means of social media.

Social media-based employment determinations can have several legal implications pursuant to statutory as well as the common law. Employers can violate federal and state statutory laws prohibiting discrimination and harassment if they take an adverse action against an employee or job applicant, based on a protected characteristic, when such information was obtained by the employer accessing social media sites or if social media is used to harass an employee. Furthermore, pursuant to federal labor law, the employees’ online communications and postings on social media can be construed as protected concerted activities which the employer cannot legally interfere with or use as the basis for a



discriminatory or adverse employment decision. The statutory implications of social media use in employment, especially regarding the discharge of an employee at-will, is definitely an evolving area of the law; and thus one that “begs” for further academic and practical examination and analysis.

#### **D. Conclusion**

Clearly, being an employee at-will is a very exposed legal position for the employee to be in. Establishing an implied contract is a herculean task, and the courts have narrowly construed the public policy exception. Moreover, although social media has both speech and association elements, it remains to be seen how expansive the courts will be in protecting employees who are terminated due to violating their employers social media policies. The degree of protection afforded by the courts will depend on the type of material posted by the employees on social media. Accordingly, one would expect that the more personal the postings, even if work-related, the less likely the courts will be to protect them; conversely, the more the postings involve matters of legitimate workplace concern or matters of public concern, the more likely the courts might be to protect the postings by means of the public policy doctrine.

However, in addition to the aforementioned public policy and implied contract exceptions, as well as tort doctrine limitations to employment at-will, there are other significant laws as that can protect the employee and that can convert the employee’s discharge into a wrongful discharge case. As noted, these statutes and regulatory principles certainly can have applicability to social media policies and practices in the private sector workplace. As noted, constitutional law affecting public sector employees, federal and state civil rights laws, labor laws, electronic privacy protection laws, as well as state lifestyle protection and anti-discrimination statutes are all applicable to social media disputes in the workplace.

Although just primarily focusing on public policy and tort law, 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 subject matter of this article into another realm – one equally complex and challenging – that of ethics, which is a branch of philosophy. Granted it is very difficult to make legal determinations and predictions regarding social media policies and practices in the workplace; however, attempting to ascertain the morality of social media use in employment emerges as an even more arduous task. The socially responsible manager, employer, and organization must ensure that its social media practices are not only legal but more. As such, the consideration of the morality of social media use in employment also must be addressed ethically by managers and human resources professionals.

#### **IV. Summary**

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 some protection for their communications and postings on 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 view of this field, but then focusing on discrete legal aspects, 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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