

## Social Media and the Workplace: How I Learned to Stop Worrying and Love Privacy Settings and the NLRB

Kathleen Carlson

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SOCIAL MEDIA AND THE WORKPLACE: HOW I LEARNED TO  
STOP WORRYING AND LOVE PRIVACY SETTINGS AND THE  
NLRB

*Kathleen Carlson\**

Abstract

Social media has permeated every aspect of society. The use of social media can easily lead to issues in an employment law context when employees suffer adverse employment actions based on the information they choose to share via their personal social media websites. Today's laws concerning online privacy are in a nebulous state and have led some observers to suggest that employees who use social media may not find adequate legal protection from wrongful termination. This Note refutes this contention by analyzing current laws that may protect employees from adverse employment actions due to their use of social media. This Note also addresses the recent memoranda released by the National Labor Relations Board regarding employee social media use in an attempt to distill some concrete categories of protected employee conduct. Finally, this Note addresses and dismisses suggested alternatives to the current laws, including drafting new legislation, broadening the impact of lifestyle discrimination statutes, and broadening the scope of the Fourth Amendment through the elimination of the Third Party Doctrine.

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INTRODUCTION

One in every nine people on Earth has a Facebook account.<sup>1</sup> Twitter averages 190 million tweets per day.<sup>2</sup> It took Google+ merely sixteen days to amass ten million users.<sup>3</sup> As social media use continues to rise, it is no wonder that social media issues continue to create complex and dynamic issues for employers and employees. What happens when an employer decides to make a hiring decision based on viewing a potential employee’s social media website or page? What happens if a current employee makes an unflattering statement about a supervisor or a coworker? What if an employer simply disapproves of an employee’s status update? In an age where information is available with just a click of a button, employees worry what employers may discover about them. Conversely, employers are left to worry about potential exposure to liability.

Employers face a variety of issues regarding employee social media use and thus have a strong interest in avoiding possible conflicts and liability. Since information posted on the Internet survives indefinitely,<sup>4</sup>

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1. Jeff Bullas, *20 Stunning Social Media Statistics Plus Infograph*, JEFFBULLAS’S BLOG (Sept. 2, 2011), <http://www.jeffbullas.com/2011/09/02/20-stunning-social-media-statistics>.

2. *Id.*

3. *Id.*

4. For a discussion on the duration and effects of posting information on the Internet, see generally VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* (2009).

employers have a strong incentive to ensure that posts made by employees are in compliance with state and federal regulations. While courts acknowledge that employers have no duty to monitor employees' private communications, courts have extended the employers' liability areas to the physical workplace and to "settings that are related to the workplace."<sup>5</sup> An employer can be held liable for harassment if a court determines that the employer had reason to know that such activity was taking place.<sup>6</sup> Social media that facilitates conversations of employees is an extension of the workplace where "relations among employees are cemented or sometimes sundered."<sup>7</sup>

Employers can be held vicariously liable for defamatory statements if such statements were made by an agent of the employer in the discharge of the agent's duty to its employer.<sup>8</sup> Employers must also be aware that some professional social media sites, such as LinkedIn, may expose employers to liability when coworkers or other professionals comment on an employee's skills or expertise.<sup>9</sup> These types of "recommendations" may seem innocuous at first blush; however, whether they are positive or negative, recommendations may leave an employer susceptible to liability in cases of defamation or wrongful termination.<sup>10</sup>

Social media is an easy way for confidential client information to be accidentally or deliberately exposed. This exposure could lead an employer to violate any number of state or federal regulations aimed at protecting personal information.<sup>11</sup> The Federal Trade Commission can hold a company liable for an employee's social media statements that include testimonials or endorsements about a company's products or

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5. *Espinoza v. Cnty. of Orange*, G043067, 2012 WL 420149, at \*6 (Cal. Ct. App. Feb. 9, 2012) (holding that an employer is liable for a coworker's harassment based on a disability when the harassing blog posts were made on a workplace computer and the plaintiff was specifically named).

6. *See Blakey v. Cont'l Airlines, Inc.*, 751 A.2d 538, 552 (N.J. 2000) (asserting that employers are responsible for curbing harassment stemming from a company's online social bulletin board).

7. *Id.* at 550.

8. *See Mars, Inc. v. Gonzalez*, 71 S.W.3d 434, 437 (Tex. App. 2002) (holding that a corporation may be held liable for defamation by its agent if such defamation is "referable to the duty owing by the agent to the corporation and was made in the discharge of that duty").

9. *See ADVISEN LTD., SOCIAL MEDIA: EMPLOYER'S LIABILITY FOR THE ACTIVITIES OF THEIR EMPLOYEES* 6 (Sept. 2011), available at [http://corner.advisen.com/pdf\\_files/socialmedia\\_employerresponsibility.pdf](http://corner.advisen.com/pdf_files/socialmedia_employerresponsibility.pdf).

10. *Id.*

11. *Id.* at 6–7. Disclosure of confidential information could potentially put an employer "in violation of certain federal and state regulations such as HIPAA (the Health Information Portability and Accountability Act), the Sarbanes–Oxley Act or the Right to Financial Privacy Act to name a few." *Id.* at 7.

services where the employee fails to disclose his or her relationship with the company.<sup>12</sup>

Commentators have argued for a change in existing laws or creation of new laws to protect employees' social media privacy rights.<sup>13</sup> These alterations to current jurisprudence are unnecessary. Privacy settings are an employee's best protection against unwanted employer visits to the employee's personal social media webpage. While limiting access to a social media profile or site may be "fundamentally crippling the social attributes that have made [social media websites] so popular . . . to their hundreds of millions of users,"<sup>14</sup> it is imperative for individuals to protect themselves by setting privacy controls. Many potential protections are triggered when employees make their social media websites private rather than publically available. Once current and potential employees enable their privacy settings, they are protected by the Stored Communications Act (SCA),<sup>15</sup> which bars employers from accessing an individual's private social media website. There are several tort actions, such as intrusion upon seclusion or invasion of privacy, that an employee may utilize against an employer. Additionally, employers are prohibited from accessing an individual's social media website and using any information protected by Title VII of the Civil Rights Act of 1964 (Title VII)<sup>16</sup> to decline to hire applicants or terminate current employees. Employees must be cautious about what they choose to share publically via social media; however, they can find protection from unlawful hiring decisions and adverse employment actions in the SCA, Title VII, and the First Amendment.<sup>17</sup>

Employees who fear termination for their social media activities under the guise of "at-will employment" may also find protection in the recent decisions and policy memos of the National Labor Relations Board (NLRB).<sup>18</sup> The NLRB has cracked down on employers' social media usage policies, finding that many of them violate the National Labor Relations Act (NLRA).<sup>19</sup> As a result, many employees terminated because of alleged policy violations are reinstated or compensated for

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12. *Id.*

13. *See infra* note 190 and accompanying text.

14. Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957, 1009 (2011).

15. 18 U.S.C. §§ 2701–2712 (2012).

16. 42 U.S.C. § 2000e (2012).

17. *See infra* Part I.

18. *See* Advice Memorandum from the NLRB Office of the Gen. Counsel to Rochelle Kentov, Regional Dir. of Region 12, Miami Jewish Health Sys., No. 12-CA-65993, 2011 WL 6960023, \*2 (Dec. 14, 2011) (showing that a terminated employee was able to raise an issue to the NLRB regarding an adverse employment action based on the time proximity of the action in comparison to the employee's derogatory Facebook message about a supervisor).

19. 29 U.S.C. §§ 151–169 (2012).

their termination. This Note argues that employees currently have ample protection from employers leveraging social media use against them in adverse employment actions, provided that the employees are enabling their social media privacy settings. As long as employees diligently attempt to protect their online privacy, further legislation or the adaption of other legal protections is not necessary to protect employees.

First, this Note details existing protections that employees have, including Title VII, the First Amendment, the SCA, and the NLRA. The importance of implementing privacy settings is highlighted throughout. Second, this Note explores recently released NLRB decisions, policy memoranda, and directives regarding social media and employment law. Finally, this Note argues that additional legislation or adaptation of current laws regarding social media is neither useful nor necessary. In order to reap the benefit of the ample protection available, employees must efficiently use privacy settings.

#### I. SURVEY OF PROTECTIONS FOR EMPLOYEE SOCIAL MEDIA USE

There are numerous channels available to protect employees from adverse employment actions based on their lawful social media use. The following Part details the protections afforded to public and private employees. Most importantly, this Part discusses the laws that are triggered when employees engage privacy settings on their personal social media platforms.

##### A. *Protection Against Discriminatory Hiring*

Due to the potential liability that employers may encounter with employees' use of personal social media websites, some employers take it upon themselves to manage social media risks in hiring policies. Despite the fact that employers face certain liabilities in performing social media background searches on employees,<sup>20</sup> a staggering number of employers still conduct such searches on potential employees. A 2011 survey conducted by Repler indicated that 91% of surveyed employers used social networking websites to screen prospective employees.<sup>21</sup> Nearly half of the employers surveyed indicated that they

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20. See Gerry Richardson, *Social Media Recruiting Exposes Employers to Liability Risks*, BLOG FOR BUS. L. (Aug. 6, 2012), <http://theblogforbusinesslaw.com/social-media-recruiting-exposes-employers-to-liability-risks> (acknowledging that the EEOC forbids employers from using social media to seek out potential employees' personal information such as age, disability, ethnicity, gender, medical history, and religion).

21. *Managing Your Online Image Across Social Networks*, REPLER EFFECT (Sept. 27, 2011, 5:00 AM), <http://blog.repler.com/2011/09/27/managing-your-online-image-across-social-network>. Repler is a social media monitoring service designed to help users of various social media websites by limiting potential risks and showing users how they are perceived through their websites. This study was conducted by surveying 300 individuals involved with their

performed these searches after receiving a prospective employee's application but before initiating a conversation with the applicant.<sup>22</sup> After conducting a search, 69% of the employers responded that they declined to hire an applicant based on information discovered through the applicant's social media website.<sup>23</sup> While these background searches have become quite common and may expose a great deal of information about prospective employees, an employer's hiring decision or adverse employment action must still be lawful.

The Equal Employment Opportunity Commission (EEOC) enforces laws that prohibit discriminatory hiring.<sup>24</sup> Title VII prohibits employment discrimination on the basis of race, color, sex, national origin, or religion.<sup>25</sup> *Gaskell v. University of Kentucky*<sup>26</sup> exemplifies how social media can potentially facilitate discriminatory hiring practices in violation of Title VII.<sup>27</sup> In 2007 the University of Kentucky established a hiring committee to name a founding director for the university's astronomical observatory.<sup>28</sup> Martin Gaskell was the leading candidate for the position until the committee conducted an online search of Gaskell, which revealed his personal website.<sup>29</sup> Gaskell posted an article on his personal website entitled *Modern Astronomy, the Bible, and Creation*.<sup>30</sup>

Though the committee had previously noted that Gaskell was "clearly the most experienced" candidate and had "already done everything [the hiring committee] could possibly want the observatory director to do," the committee recommended another candidate for the position.<sup>31</sup> The hiring committee considered the "scientific integrity" of Gaskell's statements and consulted with university biologists who in turn expressed concern about Gaskell's "creationist views."<sup>32</sup> One of the

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respective companies' hiring processes. *Id.*

22. *Id.*

23. *Id.* It is worth noting that 68% of the employers surveyed also said that they *hired* an applicant based off information discovered on the applicant's social media website. *Id.*

24. Certain laws are only covered by the EEOC if employers have a set number of employees. For a detailed explanation of these exceptions, see *Coverage*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employers/coverage.cfm> (last visited Mar. 3, 2014).

25. 42 U.S.C. § 2000e-2(a) (2012).

26. *Gaskell v. Univ. of Ky.*, No. 09-244-KSF, 2010 WL 4867630, at \*4 (E.D.K.Y. Nov. 23, 2010).

27. This case was never fully litigated as the parties reached a settlement in 2011. See Jay Blanton, *Gaskell Case Resolved: Statement from UK Counsel*, UKNOW: UNIV. OF KY. NEWS (Jan. 18, 2011), <http://uknow.uky.edu/content/gaskell-case-resolved-statement-uk-counsel>.

28. *Gaskell*, 2010 WL 4867630, at \*1-2.

29. *Id.* at \*3-4.

30. *Id.* at \*4.

31. *Id.* at \*3, \*5-6.

32. *Id.* at \*5 (internal quotation marks omitted).

committee members sent an email to the rest of the committee complaining that Gaskell was being denied the job based on his religious views and that “no objective observer could possibly believe” the decision was based on any reason other than religion.<sup>33</sup> Another committee member replied that he believed religion was a part of at least two of the committee members’ decisions and that he worried about the image Gaskell would present to the public.<sup>34</sup>

Since Title VII protections have been applied to employment decisions made based on an applicant’s social media sites, it is not unreasonable to assume that other EEOC-protected classes will be afforded the same protection. For example, the Americans with Disabilities Act (ADA) prohibits employment discrimination on the basis of an individual’s disability,<sup>35</sup> and the Age Discrimination in Employment Act (ADEA) forbids employment discrimination against individuals who are over the age of forty.<sup>36</sup>

### B. *Public Employees’ First Amendment Protection*

The First Amendment provides freedom of speech protection to public employees. There is a two-prong test known as the Pickering–Connick test that determines if the First Amendment will protect a public employee’s speech.<sup>37</sup> Employees must show their speech addresses a matter of public concern and their free speech interest outweighs their public employer’s efficiency interest.<sup>38</sup> The Supreme Court has defined a matter of public concern as “any matter of political, social, or other concern to the community.”<sup>39</sup> “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.”<sup>40</sup> The second prong of the test requires a balance of employer and employee interests. The Supreme Court further streamlined the First Amendment test by holding that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>41</sup>

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33. *Id.*

34. *Id.*

35. 42 U.S.C. §§ 12101–12112 (2012).

36. 29 U.S.C. §§ 623, 631 (2012).

37. The test employs standards from *Connick v. Myers*, 461 U.S. 138 (1983), as well as *Pickering v. Board of Education*, 391 U.S. 563 (1968).

38. *Connick*, 461 U.S. at 140.

39. *Id.* at 146.

40. *Id.* at 147–48.

41. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

The Pickering–Connick test has granted First Amendment protection to public employees using social media.<sup>42</sup> Even the simple action of a user “liking” a page on Facebook rises to the level of protected speech.<sup>43</sup> Though the district court in *Bland v. Roberts* held that a public employee’s “like” of an opponent’s campaign Facebook page was not substantial enough to warrant constitutional protection as speech or political affiliation,<sup>44</sup> the Fourth Circuit recently reversed that decision.<sup>45</sup> After reviewing “what it means to ‘like’ a Facebook page,” the court found that the conduct qualified as speech and equated the “like” in this case to “the Internet equivalent of displaying a political sign in one’s front yard.”<sup>46</sup>

The Pickering–Connick test provides public employees more protection than private employees due to the fact that only public employees are afforded First Amendment protection of their private speech. The Court “nevertheless recognizes that government employers have as much of a right as private employers to control, manage, and discipline their employees when their speech or actions adversely interfere with their job responsibilities.”<sup>47</sup> In other words, if a public employer finds an employee’s social media use to be disruptive to the work environment, that employee can be terminated just as easily if the employee were privately employed.<sup>48</sup>

### C. Private Employees’ National Labor Relations Act Protection

The NLRA applies only to private sector employees.<sup>49</sup> Section 7 of the NLRA protects employee participation in concerted activities.<sup>50</sup>

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42. See *Mattingly v. Milligan*, No. 4:11CV00215 JLH, 2011 WL 5184283, at \*4 (E.D. Ark. Nov. 1, 2011) (finding that a Facebook post criticizing an official working in his official capacity is a matter of public concern and is thus speech protected by the First Amendment).

43. See *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).

44. *Bland v. Roberts*, 857 F. Supp. 2d 599, 604 (E.D. Va. 2012).

45. *Bland*, 730 F.3d at 386.

46. *Id.*

47. Catherine Crane, Note, *Social Networking v. The Employment-at-Will Doctrine: A Potential Defense for Employees Fired for Facebooking, Terminated for Twittering, Booted for Blogging, and Sacked for Social Networking*, 89 WASH. U. L. REV. 639, 644 (2012).

48. See, e.g., *City of San Diego v. Roe*, 543 U.S. 77, 84–85 (2004) (recognizing that a police officer’s off-duty conduct was not protected speech where it exploited his employer’s image and brought the professionalism of his coworkers into disrepute); *Marshall v. Mayor of Savannah*, 366 F. App’x 91, 97 (11th Cir. 2010) (recognizing that a female firefighter’s sexually suggestive MySpace photographs taken at the fire station are not speech protected by the First Amendment).

49. See *Frequently Asked Questions*, NLRB, <https://www.nlr.gov/faq/nlr> (last visited Mar. 3, 2014).

50. “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

While the NLRA does not define the term “concerted activity,”<sup>51</sup> the NLRB defines it as “two or more employees tak[ing] action for their mutual aid or protection regarding terms and conditions of employment.”<sup>52</sup> A single employee may also participate in a concerted activity if that employee is “acting on the authority of other employees, bringing group complaints to the employer’s attention, trying to induce group action, or seeking to prepare for group action.”<sup>53</sup> Section 7 protections apply to both union and nonunion employees.<sup>54</sup> A recent analysis of charges to the NLRB by employees claiming to have been disciplined or fired because of online communications involving the workplace found that “most employees are not engaging online in concerted activities protected by the [NLRA].”<sup>55</sup> Rather . . . they are griping about work and getting fired for it.”<sup>56</sup> Even though “concerted activity does not include mere complaints from one employee to another . . . such griping can nonetheless amount to concerted activity when the matter is of common interest to all employees and implicitly solicits support or attempts to incite collective action.”<sup>57</sup>

In 2007 Joan Wells, a registered nurse, wrote and posted a story regarding patient care on a union maintained website.<sup>58</sup> Wells alleged that the hospital was understaffed and that “the for-profit company that owns [the] [h]ospital, makes more than enough money to pay for additional staff.”<sup>59</sup> Further, Wells stated that the ratio of patients to nurses was too high and a patient could have a heart attack and possibly die because a nurse may not be able to respond fast enough.<sup>60</sup> Wells was fired for the website story as well as comments made to a local newspaper.<sup>61</sup> In applying NLRA concerted activity protections to the case, the Administrative Law Judge (ALJ) found that the statements made on the website were clearly related to the union’s ongoing labor dispute over staffing.<sup>62</sup> As such, Wells’ termination was considered

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or protection.” 29 U.S.C. § 157 (2012).

51. Sprague, *supra* note 14, at 959.

52. *Employee Rights*, NLRB, <https://www.nlr.gov/rights-we-protect/employee-rights> (last visited Mar. 3, 2014).

53. *Id.*

54. See William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 278 (2002).

55. Sprague, *supra* note 14, at 957.

56. *Id.*

57. Alex B. Long, *The Troublemaker’s Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 940 (2007).

58. Valley Hosp. Med. Ctr., Inc., 351 N.L.R.B. 1250, 1250 (2007), *enforced sub nom.* Nev. Serv. Emps. Union, Local 1107, SEIU v. NLRB, 358 F. App’x 783 (9th Cir. 2009).

59. *Valley Hosp. Med. Ctr.*, 351 N.L.R.B. at 1250–51.

60. *Id.* at 1250.

61. *Id.* at 1251.

62. *Id.* at 1253.

unlawful and the hospital was ordered to reinstate Wells to her former job and compensate her for loss of earnings and benefits.<sup>63</sup>

Prior to Wells' charge, the NLRB rarely addressed employee termination due to online activity.<sup>64</sup> The NLRB did not file another charge of unfair labor practice regarding a social media related termination until 2009. Dawnmarie Souza, a veteran paramedic, received a complaint against her that was filed by a patient's spouse.<sup>65</sup> Souza's supervisor requested that Souza write a statement about the incident.<sup>66</sup> Souza's supervisor denied her request to have a union representative present while she wrote her statement.<sup>67</sup> Souza later expressed dissatisfaction with the incident via her Facebook page by referring to her supervisor using derogatory expressions and a term known to Souza's coworkers to mean "psychiatric patient."<sup>68</sup> She was initially suspended, and then ultimately fired for the comments made about her supervisor on her Facebook page.<sup>69</sup> The General Counsel of the NLRB found that the employer was in violation of § 8(a)(1) of the NLRA<sup>70</sup> by refusing Souza the opportunity to have a union representative present.<sup>71</sup> The General Counsel decided that Souza's remarks on her Facebook page regarding her supervisor were not so "opprobrious" as to deny her NLRA protection.<sup>72</sup> Souza's case was settled out of court and does not provide a legal precedent.<sup>73</sup> Between June 2009 and April 2011, the NLRB received roughly one hundred charges that employees suffered adverse employment actions due to exercising their right to a concerted activity via social media.<sup>74</sup> The NLRB responded with two decisions and a series of explanatory

63. *Id.* at 1261–62.

64. Sprague, *supra* note 14, at 960–61.

65. Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB Office of the Gen. Counsel to Jonathan B. Kreisberg, Reg'l Dir. of Region 34, Am. Med. Response of Conn., Inc., No. 34-CA-12576, at 2–4 (Oct. 5, 2010) [hereinafter AMR Memo], available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458055b9c4>.

66. *Id.* at 3.

67. *Id.*

68. *Id.*

69. *Id.* at 4–5.

70. 29 U.S.C. § 158 (2012).

71. AMR Memo, *supra* note 65, at 1.

72. In reaching this conclusion, the General Counsel considered the four factors used to determine if an employee's conduct is so egregious that it no longer warrants NLRB protection. *Id.* at 9. Those factors include, "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Id.* (citing *Atl. Steel Co. & Kenneth Chastain*, 245 N.L.R.B. 814, 816 (1979)).

73. Julianne Pepitone, *Facebook Firing Test Case Settled out of Court*, CNNMONEY (Feb. 8, 2011, 1:44 PM), [http://money.cnn.com/2011/02/08/technology/facebook\\_firing\\_settlement/index.htm](http://money.cnn.com/2011/02/08/technology/facebook_firing_settlement/index.htm).

74. See Sprague, *supra* note 14, at 962.

memoranda. Part II of this Note closely examines the employees' charges and the NLRB's response.

#### D. *Potential Protections of the Stored Communications Act*

The Stored Communications Act of 1986 makes it unlawful to “(1) intentionally access[] without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceed[] an authorization to access that facility; and thereby obtain[], alter[], or prevent[] authorized access to a wire or electronic communication while it is in electronic storage.”<sup>75</sup> Several recent court decisions make it clear that the SCA may be a viable cause of action for employees who believe that their employers have unlawfully accessed their private websites.<sup>76</sup>

In *Konop v. Hawaiian Airlines*, an airline pilot sued his employer for accessing without authorization his private personal website, which criticized his employer, coworkers, and airline union.<sup>77</sup> Konop controlled the viewers of his website by requiring preapproved visitors to log in with a user name and password.<sup>78</sup> Hawaiian Airlines' vice president requested and received permission from two employees whose names appeared on Konop's approved list to access the website under that name.<sup>79</sup> At least one of the employees had not previously visited Konop's website.<sup>80</sup> Konop's website records indicated that one of the names was used fourteen times to log on to the website and the other name was used over twenty times.<sup>81</sup>

Konop filed suit against Hawaiian Airlines alleging a violation of the SCA, among other claims.<sup>82</sup> The district court granted summary judgment against Konop, finding that Hawaiian Airlines was exempted from SCA liability because the vice president received the consent of authorized users before accessing the plaintiff's website.<sup>83</sup> The Ninth Circuit reversed, finding that neither of the employees whose names were used could be considered “users” of the website, since one employee had not previously accessed the website and it was unclear if the other had previously accessed the website.<sup>84</sup> The Ninth Circuit's

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75. 18 U.S.C. § 2701(a) (2012).

76. See *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 880 (9th Cir. 2002); *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 991 (C.D. Cal. 2010); *Pietrylo v. Hillstone Rest. Grp.*, No. 06-5754 (FSH), 2009 WL 3128420, at \*3 (D.N.J. Sept. 25, 2009).

77. *Konop*, 302 F.3d at 872.

78. *Id.*

79. *Id.* at 872–73.

80. *Id.* at 873.

81. *Id.*

82. *Id.* at 873.

83. *Id.* at 879.

84. *Id.* at 880.

holding indicates that the SCA applies to employees' private websites that have appropriate privacy protections. However, it may exempt employers who gain access to an employee's personal website using credentials supplied to other employees if employers are given permission by those authorized employees.

*Crispin v. Christian Audigier, Inc.* is a copyright infringement case that suggests that social media websites can trigger SCA protection.<sup>85</sup> The defendants in *Crispin* attempted to subpoena the plaintiff's Facebook and MySpace pages, including private messages and wall comments, for information regarding the underlying lawsuit.<sup>86</sup> The plaintiffs argued that the SCA protected this information from disclosure.<sup>87</sup> The defendants argued that the SCA did not foreclose their access since they were seeking information that was not private, as it was readily available to anyone with access to the plaintiff's social media profile pages.<sup>88</sup> The Central District of California held that the private messages were "inherently private" and protected by the SCA; however, the court remanded the issue of the wall posts back to the magistrate judge for "a fuller evidentiary record regarding . . . privacy settings and the extent of access allowed to [plaintiff's] Facebook wall and MySpace comments."<sup>89</sup> The court suggested that the SCA would protect the wall posts and comments if the plaintiff had shielded them from the general public by using privacy settings.<sup>90</sup> The court compared the wall posts and comments to "private electronic bulletin board services," which has previously been protected under the SCA.<sup>91</sup> The court also noted that the number of individuals with access to the wall posts or comments was irrelevant in determining if the plaintiff intended the information to be private so long as the plaintiff purposely engaged the social media site's privacy settings.<sup>92</sup>

In *Pietrylo v. Hillstone Restaurant Group*, the court held that an employer's unauthorized access to an employee's private social media website was a violation of the SCA.<sup>93</sup> In *Pietrylo*, several employees of a restaurant created an employees-only MySpace group page to vent about their employment frustrations.<sup>94</sup> The website contained sexual

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85. See 717 F. Supp. 2d 965, 968 (C.D. Cal. 2010).

86. *Id.* at 968–69, 76–77.

87. *Id.* at 969.

88. *Id.* at 976–77.

89. *Id.* at 991.

90. Crane, *supra* note 47, at 669 (citing *Crispin*, 717 F. Supp. 2d at 991).

91. *Crispin*, 717 F. Supp. 2d at 980–81.

92. *Id.* at 990.

93. *Pietrylo v. Hillstone Rest. Grp. (Pietrylo II)*, No. 06-5754 (FSH), 2009 WL 3128420, at \*3 (D.N.J. Sept. 25, 2009).

94. *Pietrylo v. Hillstone Rest. Grp.*, No. 06-5754 (FSH), 2008 WL 6085437, at \*1 (D.N.J. July 25, 2008).

remarks about the employees and customers as well as references to violence and illegal drug use.<sup>95</sup> The restaurant's management circumvented the employees' privacy settings by coercing another employee to give them access to the website.<sup>96</sup> The New Jersey District Court reasoned that the login authorization was not freely given to management and therefore management violated the SCA by "knowingly, intentionally, or purposefully" accessing the website without authorization.<sup>97</sup>

The significance of a user's privacy settings cannot be stressed enough. In order to trigger protection from the SCA, these cases illustrate the importance of individuals' attempts to set privacy controls on their social media sites. Failure to do so may allow employers to avoid SCA liability by arguing that the employee's social media was "readily accessible" to the public.<sup>98</sup> Unfortunately, a high percentage of social media users allow their information to remain public. A 2012 Pew Internet study indicated that only 58% of social media users utilized privacy settings.<sup>99</sup> The study also showed that nearly half of all social media users encountered some difficulty when managing social media privacy settings.<sup>100</sup>

The law in this area is far from settled.<sup>101</sup> While courts have not affirmatively extended the SCA to Facebook or MySpace posts, courts have left the door open for the SCA to potentially provide a cause of action for plaintiffs whose social media websites are accessed by individuals, be it employers or otherwise, without authorization so long as appropriate privacy settings are used.<sup>102</sup> Some commentators argue that this is an unnecessarily broad extension of the SCA and that judges

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95. *Id.* at \*2.

96. *See id.* at \*1.

97. *Pietrylo II*, 2009 WL 3128420, at \*2–3.

98. "It shall not be unlawful . . . for any person to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public." 18 U.S.C. § 2511(2)(g) (2012).

99. Mary Madden, *Privacy Management on Social Media Sites*, PEW INTERNET (Feb. 24, 2012), <http://pewinternet.org/Reports/2012/Privacy-management-on-social-media/Summary-of-findings.aspx>.

100. *Id.*

101. For example, the ramifications of a supervisor viewing an individual's post meant only for friends by being "mutual friends" with that individual have yet to be discussed. *See* Sprague, *supra* note 14, at 1008–09. Professor Sprague briefly argues that "friend-of-a-friend status" might imply that an employer is monitoring an employee's online activity. *Id.* at 1009. *But see* *Sumien v. Careflite*, No. 02-12-00039-CV, 2012 WL 2579525, at \*3 (Tex. App. July 5, 2012) (holding that an employee can be terminated for information posted on a friend's Facebook wall).

102. Crane, *supra* note 47, at 671.

will “twist[] the statute to do things that it was never intended to do.”<sup>103</sup> However, next to the NLRA, the SCA, despite “freezing into the law the understandings of computer network use as of 1986,”<sup>104</sup> can provide protection against wrongful adverse employment actions for employees who use social media.

### E. Protection of Employee Privacy

#### 1. Social Networking Online Protection Act

Federal lawmakers are aware that employees have concerns about their social media privacy and have taken steps to protect that privacy.<sup>105</sup> On April 27, 2012, House Bill 5050, known as the Social Networking Online Protection Act (SNOPA), was introduced to the House of Representatives.<sup>106</sup> If passed, SNOPA would prohibit employers from asking their employees for their social media passwords and protect employees from adverse employment actions as a result of refusing to supply such passwords.<sup>107</sup> Employees would have equitable remedies available to them if employers violated the Act.<sup>108</sup> The representatives who introduced SNOPA argue “[i]t is erroneous to just say that if you don’t want your information accessed that you shouldn’t put it online” and “a legal framework should be in place to offer basic protections and rights” to individuals who use social media websites.<sup>109</sup> At least eleven states have already passed or proposed legislation that prohibits employers from requiring that their employees provide passwords or access to their personal social media websites.<sup>110</sup> Regardless of whether SNOPA becomes federal law, employers who coerce employees into divulging access to their private social media websites may be liable under the SCA because an employee’s coerced authorization is not valid authorization for the purpose of avoiding SCA

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103. Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1214 (2004) [hereinafter Kerr, *User’s Guide*].

104. *Id.*

105. See Eliot Engel, Jan Schakowsky & Michael Grimm, *SNOPA Addresses Online Privacy Concerns*, THE HILL: CONGRESS BLOG (May 15, 2012, 1:46 PM), [hereinafter Engel et al., *Privacy Concerns*], <http://thehill.com/blogs/congress-blog/technology/227509-snopa-addresses-online-privacy-concerns>.

106. Social Networking Online Protection Act, H.R. 537, 113th Cong. (2013) (reintroduced in the 113th Congress after failing to pass during the 112th Congress).

107. *Id.* § 2(a).

108. *Id.* § 2(b)(2).

109. Engel et al., *Privacy Concerns*, *supra* note 105.

110. See J. Mark Poerio & Laura E. Bain, *Social Media in the Workplace: Employer Protections Versus Employee Privacy*, 41 INT’L L. NEWS, no. 4, 2012, available at [http://www.americanbar.org/publications/international\\_law\\_news/2012/fall/social\\_media\\_workplace\\_employer\\_protections\\_versus\\_employee\\_privacy.html](http://www.americanbar.org/publications/international_law_news/2012/fall/social_media_workplace_employer_protections_versus_employee_privacy.html).

liability.<sup>111</sup>

## 2. Invasion of Privacy Tort Action

Invasion of privacy torts illustrate another potential avenue of existing law that employees can use to protect themselves from adverse employment actions based on their social media use.<sup>112</sup> An invasion of privacy tort can consist of four different legal theories.<sup>113</sup> The two theories currently relevant to employee social media cases are intrusion upon seclusion and publication of private facts.<sup>114</sup>

Several plaintiffs were recently unsuccessful in their attempt to bring intrusion upon seclusion and invasion of privacy causes of action. In those cases, the plaintiffs could not adequately establish an expectation of privacy in information they publicly shared; thus, no invasion of privacy occurred when the defendants accessed information on their social media sites.<sup>115</sup> There cannot be an invasion of privacy of something that is “available to any person with a computer and thus opened [] to the public eye.”<sup>116</sup>

In 2012, the Texas Court of Appeals heard an attempt to apply the tort of intrusion upon seclusion to protect an employee terminated for her use of social media.<sup>117</sup> In *Sumien v. Careflite*, an emergency medical technician made a post to a coworker’s Facebook wall concerning employee safety, suggesting physical violence towards patients.<sup>118</sup> The sister of a mutual coworker reported the Facebook post to a supervisor and both Sumien and his ambulance partner were terminated.<sup>119</sup> The court found that Sumien did not have a valid intrusion claim because that cause of action requires proof of an intentional intrusion into a plaintiff’s private affairs.<sup>120</sup> In this particular instance, Sumien did not

111. See Crane, *supra* note 47, at 667 n.185 (citing *Pietrylo II*, No. 06-5754 (FSH), 2009 WL 3128420, at \*3 (D.N.J. Sept. 25, 2009)).

112. See, e.g., *Nguyen v. Starbucks Coffee Corp.*, Nos. CV 08-3354 CRB, CV 09-0047, 2009 WL 4730899, at \*3 (N.D. Cal. Dec. 7, 2009), *aff’d*, 418 F. App’x 606 (9th Cir. 2011); *Sumien v. Careflite*, No. 02-12-00039-CV, 2012 WL 2579525, at \*1–2 (Tx. Ct. App. July 5, 2012); *Moreno v. Hanford Sentinel, Inc.*, 91 Cal. Rptr. 3d 858, 861–62 (Cal. Ct. App. 2009).

113. The four theories underlying invasion of privacy torts are: (1) intrusion upon seclusion, (2) publication of private facts, (3) false light, and (4) appropriation of name or likeness. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

114. See, e.g., *Sumien*, 2012 WL 2579525, at \*1–2; *Moreno*, 91 Cal. Rptr. 3d at 862.

115. See cases cited *supra* note 112.

116. *Moreno*, 91 Cal. Rptr. 3d at 862.

117. See *Sumien*, 2012 WL 2579525, at \*2–3.

118. *Id.* at \*1. Sumien’s ambulance partner posted that she wanted to slap a recent patient and suggested the use of restraints out of fear for their safety. Sumien responded to the Facebook comment by posting “[y]eah like a boot to the head. . . . Seriously yeah restraints or actual HELP from PD instead of the norm.” *Id.*

119. *Id.*

120. *Id.* at \*3.

attempt to use privacy settings and “did not realize” that his partner’s Facebook friends could see his comments on her wall.<sup>121</sup> The court found that Sumien’s misunderstanding of Facebook’s privacy settings did not establish that Careflite intruded on his seclusion when another employee saw and reported his posting.<sup>122</sup> Thus, the use of the defense was not eliminated for other social media cases where privacy settings are in place.

Similarly, the California Court of Appeals found that an invasion of privacy action was not available if the information in question was publicly available.<sup>123</sup> In *Moreno v. Hanford Sentinel, Inc.*, a college student sued her former high school principal for invasion of privacy because the principal submitted the student’s MySpace post containing critical comments about her hometown to a local newspaper.<sup>124</sup> The court ruled that information made public on a MySpace page is not private and cannot form the basis of an invasion of privacy claim.<sup>125</sup>

In 2009, the Ninth Circuit Court of Appeals affirmed a California district court’s grant of summary judgment against an employee claiming unlawful termination based on her religious views expressed on her MySpace page.<sup>126</sup> The court granted summary judgment for the employer because there was no evidence that the employee was terminated for her religious views; rather, her MySpace page contained rants about Starbucks and her coworkers that made other employees feel “unsafe.”<sup>127</sup> While this case did not turn on the use of privacy settings, it is important to note that the employee’s MySpace page was not only available to the general public, but she also shared it with her Starbucks coworkers.<sup>128</sup>

Courts have held against plaintiffs in these cases not because they’ve declined to find a right to privacy in social media. Instead, they have found that, similar to the SCA,<sup>129</sup> intrusion upon seclusion and invasion of privacy causes of action require individuals to use some measure of

121. *Id.*

122. *Id.*

123. *See* *Moreno v. Hanford Sentinel, Inc.*, 91 Cal. Rptr. 3d 858, 863 (Cal. Ct. App. 2009).

124. *Id.* at 860–61.

125. *Id.* at 862. The court went so far as to say that “no reasonable person would have had an expectation of privacy” in the material Moreno posted on the MySpace page. *Id.*

126. *Nguyen v. Starbucks Coffee Corp.*, Nos. CV 08-3354 CRB, CV 09-0047, 2009 WL 4730899, at \*3 (N.D. Cal. Dec. 7, 2009), *aff’d*, 418 F. App’x 606 (9th Cir. 2011).

127. *Nguyen’s* MySpace post included threats against Starbucks and her coworkers. *Id.* at \*2. For example: “I’ve worked Tirelessly 2 not cause trouble, BUT I will now have 2 to turn 2 my revenge side . . . I thank GOD 4 pot 2 calm down my frustrations n worries or else I will go beserk n shoot everyone.” *Id.*

128. *Id.*

129. *See* discussion *supra* Section I.D.

privacy controls on their social media websites.<sup>130</sup> The decisions in these cases all center on the fact that plaintiffs do not have a claim to privacy when they make their social media websites publicly available.

## II. THE NLRB PROVIDES AMPLE PROTECTION TO PRIVATE EMPLOYEES

The NLRB protects private employees who attempt to “take action for their mutual aid or protection regarding terms and conditions of employment,” “bring[] group complaints to the employer’s attention,” or “try[] to induce group action.”<sup>131</sup> Recognizing the challenges that social media poses in the workplace, the office of the NLRB General Counsel released two memoranda on the emerging issue of concerted activity in the social media context with a goal of “provid[ing] guidance as this area of the law develops.”<sup>132</sup> An exploration of these memoranda sheds some light on what activity the NLRB is willing to protect. The NLRB is also conscious of employers who attempt to protect themselves from employees’ social media use. As such, the NLRB released memoranda limiting employers’ social media policies in an attempt to balance employer interests with employee interests in social media.

### A. A Closer Look at “Concerted Activities”

The first step for an employee looking for redress from unlawful termination or adverse employment action in violation of the NLRA is to file a charge against the employer with an NLRB regional office.<sup>133</sup> After an investigation, the NLRB General Counsel will decide whether they will file a formal complaint.<sup>134</sup> An ALJ hears the complaint and then issues a decision in the case.<sup>135</sup> An ALJ decision can be appealed

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130. See cases cited *supra* note 112.

131. See *Employee Rights*, NLRB, <https://www.nlr.gov/rights-we-protect/employee-rights> (last visited Mar. 3, 2014).

132. Memorandum from E. Lafe Solomon, Acting Gen. Counsel, NLRB, to All Reg’l Dirs., Officers-in-Charge, and Resident Officers, Report of the Acting General Counsel Concerning Social Media Cases 2 (Jan. 24, 2012) [hereinafter January NLRB Memo], available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>; Memorandum from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to All Reg’l Dirs., Officers-in-Charge, and Resident Officers, Report of the Acting General Counsel Concerning Social Media Cases 2 (May 30, 2012) [hereinafter May NLRB Memo], available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd>.

133. *Frequently Asked Questions*, NLRB, <https://www.nlr.gov/faq/nlr> (last visited Mar. 3, 2014).

134. *Investigate Charges*, NLRB, <http://www.nlr.gov/what-we-do/investigate-charges> (last visited Mar. 3, 2014).

135. *Id.*

to the NLRB, which will issue its own decision on the matter.<sup>136</sup> An NLRB decision can be appealed to a federal court.<sup>137</sup>

The NLRB protects employees engaged in protected concerted activity from being unlawfully terminated or disciplined.<sup>138</sup> Employees' use of social media websites to discuss work issues requires a basic analysis of what is a protected concerted activity.<sup>139</sup> While the "advent of employee social media posting has not created any new bright-line test for what constitutes protected concerted activity,"<sup>140</sup> the NLRB General Counsel gives guidance in how concerted activities apply to today's social media through General Counsel memoranda and ALJ decisions on employee charges regarding unlawful termination for activity on a social media website.<sup>141</sup> Recognizing the challenges that social media poses in the workplace, the office of the NLRB General Counsel released two memoranda on the emerging issue of concerted activity in the social media context, with a goal of "provid[ing] guidance as this area of the law develops."<sup>142</sup> Professor Robert Sprague has distilled the following elements required to protect a concerted activity: "(1) online postings must relate to terms and conditions of employment; (2) there must be evidence of concert . . .; (3) there must be evidence the employee was seeking to induce or prepare for group action; and (4) the posts must reflect an outgrowth of employees' collective concerns."<sup>143</sup>

An exploration of the case law shows that courts' reasoning is more nuanced than limited to these four basic categories. The decisions fall short of providing employees with a bright-line test, but by comparing the rules from these decisions it is possible to add clarity to this previously underdefined and murky area of law. What are "terms and conditions of employment?" What does the NLRB believe provides "evidence of concert?" Do employees have the right to criticize their coworkers via social media? What qualifies as "opprobrious" conduct? The answers to these questions will begin to demystify NLRB social media protection so that both employees and employers gain a better understanding of what will and will not be protected.

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136. Megan J. Erickson, *Employers, Social Media, & Law: Recent NLRB Activity*, SOC. NETWORKING L. BLOG (Dec. 29, 2012), <http://www.socialnetworkinglawblog.com/2012/12/employers-social-media-law-recent-nlr.html>.

137. *Id.*

138. *See What We Do*, NLRB, <http://www.nlr.gov/what-we-do> (last visited Mar. 3, 2014).

139. *See* Sprague, *supra* note 14, at 1010.

140. *Id.* at 993.

141. *Id.* at 962–63.

142. January NLRB Memo, *supra* note 132, at 2; May NLRB Memo, *supra* note 132, at 2.

143. Sprague, *supra* note 14, at 998 (citations omitted).

## 1. Terms and Conditions

Section 7 protects employees' discussion of the terms and conditions of their employment.<sup>144</sup> The employee's discussion must be centered on the actual terms and conditions of employment and not merely consist of communications via Facebook about what happens at work.<sup>145</sup> Issues "related to wages, including the tax treatment of earnings, are directly related to the employment relationship."<sup>146</sup> Therefore, an employee posting complaints on Facebook about an employer who improperly withheld payroll tax will be protected for participating in a concerted activity.<sup>147</sup> Furthermore, an employee who "like[s]" the Facebook comment will also be protected. The "like" is considered "sufficiently meaningful as to rise to the level of concerted activity."<sup>148</sup>

## 2. Evidence of Concert

The NLRB considers an employee's actions a concerted activity if the actions foster a discussion among other employees or take collective employee issues to management.<sup>149</sup> The inherently social nature of social media on the one hand tends to make this element easier to prove; on the other hand, social media fosters an environment ripe for personal gripes.<sup>150</sup> To comply with the NLRB's definition of concerted activity, an activity must be directed towards management; comments directed towards a political figure will not be protected.<sup>151</sup> Discussion between employees about their supervisors over Facebook can be protected as evidence of a concerted activity. To trigger this protection the participants in the discussion must "share[] a common concern about the effects of the supervisor's conduct upon their terms and conditions

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144. 29 U.S.C. § 157 (2012).

145. An employee who referred to a homeless facility as "spooky" and a "mental institution" did not engage in "discourse" on the terms and conditions of employment. The employee "merely communicat[ed] with her personal friends about what was happening on her shift." Advice Memorandum from the NLRB Office of the Gen. Counsel to Jonathan B. Kreisberg, Reg'l Dir. of Region 34, Martin House, No. 34-CA-12950, 2011 WL 3223853, at \*1-2 (July 19, 2011).

146. Three D, LLC, No. 43-CA-12915, 2012 WL 76862, at \*7 (N.L.R.B. Div. of Judges Jan. 3, 2012).

147. *Id.*

148. *Id.* The "like" was an "assent to the comments being made, and a meaningful contribution to the discussion." *Id.*

149. Advice Memorandum from the NLRB Office of the Gen. Counsel to Rik Lineback, Reg'l Dir. of Region 25, Rural Metro, No. 25-CA-31802, 2011 WL 2960970, at \*2 (June 29, 2011) [hereinafter Rural Metro Memo].

150. Lauren K. Neal, Note, *The Virtual Water Cooler and the NLRB: Concerted Activity in the Age of Facebook*, 69 WASH. & LEE L. REV. 1715, 1751 (2012).

151. Rural Metro Memo, *supra* note 149, at \*2.

of employment.”<sup>152</sup> Essentially, employees speaking about their employer must be addressing fellow employees about a common issue that affects the circumstances of their employment situation. For example, in response to not being promoted, an employee sent a series of emails and Facebook posts suggesting that his supervisor was having an affair with an employee who received the promotion.<sup>153</sup> Despite the fact that other employees participated in these conversations via Facebook, the General Counsel determined that the other employees were only participating “to express amusement or sympathy” and not because they wanted to participate in a discussion about terms of employment or their supervisor’s conduct.<sup>154</sup> After being transferred to a position that paid less, “[u]sing expletives, [an employee] stated the Employer had messed up and that she was done with being a good employee.”<sup>155</sup> The General Counsel found that the employee was participating in a concerted activity because her comments elicited a number of posts from other employees that echoed their own “frustrations with the [e]mployer’s treatment of employees.”<sup>156</sup>

Generally, personal grievances will not be protected if they are not intended to induce a group action. If the employee’s Facebook complaint about a supervisor is merely a personal gripe and the ensuing conversation with a coworker is not an attempt to change anything or induce any group action, it will not be protected even if the conversation focuses on ways to cope with the supervisor.<sup>157</sup> Complaining about a personal grievance with a customer or coworker is not a concerted activity if it does not attempt to induce action on the part of other employees.<sup>158</sup>

Employees’ social media discussions about supervisors or terms and conditions of employment do not have to be in an advanced stage.<sup>159</sup> Several coworkers responded to a Facebook post from an employee frustrated with the promotion of a new manager by agreeing with the

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152. Sprague, *supra* note 14, at 974 (citations omitted).

153. Advice Memorandum from the NLRB Office of the Gen. Counsel to Cornele A. Overstreet, Reg’l Dir. of Region 28, Sagepoint Fin., Inc., No. 28-CA-23441, 2011 WL 3793672, at \*1 (Aug. 9, 2011).

154. *Id.* at \*2.

155. January NLRB Memo, *supra* note 132, at 3.

156. *Id.* at 5.

157. Advice Memorandum from the NLRB Office of the Gen. Counsel to Wanda Pate Jones, Reg’l Dir. of Region 27, Intermountain Specialized Abuse Treatment Ctr., No. 27-CA-065577, 2011 WL 6543306, at \*3 (Dec. 6, 2011).

158. Advice Memorandum from the NLRB Office of the Gen. Counsel to Wanda Pate Jones, Reg’l Dir. of Region 27, Pub. Serv. Credit Union, No. 27-CA-21923, 2011 WL 5822506, at \*3–4 (Nov. 1, 2011) (finding that a gripe about a customer was not attempting to engage other employees in any action); January NLRB Memo, *supra* note 132, at 12–13 (finding an employee who expressed only personal anger with her coworkers had not engaged in a concerted activity).

159. January NLRB Memo, *supra* note 132, at 21–22.

employee and complaining of mismanagement.<sup>160</sup> Two of the employees were fired and the other two were disciplined for the Facebook conversation.<sup>161</sup> The General Counsel determined that the coworkers were sharing concerns about the terms and conditions of their employment and, despite the fact that these concerns were in their preliminary stages, the termination did not allow the employees time to organize actual concrete activity.<sup>162</sup> Recently, the NLRB issued a decision about five coworkers who were terminated for expressing concern over criticism received by another worker via Facebook.<sup>163</sup> The ALJ found that the Facebook comments were protected by the NLRA because the coworkers “were taking a first step towards taking group action to defend themselves” against criticism from another coworker.<sup>164</sup> The NLRB adopted the ALJ decision and added that the five employees’ comments “made common cause” and “together their actions were concerted” in preparing a “group defense” to the complaints.<sup>165</sup>

These examples make it clear that merely discussing a matter involving the workplace with other employees via a social media website is not enough to be considered concerted activity. To be afforded protections, employees must be discussing conduct that impacts the terms and conditions of their employment. If employees are trying to take action about their employment situation, they must take their grievances to the employer. Furthermore, a social media conversation must involve more than an employee’s personal issue and it must attempt to solicit action on the part of other employees.

### 3. Criticism of Coworkers

Section 7 of the NLRA protects an employee’s criticism of a coworker’s job performance,<sup>166</sup> but there are limitations to those protections. For instance, if the criticism is not seeking to involve other employees in resolving work-related issues, it will not be protected.<sup>167</sup>

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160. *Id.* at 20–21.

161. *Id.* at 21.

162. *Id.* 21–22.

163. An employee posted, “a coworker feels that we don’t help our clients enough . . . I about had it! My fellow coworkers how do u feel?” to her Facebook wall, triggering a lengthy discussion between her coworkers that violated the employer’s policy. *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges Sept. 2, 2011).

164. *Id.*

165. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37 (Dec. 14, 2012), 2012 WL 6800769, at \*2.

166. *Hispanics United of Buffalo, Inc.*, 2011 WL 3894520 (“Explicit or implicit criticism by a coworker of the manner in which they are performing their jobs is a subject about which employee discussion is protected by Section 7.”).

167. A reporter’s criticism via Twitter of coworkers and reference to “TV people” as

Further, the criticism will not be protected if it is mere griping and does not suggest that an “[e]mployer should do [something] about it.”<sup>168</sup> The NLRB will also not protect criticisms of employers or coworkers who do not attempt to take their issues to management, particularly if the criticisms are visible to the employer’s customers.<sup>169</sup> The General Counsel rationalized that communication of dissatisfaction with a coworker’s behavior with customers is conduct that would have an impact on an employer’s business.<sup>170</sup> From this case it is clear that the NLRB is concerned about protecting employees’ § 7 rights, but at the same time, the NLRB is not willing to force employers to allow such conduct that could potentially alienate their customer base. Through these cases employees can distill that they have some leeway in public coworker criticism; however, there is only a very narrow margin of conduct that will be protected. An employee seeking to correct a coworker’s behavior will likely find protection, whereas mere complaints without an attempt at action is unlikely to be afforded protection.

#### 4. “Opprobrious Conduct” and Other Unprotected Behavior

There are several categories of speech and behavior that are not protected by § 7. Among these categories are threats,<sup>171</sup> racial stereotypes or racial slurs,<sup>172</sup> and vulgar jokes.<sup>173</sup> These types of

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“stupid” for making mistakes does not relate to the terms and conditions of employment nor does it seek to involve other employees in addressing work-related issues. Advice Memorandum from the NLRB Office of the Gen. Counsel to Cornele A. Overstreet, Reg’l Dir. of Region 28, Lee Enters., Inc., d/b/a/ Ariz. Daily Star, No. 28-CA-23267, 2011 WL 1825089, at \*3, 5 (Apr. 21, 2011). As such, this employee’s conduct was not considered a concerted activity. *Id.* at \*4–5.

168. A complaint on Facebook about a coworker’s irritating mannerisms while traveling was not a concerted activity because it did not concern the terms and conditions of employment “and [it] was not even suggesting that the Employer should do anything about it.” Advice Memorandum from the NLRB Office of the Gen. Counsel to Wayne Gold, Reg’l Dir. of Region 5, Children’s Nat’l Med. Ctr., No. 05-CA-36658, 2011 WL 6009620, at \*2 (Nov. 14, 2011).

169. A bartender who criticized her coworker’s bartending practices via Facebook did not participate in a concerted activity because the employee did not take the issue to management and instead chose to post it where it was readily viewable by the bar’s patrons. Advice Memorandum from the NLRB Office of the Gen. Counsel to Richard L. Ahearn, Reg’l Dir. of Region 19, The Wedge Corp. d/b/a/ The Rock Wood Fired Pizza & Spirits, No. 19-CA-32981, 2011 WL 4526829, at \*3 (Sept. 19, 2011).

170. *Id.*

171. Advice Memorandum from the NLRB Office of the Gen. Counsel to Richard L. Ahearn, Reg’l Dir. of Region 19, Frito Lay, Inc., No. 36-CA-10882, 2011 WL 4526828, at \*1 (Sept. 19, 2011) (refusing to extend protection to an employee whose Facebook post threatened that he was “a hair away from setting it off in that BITCH”).

172. Advice Memorandum from the NLRB Office of the Gen. Counsel to Ray Kassab, Acting Reg’l Dir. of Region 7, Detroit Med. Ctr., No. 07-CA-06682, 2012 WL 1795803, at \*3 (Jan. 10, 2012) [hereinafter Detroit Med. Ctr. Memo].

comments lose any protection they would have under evidence of concerted activity or terms and conditions of employment because the terms cause disruption and racial tension in the workplace.<sup>174</sup> The NLRB will not extend any protection to an employee who is aware that their Facebook post is false and potentially damaging to the employer.<sup>175</sup> However, critical comments about an employer do not lose protection simply because they can be seen by nonemployees, so long as the comments were not critical of the employer's product or business policies.<sup>176</sup> For example, several employees participated in a conversation on Facebook that was initiated by an employee posting that she hated her place of employment and that her operations manager was responsible for her feeling that way.<sup>177</sup> An employee of a hospital made multiple accusations that the hospital's "corporate paradigm" was responsible for a prior employee's fatal shooting.<sup>178</sup> Despite the fact that the comments were disparaging to the employer, the comments did not lose their protection because they did not disparage the employer's product.<sup>179</sup> In summation, the NLRB refuses to recognize certain types of behavior because of its offensive or indefensible nature. However, the mere fact that nonemployees can view an employee's criticism of an employer will not bar the employee from protection, so long as it is not critical of the employer's business or product.

### B. NLRB Regulation of Social Media Policies

Recently the General Counsel of the NLRB updated its policies on employers' social media policies by releasing a memorandum exploring several cases and explaining which examples are and are not appropriate.<sup>180</sup> If the NLRB finds that an employer's policies are not compliant with the NLRA, those policies will not be enforced.<sup>181</sup> The

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173. Advice Memorandum from the NLRB Office of the Gen. Counsel to Elbert F. Tellem, Acting Reg'l Dir. of Region 2, Schulte, Roth, & Zabel, No. 02-CA-60476, 2011 WL 5122642, at \*1 (Oct. 13, 2011) (refusing to extend protection to an employee who used profanity in his job title on his LinkedIn profile because it was in poor taste despite the fact that the employee claimed it was a joke).

174. See Detroit Med. Ctr. Memo, *supra* note 172, at \*3.

175. Advice Memorandum from the NLRB Office of the Gen. Counsel to Ronald K. Hooks, Reg'l Dir. of Region 26, TAW, Inc., No. 26-CA-63082, 2011 WL 6543304, at \*2 (Nov. 22, 2011).

176. See January NLRB Memo, *supra* note 132, at 25.

177. *Id.* at 24–25.

178. *Id.* at 26. Over the course of five months the employee posted four letters to the website of a local newspaper. *Id.*

179. *Id.* at 29. The General Counsel determined that the employee's letters did not disparage the healthcare that the hospital provided to its patients. *Id.* at 29–30.

180. See generally May NLRB Memo, *supra* note 132.

181. See, e.g., Mercury Marine-Division of Brunswick Corp., 282 N.L.R.B. 794, 794–95 (1987) (holding that the rules requiring that employees seek their employers' permission to

purpose of an employer's social media policy is to educate employees on acceptable uses of social media in order to maintain compliance with state or federal laws.<sup>182</sup> These policies protect both the employer and the employee from potential liability.

Employers are not free to impose whatever social media policies they wish upon their employees. Social media policies must meet the rigorous and often-changing standards set forth by the NLRB. Employers violate § 8(a)(1) of the NLRA by imposing a rule that “would reasonably tend to chill employees in the exercise of their Section 7 rights.”<sup>183</sup> There is a three-part inquiry to determine if an employer's rule would have such an effect.<sup>184</sup>

First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.<sup>185</sup>

While an employee cannot suffer an adverse employment action for violating an employer's social media policy that violated the NLRA, an employee who violates an employer's lawful social media policy may be terminated for willful misconduct.<sup>186</sup> Some practitioners criticize the rules promulgated by the NLRB Memo by saying they take away employers' abilities to combat social media issues in the workplace.<sup>187</sup>

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engage in § 7 activity violates the NLRA); KSL Claremont Resort, Inc., 344 N.L.R.B. 832, 836 (2005) (holding that an employer's rules cannot proscribe “negative conversations” about managers because of the potential chilling effect on protected NLRB activities).

182. For an extensive list of employers' social media policies, see *Policy Database*, SOC. MEDIA GOVERNANCE, <http://socialmediagovernance.com/policies.php> (last visited Mar. 3, 2014).

183. Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).

184. Martin Luther Memorial Home, Inc., 343 N.L.R.B. 646, 647 (2004).

185. See May NLRB Memo, *supra* note 132, at 3.

186. See *Chapman v. Unemployment Comp. Bd. of Review*, 20 A.3d 603, 605, 610 (Pa. Commw. Ct. 2011) (affirming an employee's termination for willful misconduct for violating the employer's social media policy by posting on Facebook while on duty); *Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943, at \*16, \*20, \*29 (E.D. Pa. Dec. 3, 2008) (finding that a student-teacher was properly dismissed for violating her school's Internet policy by posting personal information about a supervising teacher).

187. See, e.g., Daniel Schwartz, *After NLRB's Memo, Drafting Employment Policies Got Trickier*, CONN. EMP'T L.BLOG (May 31, 2012), <http://www.ctemploymentlawblog.com/2012/05/articles/after-nlrbs-memo-drafting-employment-policies-got-trickier> (arguing that the NLRB's memo on employment policies is an “utter mess” that is a “crazy assault on an

However, the measures that the NLRB is willing to take with its rules protecting employee speech via social media strengthens the argument that employees have ample legal protection and any further legislation would be redundant. Employees can voice their concerns and attempt to coordinate action against an employer or coworker and still be protected from adverse employment action.

### III. ADDITIONAL EMPLOYEE PROTECTIONS ARE UNNECESSARY WHEN EMPLOYEES ARE CONSCIENTIOUS ABOUT ENABLING PRIVACY SETTINGS

The additional solutions proposed to protect employees from adverse employment actions are both impractical and unnecessary considering the available protection when privacy settings are enabled. The application of a lifestyle discrimination statute or the broadening of the Fourth Amendment to accommodate social media use is duplicative and presents issues when applied to social media.

#### A. *Amending or Adopting Lifestyle Discrimination Statutes Is an Impractical Solution*

Lifestyle discriminations statutes are laws that protect an employee's off-duty conduct.<sup>188</sup> Some legal practitioners acknowledge that the statutes' applicability to social media is unclear but still suggest that they may extend protection to employees.<sup>189</sup> Arguments have also been made that existing law does not adequately protect an employee's off-duty social media activities, and that it is necessary to enact or amend state lifestyle discrimination statutes in order to protect these activities.<sup>190</sup> There are several reasons why lifestyle discrimination

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employer's ability to have policies that have any teeth to them").

188. Christine Burke & Barbara Roth, *Labor: Lifestyle Discrimination Laws Are Becoming Increasingly Prevalent*, INSIDECOUNSEL (June 13, 2011), <http://www.insidecounsel.com/2011/06/13/labor-lifestyle-discrimination-laws-are-becoming-i>.

189. See, e.g., ROBERT B. FITZPATRICK, SOCIAL MEDIA AND PRIVACY IN THE WORKPLACE 11 (2011), available at <http://www.robertbfitzpatrick.com/papers/Social-Media-Privacy.pdf>; Brian Flock, *Off-Duty Conduct Statutes Limit Prying into an Applicant's Online Background*, COUNS. @ L. (Aug. 31, 2010), <http://www.wac6.com/wac6/2010/08/off-duty-conduct-statutes-limit-prying-into-an-applicants-online-background.html>; Kaiser Wahab & Lauren Mack, *Top Employer Questions on Employee Social Media Conduct Answered*, JDSUPRA L. NEWS (Mar. 21, 2012), <http://www.jdsupra.com/legalnews/top-employer-questions-on-employee-social-22807>.

190. See Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 680-83 (2004); Shelbie J. Byers, Note, *Untangling the World Wide Weblog: A Proposal for Blogging, Employment-at-Will, and Lifestyle Discrimination Statutes*, 42 VAL. U. L. REV. 245, 247 (2007); Joseph Lipps, Note, *State Lifestyle Statutes and the Blogosphere: Autonomy for Private Employees in the Internet Age*, 72 OHIO ST. L.J. 645, 646 (2011); Jean M. Roche, Note, *Why Can't We Be Friends?: Why California Needs a Lifestyle Discrimination*

statutes should not be relied upon for protection. First, despite the seemingly wide-open language of a few state lifestyle discrimination statutes, state courts have limited the protection that these statutes provide employees. Second, many of these statutes were written to protect specific conduct such as tobacco use, sexual orientation, or political affiliation.<sup>191</sup> These statutes were not written to protect employees' social media conduct.<sup>192</sup> Finally, as argued throughout this Note, there are ample alternative channels available that provide employees with protection so long as employees are diligent in the protection of their privacy rights by engaging social media privacy settings.

The protection provided by the lifestyle discrimination statutes with the broadest language is actually extremely limited. Five states have adopted broad language in their lifestyle discrimination statutes aimed at protecting employees' lawful off-duty conduct.<sup>193</sup> An overview of how state courts have interpreted these statutes shows the limited protection these statutes actually offer to employees. For example, the plain language of California's statute implies that it would, without exception, provide protection to employees' lawful off-duty conduct.<sup>194</sup> In reality the protection is incredibly narrow. In 2000, the California Attorney General limited the protection of that statute to cover only "independently recognized constitutional rights."<sup>195</sup> Thus, much of the conduct that proponents of lifestyle discrimination statutes want to shield will not find any protection under the California law.

In comparison, Connecticut's statute focuses only on the speech aspect of an employee's conduct.<sup>196</sup> The Free Speech Act was enacted to "remedy the disparity" between public sector employees' First Amendment free speech protection and private sector employees who are not given First Amendment protection.<sup>197</sup> The Act prohibits

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*Statute to Protect Employees from Employment Actions Based on Their Off-Duty Behavior*, 7 HASTINGS BUS. L.J. 187, 202 (2011).

191. Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377, 418-20 (2003), available at <http://scholarship.law.berkeley.edu/facpubs/534>.

192. Byers, *supra* note 190, at 275 ("Lifestyle discrimination statutes, which protect lawful off-duty activities, conduct, or speech are inadequate to protect at-will employee bloggers because the statutes lack protection for both the act of blogging and the speech that necessarily accompanies blogging."). Despite the fact that Byers's Note centers on blogging, the argument is still valid for other types of social media including Facebook.

193. See, e.g., CAL. LAB. CODE § 96(k) (West 2012); COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2007); CONN. GEN. STAT. ANN. § 31-51q (West 2013); N.D. CENT. CODE ANN. § 14-02.4-01 (West 2011); N.Y. LAB. LAW § 201-d(2) (McKinney 2012).

194. CAL. LAB. CODE § 96(k); Byers, *supra* note 190, at 269.

195. Supersession of Labor Code § 96, 83 Op. Att'y Gen. Cal. 226 (2000).

196. CONN. GEN. STAT. ANN. § 31-51q.

197. Byers, *supra* note 190, at 271.

employers from “subject[ing] any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the [F]irst [A]mendment to the United States Constitution” so long as the “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.”<sup>198</sup> Employers can easily circumvent violating this act by arguing that an employee’s speech rose to the level of required interference as to negate the employee’s protection from the Act.

New York’s statute protects four categories of lawful off-duty conduct: political activities, use of legal consumable products, recreational activities, and union membership.<sup>199</sup> New York’s statute differs from other states’ lifestyle discrimination statutes since it only protects the narrower category of “recreational” activities rather than any type of lawful off-duty conduct.<sup>200</sup> The issue with the application of this statute to social media use is that New York state courts have limited the term “recreational” only to “clearly defined categories of leisure-time activities.”<sup>201</sup> Since the statute lists “sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material,”<sup>202</sup> state courts have applied the doctrine of *noscitur a sociis* to conclude that the statute was not intended to cover activities outside of that scope.<sup>203</sup>

North Dakota also has a fairly broad lifestyle discrimination statute to protect lawful off-duty conduct and activities.<sup>204</sup> The statute makes an exception for activities that are in direct conflict with an employer’s business interest.<sup>205</sup> This statute provides more protection than states that only require that the activity create a conflict of interest with the employer.<sup>206</sup> The limits of an employer’s business interest have not yet been tested in the realm of employee social media so it remains to be seen how much protection this statute will afford.

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198. CONN. GEN. STAT. ANN. § 31-51q.

199. N.Y. LAB. LAW § 201-d(2) (McKinney 2012).

200. Byers, *supra* note 190, at 273.

201. *State v. Wal-Mart Stores*, 207 A.D.2d 150, 152 (N.Y. App. Div. 1995).

202. N.Y. LAB. LAW § 201-d(1)(b).

203. *See, e.g., McCavitt v. Swiss Reinsurance Am. Corp.*, 89 F. Supp. 2d 495, 498 (S.D.N.Y. 2000) (holding that dating is not a recreational activity under the statute); *Wal-Mart*, 207 A.D.2d at 152 (finding that personal relationships fall outside of the scope of the statute’s intended coverage); *Bilquin v. Roman Catholic Church, Diocese of Rockville Ctr.*, 286 A.D.2d 409, 409 (N.Y. App. Div. 2001) (finding that a woman’s cohabitation with a married man was not a recreational activity under the statute); *cf. Cavanaugh v. Doherty*, 243 A.D.2d 92, 95–96, 100 (N.Y. App. Div. 1998) (holding that a discussion with a political official in a restaurant during an employee’s off-duty hours was a recreational activity).

204. N.D. CENT. CODE ANN. § 14-02.4-01 (West 2011).

205. *Id.*

206. Byers, *supra* note 190, at 273–74.

Colorado's statute may come the closest to potential social media protection. The language of the statute appears to protect both employee privacy and an employer's business interest.<sup>207</sup> The statute limits the protection to employees' activities occurring "off the premises of the employer during nonworking hours."<sup>208</sup> The protection is further limited as it allows for an exception that would let an employer terminate an employee for lawful off-duty conduct that created a conflict of interest or interfered with an occupational requirement.<sup>209</sup> As these statutes have not yet been invoked in a social media case, Colorado courts have not had the opportunity to show how broadly or narrowly they will construe conflicts of interest. This uncertainty in interpretation should leave employees wary of the protections this statute will provide them.

Many states have even narrower lifestyle discrimination laws that only protect specific employee conduct.<sup>210</sup> The Right to Privacy in the Workplace Act, for example, protects employees from suffering adverse employment actions based on their use of lawful products, such as tobacco, off of the employer's premises.<sup>211</sup> Five other states have similar laws protecting an employee's use of "lawful products" or "lawful consumable products."<sup>212</sup> Roughly ten jurisdictions protect employees from adverse employment action based on their sexual orientation.<sup>213</sup> Finally, a majority of states protect employees' rights to political affiliation.<sup>214</sup>

Given the fact that none of these current statutes apply to social media, and many states do not have lifestyle discrimination statutes, it is implausible to insist that current statutes be broadened or completely rewritten<sup>215</sup> since employees are already afforded ample protection. State courts have already interpreted the broad language of lifestyle discrimination statutes to apply to very narrow situations. It is illogical

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207. Roche, *supra* note 190, at 200–01.

208. COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2007).

209. *Id.*

210. See Sugarman, *supra* note 191, at 418.

211. In Illinois it is "unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses lawful products off the premises of the employer during nonworking hours." 820 ILL. COMP. STAT. ANN. 55/5 (West 2010).

212. See MINN. STAT. ANN. § 181.938 (2012); MONT. CODE ANN. § 39-2-313 (2011); NEV. REV. STAT. ANN. § 613.333 (West 2011); N.C. GEN. STAT. ANN. § 95-28.2 (West 2012); WIS. STAT. ANN. § 111.321 (West 2011).

213. Sugarman, *supra* note 191, at 419. For an example of these statutes, see MASS. GEN. LAWS ANN. ch. 151B, § 3(6) (West 2012).

214. Sugarman, *supra* note 191, at 419 & n.141.

215. See Lipps, *supra* note 190, at 675–77 (suggesting a model state lifestyle discrimination statute for protecting social media use for the purpose of increasing consistency and balancing employer and employee rights).

to argue that these types of statutes would make a good fit for employee social media protection, particularly when current laws that provide employees adequate protection are considered.<sup>216</sup>

B. *Broadening the Scope of the Fourth Amendment for Public Employees Is Unwarranted*

The current state of the law<sup>217</sup> makes it unlikely that the Fourth Amendment would protect social media use because of the application of the Third Party Doctrine.<sup>218</sup> The Third Party Doctrine was established in the Supreme Court decision *United States v. White*.<sup>219</sup> In 1979 the Supreme Court extended the doctrine to include information shared with automated machines.<sup>220</sup> Thus, individuals lose their Fourth Amendment protections by posting information on the Internet where third-party Internet service providers host and store the information.<sup>221</sup> Once an individual passes on personal information to another person, that individual no longer has direct control over the confidentiality of that information.<sup>222</sup>

There has been a recent argument to alter the Third Party Doctrine because social media has changed society's expectation of privacy and thus the Third Party Doctrine is not an effective limit to privacy expectations.<sup>223</sup> Another scholar argues that "[c]ourts should view Facebook as the twenty-first century equivalent of a phone booth," implying that instead of the Third Party Doctrine, the *Katz*<sup>224</sup> standard for privacy should apply to social media.<sup>225</sup> In *Katz*, the Supreme Court

216. See discussion *supra* Part I.

217. See *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (establishing that public and private sector employees have a Fourth Amendment right to privacy subject to the reasonableness of their expectation of privacy). The Court introduced a two-part analysis for deciding if there is a right to privacy in the workplace. The employee must have a reasonable expectation of privacy in the area the employer searched. *Id.* If the reasonable expectation exists, then the court must decide if the employer's intrusion on that privacy was justified. *Id.* at 718.

218. Alexander Naito, Note, *A Fourth Amendment Status Update: Applying Constitutional Privacy Protection to Employees' Social Media Use*, 14 U. PA. J. CONST. L. 849, 867–68 (2012).

219. *United States v. White*, 401 U.S. 745, 749 (1971) (holding that an individual does not have an expectation of privacy in materials they choose to share with others).

220. *Smith v. Maryland*, 442 U.S. 735, 744 (1979) (extending the "Third Party Doctrine" to telephone information shared with automated pen registers).

221. See Monu Bedi, *Facebook and Interpersonal Privacy: Why the Third Party Doctrine Should Not Apply*, 54 B.C. L. REV. 1, 11 (2013) (when a person willingly discloses personal information on social media, that person's Fourth Amendment privacy is "vitiating").

222. See MAYER-SCHÖNBERGER, *supra* note 4, at 133.

223. Naito, *supra* note 218, at 875; see also *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

224. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

225. Junichi P. Semitsu, *From Facebook to Mug Shot: How the Dearth of Social*

established that in matters of privacy “there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>226</sup> However, courts have repeatedly held that when an individual knows information can become publically available there is no reasonable expectation of privacy.<sup>227</sup> In a social media context this would include tweets made to followers or comments posted on Facebook pages.

In a recent Supreme Court decision, Justice Sonia Sotomayor urged that in the future “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”<sup>228</sup> A restructuring of this doctrine may occur in the future to address other privacy implications. However, there is no current need to restructure the Third Party Doctrine based on its relation to social media in an employment context. First, the SCA already “is narrowly tailored to provide a set of Fourth Amendment-like protections for computer networks.”<sup>229</sup> Thus it would be superfluous to alter the scope of the Third Party Doctrine. Second, the functions that the Third Party Doctrine serve<sup>230</sup> outweigh the Internet privacy interests scholars seek to protect through this channel. Finally, the Fourth Amendment only represents the minimum protection afforded to material shared on social media websites.<sup>231</sup> Given the fact that more comprehensive protections are available to individuals through alternate channels,<sup>232</sup> such as the NLRA or SCA, these avenues should be exhausted before scholars attempt to alter the privacy rights of the Fourth Amendment.

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*Networking Privacy Rights Revolutionized Online Government Surveillance*, 31 PACE L. REV. 291, 369 (2011).

226. *Katz*, 389 U.S. at 361.

227. *See Romano v. Steelcase, Inc.*, 30 Misc. 3d 426, 434 (N.Y. Sup. Ct. 2010) (reasoning that a plaintiff who created a Facebook or MySpace account consented to the fact that her personal information would be shared on the Internet regardless of her privacy settings); *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012) (finding that “material posted on a ‘private’ Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy”).

228. *Jones*, 132 S. Ct. at 957.

229. Kerr, *User’s Guide*, *supra* note 103, at 1214.

230. The merits of the Third Party Doctrine are beyond the scope of this Note. For a scholarly discussion of the importance of preserving the Third Party Doctrine, see generally Orin S. Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561 (2009).

231. *See Bedi*, *supra* note 221, at 29.

232. *Id.* at 38–39 (suggesting that social media may be best protected through interpersonal privacy rights).

## CONCLUSION

In summation, an employee who uses social media websites can take proactive steps to avoid issues in the workplace by practicing good judgment and common sense. Most importantly, employees need to activate privacy settings on their social media websites. An overview of employment litigation in this area shows that if employees take steps to protect their online privacy, employers will have little recourse if they are displeased with an employee's social media presence. If an employer wrongfully terminates an employee for something found on a Facebook wall or similar social media platform, that employee can seek redress through the courts using the appropriate methods explored throughout this Note.

As technology evolves, so must the laws that govern its use—unless the laws in place already provide ample protection. When employees suffer adverse employment actions based on their social media use that are unlawful, there are copious channels available for employees to contest those actions. Both public and private sector employees enjoy protection from federal discrimination laws, which protect against discriminatory adverse employment action, and the SCA, which protects against employers' intrusions into employees' private social media. Employees may also potentially find protection for their online privacy from existing causes of action such as intrusion upon seclusion or federal legislation such as SNOA. The First Amendment protects public-sector employees, and private-sector employees can find additional protection through the NLRB. With this abundance of available protections, it is unnecessary to enact new legislation or stretch other laws to protect an employee's social media use. Broadening the Fourth Amendment or adopting lifestyle discrimination statutes would expand these laws to cover areas for which they were not intended and do not logically fit.