Workplace Blogs and Workers' Privacy

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I. INTRODUCTION

Over the years, the ability of employers to impinge upon the privacy rights of their employees has been shaped to a large extent by technology. New forms of technology have allowed employers to more intrusively and surreptitiously monitor employees while at work in forms that were unimaginable few years ago. Advances in technology even allow employers to monitor employees outside the traditional confines of the physical workplace. Employees who work at home are subject to monitoring through webcams, or monitoring of keyboard strokes. Even employees whose jobs take them on the road are subject to monitoring through satellite monitoring through GPS positioning devices.

Technology serves also a different function. Technology helps create new ways for employees to communicate and interact with other employees both in and outside the workplace. Most observers will agree, for example, that the advent of email has dramatically changed not only the format or style in which

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2. Id.
4. See Diane Cadrain, GPS on Rise; Workers' Complaints May Follow, HR Magazine, April 2005 (reporting that an increasing number of employers are using the global positioning system (GPS) to track down “mobile” employees—those employees that work outside the traditional confines of the workplace). See also Jill Yung, Big Brother is Watching: How Employee Monitoring in 2004 Brought Orwell's 1984 to Life and What the Law Should Do About It, 36 Seton Hall L. Rev. 163, 170–75 (2005) (describing the use of GPS technology and its impact on employees).
communications occur within organizations, but even perhaps the substance of some of the type of conversations that occur within individuals in those organizations. Email communications have without a doubt changed the way we interact with each other at work, how often we talk to our colleagues, and how we communicate with them. For example, email communications are more easily traced than phone conversations; therefore, the use of email communications is more likely to alter the behavior of parties involved in generating them. In short, technology has not only changed the means we use to communicate with each other, but more profoundly, the actual way we talk to each other.

Among workers, we argue, technology also has opened the door to the creation of new spaces where conversations can take place.

In this article we focus on a related issue. We discuss the development of blogs, and the virtual "space" where blogs and bloggers interact—the "blogosphere" and their impact on the issue of workers' privacy. To some extent it would seem a bit of a contradiction to talk about privacy and blogging in the same article. Blogging, as we will discuss below, does not appear to be the most private of enterprises. There are, we argue, a number of interesting privacy issues raised by the development of blogs as an employee communication tool and by the way employers have reacted to it. In Part II we begin by describing what blogs are. We argue that the importance of the development of blogs and the so called "blogosphere" lies in the fact that it has created a new "space," albeit a virtual one, where workers communicate.

When confronting new forms of communication, employers have reacted primarily in two ways. The traditional way involves intrusive and secretive monitoring of employee's actions. We use the image of a "prying employer" to illustrate this type of privacy issue. We develop this argument in Part III.

The development of blogs, however, has also unearthed a perhaps more complex, and dangerous side, although to some extent "post-legal" side, to the invasion of privacy story. This unconventional invasion of privacy, what we refer to as the "manipulating employer," involves employers' attempts to turn

5. See Robert Oliphant, Using "Hi-Tech" Tools In a Traditional Classroom Environment—A Two Semester Experiment, 9 Rich. J. L. & Tech. 5, 90 (2002) (suggesting that the social impact of email "serves as the new office water cooler, allowing people to socialize informally and efficiently").


blogs around into tools of control which give them access into the lives of employees. We develop this argument in Part IV. Part V concludes the article.

II. BLOGS AS CREATING A NEW SPACE TO COMMUNICATE

_A blog, you see, is a little First Amendment machine._

Webster’s Dictionary defines a blog as “an online diary; a personal chronological log of thoughts published on a Web page.” While accurate as far as it goes, this definition is by no means complete. In fact, the very incompleteness of the definition reflects the very fast changing nature of the blogosphere.

Not that long ago, blogs were associated with personal online diaries “typically concerned with boyfriend problems or techie news.” Writing about his early experiences with blogs, Andrew Sullivan, noted that to a large extent blogs were, “quirky, small, often solipsistic enterprises.” He singled out the site of an earlier blog pioneer for discussing “among other things, his passion for sex and drugs,” and summarized his early impressions of blogs by noting that “reading them is like reading someone else’s diary over their shoulder.”

Things changed. Between the terrorists attacks of September 11, 2001, and the beginning of the war against Iraq, blogs became more than “stream(s) of blurts about the writer’s day.” These events generated a search for a new form of communication. According to Sullivan,

The blog almost seemed designed for this moment. In an instant, during the crisis, the market for serious news commentary soared. But people were not just hungry for news; I realized. They were hungry for communication, for checking their gut against someone they had come to know,

12. _Id._
13. _Id._
for emotional support and psychological bonding. In this world, the very personal nature of blogs had far more resonance than more impersonal corporate media products. Readers were more skeptical of anonymous news organizations anyway, and preferred to supplement them with individual writers they knew and liked.15

This account suggests that the dramatic events of the first few years of the new century created a need not only for information, but for a more interactive and personal form of getting information—a form of communicating that generated trust. We argue that blogs provided a format which facilitated those kinds of conversations to take place.16 Those conversations, in turn, transformed themselves into the space which we now refer to as the “blogosphere.”

What factors might explain the ability of blogs to generate such an immense amount of trust? Commentators have suggested that the answer lies, not in the content of blogs, but in their format. In particular, commentators note four aspects of the format in which blogs are published that have played an important role in their fast growing influence and popularity: reverse chronological order, the use of “links,” their interactive nature, and low entry costs.

The first two features are ubiquitous. Unlike earlier web pages, “bulletin boards” and “discussion groups,” the comments, or posts, appear in a blog in reverse chronological order. Most recent commentary appears at the top of the blog. This simple format characteristic creates an expectation on the reader’s part that the blog will be updated regularly, and thus, that it should be visited time and time again, potentially several times the same day. And the updates are expected to add value, to be important and timely, and thus they are placed right at the top, the first thing the reader sees when opening a blog.

Value can be added in many different ways, and certainly, the posting of commentary, opinion and analysis is an important part of that. Bloggers have found, though, a new source of value: the “link.” A link is simply a way of pointing the readers to a different

15. See Sullivan, supra note 11. Blogs have proliferated at an incredible rate. Towards the end of the 1990s there were, perhaps, a dozen blogs. By the end of 2004, a reported 8 million people indicated having created blogs, and another 32 million people reported being regular readers. See Hugh Hewitt, Blog: Understanding the Information Reformation That’s Changing Your World 70 (2005).

16. According to Professor Hewitt, “[m]ost visitors to my site came because they believed I had something unique to offer them. They trusted me.” See Hewitt, supra note 15, at xv.
site. In the 1990s as the Internet developed, the objective of commercially driven websites was to capture their visitors' attention by getting them to stay on their websites. The focus was on providing comprehensive websites which included every possible type of information wanted by the reader. It was common for the websites to prohibit the use of any external link. Blogs are based on precisely the opposite model. Blogs link to "anything and everything." "As counterintuitive as this may seem from an old-media perspective, weblogs attract regular readers precisely because they regularly point readers away."

Links have thus become the blogs' currency. Links allow blogs to add value in various ways. By linking to the sources of their commentary, the bloggers provide readers a context in which to place the blogger's comments. By contextualizing information, links also generate transparency. Links allow the reader to access the very sources used by the blogger, and evaluate the blogger's interpretation and analysis. The blogger's selection of links also serves a filtering function. Commentators argue that blogs represent a very useful and adept instrument in what perhaps is the key challenge individuals face in the information economy, i.e., "to develop avenues to information that genuinely enhances our understanding, and to screen out the rest." Because the reader "gets to know" the blogger, and his or her point of view, the reader can delegate to the blogger the job of keeping the reader informed as to specific issues, or more generally, as to what is happening out there.

A third characteristic of blogs which has enabled them to concurrently generate vast amounts of trust is their interactivity. The technical feature that facilitates this function is the "comment

18. Id.
19. Id. at 6.
20. Id. at 9.
21. The comments posted by bloggers become just part of the communication, with the links, and the information they convey, providing the context. The context could very well include data relevant to the issue, or other current reports on the same issue. Providing context, however, is likely to include previous stories. Id. at 13.
22. The information is instantly available to the reader without any additional effort. Not only can the reader evaluate the strength of the blogger's argument, but the selection of links or how the blogger tries to support the argument also allows the reader to evaluate the blogger. Knowing the blogger's biases allows the reader to better evaluate the information being conveyed in the blog. Id. at 17.
23. Id. at 12.
24. Id.
The comment system allows readers to comment on the bloggers' posts. The comments become part of the blog, and can be accessed not only by the blogger, but also by other readers. More fundamentally, however, the blogs invite interactivity. Bloggers frequently invite their readers to comment, or to offer additional context on a particular issue.

Finally, the quick explosion in blogs has been in part fueled by the very low entry costs associated with starting a blog. Getting a blog up and running is relatively easy and inexpensive. Once in place, the blogger is totally in control of the content, tone and direction of the blog. "Suddenly" notes an article in Fortune Magazine, "everyone's a publisher and everyone's a critic."

Blogs, thus, were the perfect tool to create a virtual space in which bloggers communicate seamlessly with each other, within and across communities, within and across traditionally recognized physical boundaries, interests, workplaces, social structures, and perhaps every other social, economic, and political barrier we have previously imposed. In the next section we discuss the importance of this development for employees in today's workplace.

25. Id. at 17.
26. Again, Andrew Sullivan's experience is instructive: "In October of 2000, I started my fledgling site, posting pieces I had written, and then writing my own blog, publishing small nuggets of opinion and observation at least twice a day about this, that and the other. I thought of it as a useful vanity site—and urged my friends and their friends to read it. But within a couple of weeks, something odd started happening. With only a few hundred readers, a few started writing back. They picked up on my interests, and sent me links, ideas and materials to add to the blog. Before long, around half the material on my site was suggested by readers. Sometimes, the readers knew far more about any subject than I could." See Sullivan, supra note 11.
27. "If you own a computer or have access to a computer (at your local library, for example) and have an Internet connection, then you pretty much know everything you need to know to start a personal blog. There are a ton of blog hosting services today, and each of them provides easy registration, templates, and online support to guide you through the process of setting up a personal blog. One of the most popular blog hosts is LiveJournal.com. LiveJournal offers users a simple-to-use, customizable blogging tool. Registration at the basic level is free, but you can upgrade for a fee and gain access to a wider selection of tools and features." Blog Tips, Starting a Personal Blog, http://blog.lifetips.com/ (last visited Apr. 12, 2006).
28. See David Kirkpatrick & Daniel Roth, Why There's No Escaping the Blog, Fortune, Jan. 10, 2005, at 44. See also, Hewitt, supra note 15, at 154 (noting that, "Now that writers and reporters, pundits and everyone with a key board has access to publishing technology, there are no gates to keep, no power to say no to anyone.").
III. EMPLOYEES’ USE OF THE NEW FOUND SPACE

Clearly, blogs have become a key staple of America’s “online culture.” It is our contention that blogs have facilitated the development of a new space where employees have found room to engage in conversations which at times involve workplace issues. A recent study analyzing the content of blogs shows that about nine percent of the comments posted in blogs are related to comments about the blogger’s employer. Given that various reports put the number of blogs at over 30 million, and that as described above, the commentary feature is common to many blogs, the nine percent figure represents a substantially large number of individuals talking about their jobs during their off-duty hours. Below we provide some examples of the types of uses employees are making of this new space and the types of conversations they are having.

Before we do that, however, we come back, briefly to the tension that we noted at the beginning of the article, regarding the nature of blogging and the concept of privacy. How can an individual claim a right to privacy, when she voluntarily opens up her diary to the “world wide web”? Our conceptualization of privacy is, as Professor Catherine Fisk points out in her contribution to this Symposium, one based on the idea of

31. Id. at 4.
32. See supra notes 25 and 26 and accompanying text.
33. Interestingly, the Edelman & Intelliseek Survey also reports that over the six-month period analyzed most of the comments expressed by the employees with regard to their jobs were generally positive. “[B]log postings with a phrase or derivative of ‘love my job’ outnumbered those with ‘hate work’ by about 2-to-1 and outnumbered those with ‘hate my boss’ by about 4-to-1.” See supra note 30, at 7.
34. For an interesting article discussing the difficulties in defining the concept of privacy, see Daniel J. Solove, A Taxonomy of Privacy, 154 U. Pa. L. Rev. 477, 479 (2006) (describing the concept of privacy as being “about everything, and therefore it appears to be nothing”).
35. William L. Proser, Privacy, 48 Cal L. Rev. 383, 389 (1960) (identifying four types of harmful activities redressed by the concept of privacy: intrusion upon the seclusion or solitude, or into the plaintiff’s affairs; public disclosure of embarrassing private facts; publicity which places the plaintiff in a false light in the public eye; and appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness).
protection of autonomy.\textsuperscript{36} That is, to the extent that employees, are engaged in off-duty activities, on their own time, using their own resources, and otherwise not "on-the-clock," we answer the question posed by Professor Finkin in his article at the beginning of this issue: Has an employee a \textit{right} to a life away from work?, (or perhaps if we are allowed to rephrase the question—\textit{Should an employee be allowed to have a right} to a life away from work?)—with a resounding yes.\textsuperscript{37}

Employee blogging about work can take myriad forms. First, employees might blog in order to obtain technical types of feedback from fellow employees or others about work-related issues.\textsuperscript{38} These bloggers commonly seek to discuss particular aspects of their jobs, and to share information or seek advice regarding the substantive aspects of what they do. The focus of their blogging is generally not on their co-workers or their immediate environment. Bloggers of this type can be found in a variety of professions such as law,\textsuperscript{39} accounting,\textsuperscript{40} and medicine,\textsuperscript{41} as well as in other industries such as the construction industry.\textsuperscript{42} A blogging attorney of this kind, for example, might discuss a legal topic she is researching and seek leads for pertinent recent court cases or law review articles.

Employees might also blog to share more general stories about their jobs, or to keep their co-workers informed about issues of collective concern. An example of the former is \textit{Waiter Rant}, a blog dedicated to chronicle the daily events on the blogger’s job as a waiter. In a recent posting, for example, the author recants the story of a regular customer who stops by to pick up an order for his wife, and while waiting engages the waiter in a conversation about the state of his marital life.\textsuperscript{43} An example of the latter is \textit{LANL}:

\textsuperscript{38} See Edelman & Intelliseek, \textit{supra} note 30, at 9 (discussing various employee blogs dedicated to share information about plant related problems).
\textsuperscript{39} For a list of law related blogs, see Legal Blogs, http://law-library.rutgers.edu/resources/lawblogs.html (last visited Apr. 12, 2006).
The Real Story, a blog established by a group of scientists at the Los Alamos National Laboratory in response to a decision by the Laboratory’s Director to shut down the operation due to concerns about security and safety violations. The blog was created in order to “provide an uncensored forum where those concerned about the future of LANL may express their views.”

Finally, perhaps the most common type of employee blog and certainly the kind that has received the most media attention is that of the employee who occasionally blogs about work, but whose primary focus is on some other aspect of her life. An example of this type of blogger includes Heather B. Armstrong who was fired from her web design job in 2002 for writing about work and colleagues on her blog, Dooce.com. Armstrong was terminated almost precisely one year after she began blogging. In one of her earlier postings she listed the reasons why she “should not be allowed to work from home.” In later postings Armstrong revealed diary entries from her college years, talked about buying a new car, and discussed the pros and cons of talking about sex when carpooling with co-workers. Over the next year she continued to blog about a variety of personal subjects, and at times about work. Just before her termination, for blogging, Armstrong blogged about a co-worker’s reluctance to use email, and about a supervisor who “wasn’t born with an ‘indoor’ voice, but with a shrill, monotone, speaking-over-a-passing-F16 outdoor voice.”

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44. LANL: The Real Story, http://www.lanl-the-real-story.blogspot.com (last visited Apr. 12, 2006). The blog recently became the focus of Congressional hearings, with various parties arguing about the propriety of the venture.

45. The list includes:
   Too many cushiony horizontal surfaces prime for nappage; 13 bowls of cereal today, all within a two hour period; Oprah; Total Request Live; Horizontal surfaces; Rabid Naked IMing; Shower? Why?; Porn; Have you seen my couch and it’s lovely horizontal surface?; That box of Wheaties is GONE; Passions; The nap after Passions; Too much time alone with two jars of Jif Peanut Butter; The nap to recover from all the naps; I can lie down underneath my desk and no one is going to know. No one. Justin Timberlake.


Peter Whitney’s “Gravityspike.blogspot.com” is another example of this type of blog. Whitney was terminated from his position as an administrative assistant for Wells Fargo Bank after commenting on his blog about having to contribute to buy a birthday card for a manager at work with whom Whitney was not friendly.50 A look at Whitney’s blog, however, reveals that apart from some sporadic comments like the one about the manager, the vast majority of postings involve discussions about non-work related issues.

Perhaps the best known work related blogger of this kind is Ellen Simonetti. Before her termination in October 2004, Ms. Simonetti, also known as the “Queen of Sky,” told her readers the “semi-fictitious account of life as a flight attendant.”51 As with other bloggers of this type, Ms. Simonetti’s blog blended work and private aspects of her life. In an article she wrote following her termination, Ms. Simonetti noted that she had started her blog “as a form of therapy. I had lost my mother in September 2003 to cancer and that hit me hard. It was much easier to write about my feelings than talk about them.”52

IV. INVASING EMPLOYEE PRIVACY THE TRADITIONAL WAY

The history of labor relations in the United States has been the history of fight for control over the workplace.53 Traditionally employers have been on the winning side of that fight.54 As this new space—the blogosphere—was being created and as employees began to use this new space to dialogue about, among other things, work-related issues, it comes as no surprise that employers have shown some interest in this new space as well.

Employers have traditionally advanced four primary justifications for monitoring of employees, at least while the employees are at work or engaged in work related activities. These are: (1) concerns that employees might be using work time and

50. See Todd Wallack, Beware if Your Blog is Related to Work, S.F. Chron., Jan. 24, 2005, at C1 (noting that “[w]ith blogging going mainstream and millions of Americans logging details of their everyday lives, including work, a growing number of people are getting into hot water for being too candid about their jobs” and relationships with their colleagues).
54. Id.
equipment for non-work related purposes;\(^\text{55}\) (2) concerns that employees might damage a computer or software by, for example, downloading a computer virus while engage in non-work related uses;\(^\text{56}\) (3) concerns over limiting the flow of information from and into the workplace including the possible dissemination of proprietary information; and, (4) concerns that employees' misuse of the employer's communications systems might threaten the employer with legal liability (e.g., violation of intellectual property laws,\(^\text{57}\) defamation,\(^\text{58}\) sexual harassment\(^\text{59}\)). Several commentators have debated to what extent these concerns justify the ability of employers to monitor employees while at work. On balance, courts have sided with employers when deciding disputes over the at-work privacy rights of employees.\(^\text{60}\) However, we submit that these concerns do not carry the same weight in justifying the ability of employers to follow employees outside the confines of the workplace and intrude in employees' off-duty communications blogging.

Why are employers so interested in intruding in this newly created space? We suggest two answers. First, as Professor Dennis Nolan recently noted, "some employers simply want to know what employees are up to."\(^\text{61}\) Second, we argue that employers see this new space as a potential managerial tool—as a possible controlling and manipulating mechanism. In this section we discuss the former rationale and its implications. In the next section we discuss the implications of the latter.

A. The "Prying" Employer: "Curiosity and Morality"

Professor Nolan's argument regarding the employers' motivation for monitoring and restricting employees' use of email and Internet use is that "some employers are simply curious, voyeuristic, or moralistic about their employees' conduct."\(^\text{62}\) They like to pry. "The monitoring methods they use are so ill-suited to

\(^{55}\) See Finkin, supra note 6, at 474–77; Jeffery, supra note 3, at 268–73; Nolan supra note 3, at 213–16.

\(^{56}\) See Jeffery, supra note 3, at 270.

\(^{57}\) Id. at 273.

\(^{58}\) Id. at 272.

\(^{59}\) See Finkin, supra note 6, at 475.

\(^{60}\) See Alvin L. Goldman, Overview and U.S. Perspective, 24 Comp. Labor Law & Pol'y Journal 1, 9–17 (2002); see also Paula Knoff, Free Speech and Privacy in the Internet Age: The Canadian Perspective, 24 Comp. Labor Law & Pol'y Journal 67, 81 (2002).

\(^{61}\) See Nolan, supra note 3, at 215.

\(^{62}\) Id.
achieving other objectives that one has to be suspicious of their real motives." We suggest that this assessment likely applies with much more force to employer attempts to monitor employees’ use of blogs on non-work time. In such situations employees engage in blogging on their own time using their own resources. Thus, the timing and place of the employees’ activity should reduce, if not completely eliminate, the most common rationales advanced to explain employer monitoring. The employee is not using the employer’s resources, nor is the employee “on the clock.” Similarly, concerns about employer liability issues would generally also appear to be reduced.

One of the rationales used to justify the monitoring of employees at work, which arguably applies to the monitoring of bloggers, is the concern the employer might have with employees divulging sensitive (e.g., trade secrets) information. For example, a case that has received some attention, at least among bloggers, is that of Michael Hanscom who was terminated from his temporary job at Microsoft. Hanscom was terminated for posting in his blog pictures of Apple computers being downloaded (an actual physical download) into a loading dock at a Microsoft building. According to Hanscom:

[H]aving read stories here and there on the ‘net about people who had for one reason or another lost their jobs due to something on their weblogs, I thought that I had done what I could to avoid that possibility. To my mind, it’s an innocuous post. The presence of Macs on the Microsoft campus isn’t a secret (for everything from graphic design work to the Mac Business Unit), and when I took the picture, I made sure to stand with my back to the building so that nothing other than the computers and the truck would be shown—no building features, no security measures, and no Microsoft personnel. However, it obviously wasn’t enough.

The problem with the sensitive information argument, we submit, is that it is overbroad, even in this context. The use of blogs does not make the information any more sensitive or confidential. Although, blogs provide employees perhaps with one

63. Id.
more means of divulging the information, there is nothing about blogs that should increase whatever right an employer might have had to monitor the employee's off-duty conduct. 65

B. Legal Protections

In this section we discuss the protections available to employees who engage in blogging activities outside of work. As discussed below, however, except for a few state statutes protecting off-duty conduct, bloggers are not likely to receive broad protection under existing legal frameworks.

1. Common Law

Most private sector employees in the United States today are employees “at will” and can be fired or disciplined by employers for virtually any reason. Or, as the Tennessee Supreme Court put it in the Payne v. Western & Atlantic Railroad 66 case, employers are free to “discharge or retain employees at-will for good cause or for no cause, or for even bad cause without thereby being guilty of an unlawful act.” 67 In short, the employment-at-will doctrine, in general, affords little legal protection to employees facing employer discipline for work-related or other blogging. It is true, as also noted that numerous federal, and to a more limited extent state, 68 statutes have eroded the employment-at-will doctrine, and thus may provide employee bloggers with some legal protection. For example, Title VII of the Civil Rights Act of 1964 69 prohibits employment terminations based on sex, race and other reasons, and clearly it would be unlawful for an employer to systematically fire only female employee bloggers and not male bloggers. 70 But such

65. To the extent that the employee engages in communications that harm the employer’s business interests, the employer should be able to protect such interests. See infra notes 124 to 128 and accompanying text.
66. 81 Tenn. 507, 523, 526–27 (1884).
68. Of particular note in this regard are the few state laws enacted which comprehensively protect “lawful” off-duty employee conduct. See, e.g., New York Lab. L, § 201-d (1996); North Dakota Cent. Code § 14-02.4-03 (1995). Even such statutes, however, permit employers to terminate employees where their off-duty conduct presents a “conflict of interest” or the “appearance of such a conflict of interest.” Colorado Rev. Stat. § 24-34-402.5 (1995).
70. This would present a straightforward “disparate treatment” case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973).
a scenario is probably somewhat unlikely in today’s era of more “subtle” forms of employment discrimination, and concerns about being sued under Title VII have led some employers to more strictly scrutinize (or as Professor Vicki Schultz might put it, “sanitize”) employee speech.

More promising protections for employee bloggers, though, possibly lie in the various state court exceptions to the doctrine of employment-at-will handed down in recent years, particularly the implied-contract and public policy exceptions. Under the implied-contract exception, representations made by employers regarding job security, disciplinary procedures, and other employee privileges have been frequently treated by state courts as enforceable provisions, even in the absence of an express employment contract. Employees raising this exception have relied on employee manuals/handbooks and oral statements made by supervisory personnel as the contractual basis for an implied promise of some form of job security. Thus, to the extent employers have set forth general policies regarding employee blogging in employee handbooks or other materials, state courts may find these policies to be binding on employers, even if they do not formally constitute contracts between the employer and employee. With blogging still in its nascent stages, however, employer guidelines of this kind may not be all that common.


73. See Mark A. Rothstein et al., Employment Law 671–94 (2d ed. 1999). The implied contract exception includes both cases based on written or oral communications. See, e.g., Chiodo v. General Waterworks Corp., 413 P.2d 891 (Utah 1967) (finding that a contract for a specific time period included implied terms that employee would conform to the usual standards of performance); Wooley v. Hoffman-La Roche, Inc., 491 A.2d 1257, modified, 499 A.2d 515 (N.J. 1985) (finding that absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term); Grouse v. Group Health Plan Inc., 306 N.W.2d 114 (Minn. 1981) (holding that the doctrine of promissory estoppel allows a plaintiff to sue employer who withdrew job offer after plaintiff had accepted, but before plaintiff had began job).

74. See, e.g., Small v. Spring Indus., Inc., 357 S.E.2d 452, 454–55 (S.C. 1987) (noting that it would be unfair to allow employers to treat statements of this kind as gratuitous or nonbinding).


76. See infra notes 156 to 160 and accompanying text (discussing how large companies are just beginning to develop blogging policies).
minimizing the possible protection afforded employees under the implied-contract exception.

The public policy exception involves situations in which the termination of the employee contravenes some explicit, well-established public policy. Initially, the public policy exception focused on protecting employees who were fired for engaging in behavior which directly benefited the public welfare. For example, courts protected employees who had been fired for serving on jury duty or refusing to follow orders to commit an illegal act.

Recently, plaintiffs' lawyers have attempted to expand the reach of the public policy exception. In particular, the public policy exception, it has been argued, should apply not only in those narrow situations in which an employee is fired for performing a civic duty, but also in cases in which employers were engaging in actions that encroached on employees' personal autonomy. This argument has been especially raised regarding employer efforts to limit the off-duty activities of employees with regard to employees' political activities, personal relationships, and behavior and lifestyle outside of work. The approaches the courts have developed in each of these areas provide some insight into how courts might look at similar types of challenges by employees who are terminated because of their blogging activities.

In a number of cases employees have argued that their decisions to participate (or not participate) in specific political activities have been the basis for their terminations, and thus claimed that the terminations were contrary to public policy. In general, employees making this argument have argued that the public policy in favor of free speech, as found in the federal or

77. See, e.g., Nees v. Hocks, 536 P.2d 512 (Or. 1975) (finding a violation of public policy in a case involving an employee who was discharged for jury service).

78. Id.

79. See, Rothstein et al., supra note 73. See also Bell v. Faulkner, 75 S.W.2d 612 (Mo. Ct. App. 1934) (finding against an employee who was discharged for refusing to vote or campaign for certain candidates favored by the employer).


81. Brunner v. Al Attar, 786 S.W.2d 784 (Tex. App. 1990) (upholding lower court decision against employee who was terminated for her volunteering off-duty work with an AIDS foundation).
corresponding state constitution, was violated by the employer’s action. For example, this argument was successfully raised in the case of *Novosel v. Nationwide Ins. Co.*, where the United States Court of Appeals for the Third Circuit found an insurance company to have acted illegally when it fired an employee for refusing to lobby the Pennsylvania House of Representatives in support of a company sponsored piece of insurance reform legislation. According to the court, the key question was “whether a discharge for disagreement with the employer’s legislative agenda or a refusal to lobby the state legislature on the employer’s behalf sufficiently implicates a recognized facet of public policy.” The court answered this question affirmatively, noting that “the protection of an employee’s freedom of political expressions would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workers’ compensation claim.”

A second type of off duty conduct that has been raised in wrongful discharge against public policy cases relates to employees’ dating practices. In these cases courts have generally sided with employers, especially where supervisor-subordinate relationships were involved, and have been wary of employee attempts to argue discharges of this kind are in any way violative of “public policy.” Thus, in a case involving the discharge of an employee for bringing a woman other than his wife to an employer banquet, a court explicitly rejected employee arguments regarding “freedom of association.” The court held that the right to associate with a non-spouse at an employer banquet was not a threat to a recognized aspect of public policy of the kind which merited an exception to the traditional doctrine of employment-at-will.

Similarly, an Illinois court refused to overturn an employer’s decision to terminate an employee for marrying a co-worker on the basis that the state’s interest in promoting marriage created a “public policy” exception to the at-will doctrine. Finally, in the case of *Patton v. J. C. Penney Co.*, the Supreme Court of Oregon directly held that the employment-at-will doctrine gave the retailer

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83. 721 F.2d 894 (3d Cir. 1983).
84. *Id.* at 899.
85. *Id.*
the right to fire an employee for dating a co-worker, and that any interference with the employee’s “personal lifestyle” in this regard did not “trigger the public policy exception to the employment-at-will doctrine.”

Employees have been equally unsuccessful when challenging adverse employment actions based on other aspects of their private life, such as their behavior and lifestyles. For example, in *Graebel v. American Dynate Corporation*, the plaintiff was fired after a local newspaper’s article “memorialized [the employee’s] racially-biased attitudes and opinions regarding the effect of the increased Asian immigration” in the local area. The plaintiff argued that his termination “for speaking from the confines of his home on a matter of public concern unrelated to his employment” constituted a wrongful discharge in violation of the state constitution and the common laws of the state. In finding against the employee, the Wisconsin Court of Appeals noted the very narrow nature of the public policy exception to the at-will doctrine. While recognizing the “importance of one’s free speech rights,” the court refused “to include an employee’s complaint that he was discharged as a result of oral or written complaints made concerning some matter that is related to a public policy,” concluding that “the public policy exception may not be used to extend constitutional free speech protection to private employment.”

The Idaho Supreme Court recently reached a similar result in the case of *Edmondson v. Shearer Lumber Products*. The plaintiff, an employee at a lumber mill, was terminated after making public statements criticizing a project involving his

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88. Patton v. J. C. Penney Co., 719 P.2d 854 (Or. 1986). In one isolated but prominent case involving the IBM Corporation, however, a California court did overturn the discharge of an employee for having a romantic relationship with an employee at a rival office products firm. The plaintiff in *Rulon-Miller* was terminated for dating an ex-employee. The California Court of Appeals ruled that her discharge was unlawful. While acknowledging the traditional doctrine of employment-at-will, the court’s decision turned almost solely on two internal IBM policy documents.


90. *Id.* at *1.

91. *Id.* at *5. In particular, under Wisconsin law the court noted, the exception is limited to cases covering “an employee’s refusal to obey his or her employer’s command to violate public policy as established by: (1) statutory or constitutional provision; (2) the spirit of a statutory provision; or (3) administrative rules.”

92. *Id.* at *5.

93. *Id.*

94. 75 P.3d 733 (Idaho 2003).
employer and a local civic group regarding the managing of a local national forest. The plaintiff argued that he had been wrongfully terminated because he exercised his constitutionally protected rights of free speech and association. The Idaho Supreme Court upheld the summary judgment finding against the employee, clearly indicating that "an employee does not have a cause of action against a private sector employer who terminates the employee because of the exercise of the employee's constitutional right of free speech."95

A few courts, though, have been willing to entertain the argument that an employer's action which limits the employees' freedom of speech and association might serve as the basis for a wrongful discharge claim. Even when the courts have entertained the argument, however, plaintiffs have generally been unsuccessful.

Wiegand v. Motiva Enterprises, LLC is illustrative.96 In Wiegand, the plaintiff was a Texaco gas station supervisor who operated a website that sold Neo-Nazi paraphernalia.97 Wiegand began working for Texaco in 1994.98 Upon being hired, he received and signed an employee handbook that indicated his at-will employee status.99 In 1999, Wiegand informed his immediate supervisor that he sold "non-mainstream CDs and flags," but the supervisor did not look into Wiegand's activities because Wiegand's work was not affected.100 In addition, his supervisor claimed he "did not care about what plaintiff [Wiegand] did in his free time."101 Two years later, the website was revealed in two newspaper articles.102 Although the newspaper articles did not reveal where Wiegand worked,103 he was soon terminated because Texaco deemed Wiegand's actions as "violat[ing] the company's 'core value' of 'respect for all people.'"104

Wiegand challenged his termination arguing that his employer could not terminate his employment because of his right to

95. Id. at 739.
97. Items sold in Wiegand's website included "'underground music and records' that are 'racist and/or offensive to some people,' such as swastika flags, music advertised as 'the most popular and funniest Nigger-hatin' songs ever written' and t-shirts with sayings like 'Skinheads' and 'Blue-Eyed Devil.'" Id. at 466.
98. Id. at 467.
99. Id.
100. Id. at 468.
101. Id.
102. Id.
103. Id. at 469.
104. Id. at 466.
exercise free speech. Wiegand alleged that “an employee, whether public or private, should not have to be fearful about expressing his personal views in his own home, on his own time. He should not have to worry about losing his job because of his exercise of his first amendment rights in such a private manner that does not affect his employer.”

The United States District Court in New Jersey noted that under New Jersey law, at-will employees “may sustain a claim for wrongful termination if [they] can show [their] discharge was ‘contrary to a clear mandate of public policy.’” The court also noted that matters of public policy are determined from both United States and state constitutions, federal, state, and administrative rules and regulations, and common law.

The court, however, found against the plaintiff. According to the court, Wiegand had failed to establish that the employer’s termination decision was contrary to a clear mandate of public policy, since the plaintiff’s speech was not clearly protected by the First Amendment due to its nature as commercial hate speech.

Interestingly, in reaching its decision in Wiegand the federal district court relied in part on two United States Supreme Court decisions involving public (not private) employment to determine when an employee had a First Amendment right to freedom of speech. According to the district court, the United States Supreme Court had held that states cannot “condition employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression,” but that under certain circumstances states can “regulat[e] the speech of its employees.” In determining the conditions where speech can be regulated, the Supreme Court had balanced the public employee’s interest in commenting on matters of public concern (e.g., political, social, or community concerns) and the public employer’s interest in efficiently running its services through its employees. If the employee’s speech is deemed to be of a

105. Id. at 474.
106. Id. at 473 (citing Pierce v. Ortho Pharm. Corp., 417 A.2d 505 (1980)).
107. Id. at 473 (citing MacDougall v. Weichert, 677 A.2d 162 (1996)).
108. Id. at 475.
110. Connick, 461 U.S. at 142, 103 S. Ct. at 1687.
112. Id. at 477 (citing Pickering, 391 U.S. at 568, 88 S. Ct. at 1734). The Supreme Court recently reaffirmed this test in the case of City of San Diego v. Roe, 543 U.S. 77, 125 S. Ct. 521 (2004). Plaintiff John Roe was a San Diego police officer who was terminated for selling videos of himself on eBay.
personal nature, then the state has the discretion to do as it sees fit to promote the efficient running of its business. The district court applied a similar balancing test in the case at bar to hold that Texaco was within its rights to terminate Wiegand because Wiegand’s speech and his contact with the public could negatively affect Texaco’s business interests.

In sum, employee bloggers may indeed be afforded some limited degree of protection under the public policy exception to the doctrine of employment-at-will. The level of protection, though, will depend on the nature and content of the “speech” involved in their blogging. To the extent employee blogging involves matters of important “public concern,” such activity may receive higher degrees of protection although such protection, as the Wiegand case points out, will clearly be balanced against

masturbating in a police uniform. In addition, plaintiff also sold customized videos, police equipment, and official uniforms of the San Diego Police Department (“SDPD”). Id. at 78, 125 S. Ct. 522. Although John Roe identified himself online as “Code3stud,” partially masked his face in the videos, and did not wear the official uniform in the videos, his activities were discovered by his supervisor when the supervisor found the SDPD uniform being sold on eBay. The SDPD ordered John Roe to cease his activities, but Roe did not change his eBay seller profile, which described his videos and listed their prices. Consequently, the SDPD fired John Roe for violating SDPD policies namely “conduct unbecoming of an officer, outside employment, and immoral conduct.” Id. at 79, 125 S. Ct. 523. John Roe claimed that his termination violated his First Amendment right to freedom of speech. Initially, the District Court awarded summary judgment to the City of San Diego because John Roe’s actions of selling the videos for profit did not constitute a matter of “public concern” as defined in Connick. Id. The Ninth Circuit Court of Appeals, however, reversed and also took into consideration the fact that Roe’s activities were done while he was “off-duty and away from his employer’s premises, and was unrelated to his employment.” Id. at 80, 125 S. Ct. 523. The United States Supreme Court agreed with the District Court and held that John Roe’s speech was not of public concern and that the City of San Diego was justified in terminating the plaintiff because the speech was “detrimental to the mission and functions” of the SDPD. Id. at 84, 125 S. Ct. 526. The Court stated that matters of public concern are of “legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.” Id. Furthermore, the Supreme Court also referred to the dissenting opinion in Connick which argued that an employee’s discussion of “subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions” about governmental functions could constitute “public concern.” Id. But, John Roe’s activities did not “inform the public about any aspect of the SDPD’s functioning or operation” and clearly did not meet the public concern standard. Id.

114. Id.
business efficiency interests. To the extent employee blogging is mostly focused on work-related issues, however, as opposed to matters of general public concern, it will likely receive virtually no protection under state common law public policy exceptions to the doctrine of employment-at-will.

2. State Off-Duty Activity Statutes

While courts have been rather hesitant to find ways of protecting employees against adverse employment actions taken as the result of the employees’ off-duty conduct, legislatures in various states have been more forceful. In the late 1980’s the tobacco industry began aggressively lobbying state legislatures to pass laws protecting the rights of employees and prospective employees to smoke while off-duty. In several of these states, however, the narrow nature of the proposed legislation, i.e., simply protecting the rights of smokers, drew sharp opposition. Consequently, in a number of states the proposed legislation was broadened to protect employee/prospective employee use of “lawful products” or “lawful consumable products” during non-work hours away from employer premises. In such states, for example, an employer could not discharge an employee for his or her vacation-time consumption of alcohol. Moreover, the state legislatures in four states, California, Colorado, New York, and North Dakota, went even a step further protecting not only employee off-duty use of lawful products (tobacco, alcohol, etc.) but also providing protection against employee discharge for “legal recreational activities” or “lawful activities” off the employer’s premises during non-working hours. In total, over thirty states have passed legislation protecting the off-duty rights of employee smokers, and of these, about seven states have gone a step further by protecting employee off-duty use of all lawful products, while the aforementioned three states have gone two steps further providing protections for employees with regard to all off-duty lawful or legal recreational activity.

119. N. D. Cent. Code § 14.02.4-03 (Mitchie 1997).
Obviously, the broad Colorado, New York, and North Dakota statutes, in particular, represent as one observer has put it: "a vast and muddled expansion of traditional employment law."\(^{121}\) It is important to note that the language in the Colorado and North Dakota statutes is arguably somewhat broader than in New York and California, given that the former states protect employees from discharge for any "lawful activity" as opposed to just "legal recreational activities."\(^{122}\)

Indeed, the North Dakota statute probably has the broadest language of those in the three states, stating it to be an unlawful discriminatory practice for an employer "to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of . . . participation in lawful activity off the employer's premises during nonworking hours . . . ."\(^{123}\) Thus, North Dakota protects employees in virtually all aspects of the employment relationship with respect to ill treatment due to their lawful off-duty activities.

It is also important to note, however, that the "conflict of interest" provisions attached to the off-duty statutory language in Colorado and North Dakota are also arguably broader than in New York. Thus in Colorado, for example, employers are prohibited from terminating employees for lawful off-premises off-hours activities unless the termination relates to a bona fide occupational requirement or is necessary to avoid a "conflict of interest" or the "appearance of such a conflict of interest."\(^{124}\)

Moreover, considerable differences exist among the statutes in the four states which broadly protect all lawful employee off-duty conduct. The Colorado statute, for example, appears to only protect current employees from termination,\(^{125}\) while the statutes in New York, California, and North Dakota\(^{126}\) appear to protect both job applicants and employees from any adverse employment action or "discrimination" (e.g., demotion, transfer, and failure to hire/promote) due to their lawful off-duty conduct.


\(^{122}\) *Id* at 165–66.

\(^{123}\) N.D. Cent. Code § 14-02.4-03 (Mitchie 1997).


\(^{125}\) *Id*.

\(^{126}\) See N.Y. Lab. Law § 201(d) (McKinney 2002); Cal. Lab. Code § 96 (k) (West 2003); N. D. Cent. Code § 14.02. 4-03 (Mitchie 1997).
In addition, the aforementioned four states have different provisions regarding "conflict of interest" exemptions from statutory coverage. The North Dakota statute, for example, explicitly protects employee "lawful activity off of the employer's premises during nonworking hours" so long as this activity is not in "direct conflict with the essential business-related interests of the employer." In contrast, the Colorado statute does not apply if the employee's off-duty activities present a "conflict of interest" or "the appearance of . . . a conflict of interest." Thus, employees blogging off-duty currently appear to enjoy broader protection for their blogging activities in North Dakota than in Colorado.

Finally, the enforcement schemes of the four broad statutes vary markedly. The Colorado statutes specifically state that the "sole remedy" for aggrieved individuals under its off-duty conduct statute is a civil lawsuit in state district court for lost wages and benefits, although such aggrieved individual is explicitly required by the statute "to mitigate his damages." The relevant North Dakota statute, in contrast, is embedded in the state's Human Rights Act which is enforced by the Human Rights Division of the North Dakota Department of Labor. The remedies under the North Dakota law appear to include wide-ranging equitable relief, including injunctions. In addition, the North Dakota Human Rights Division, similar to the approach taken by the United States Equal Employment Opportunity Commission (EEOC) in enforcing Title VII of the United States Civil Rights Act, places considerable emphasis on using alternative despite resolution

127. N. D. Cent. Code § 14.02.4-03 (Mitchie 1997).
128. Colo. Rev. Stat. § 24-34-402.5 (1) (b) (West 2001). The Colorado law also gives employers the right to restrict employee lawful activity if it relates to a bona fide occupational qualification, among other things. See id. at § 24-34-402.5(1)(a).
129. Id. at § 24-34-402.5(2)(a).
130. See N. D. Cent. Code Chapter § 14-02-4 (Mitchie 1997). See also N.D. Dep't of Labor, How To File A Discrimination Complaint in North Dakota, Human Rights Division, www.nd.gov/labor/services/human-rights (last visited Apr. 12, 2006).
131. Id.
methods, especially mediation/conciliation, in resolving complaints brought under the North Dakota Human Rights Act.\textsuperscript{133}

The New York State off-duty activities statute is actually embedded in a law giving that state's Labor Commissioner the power to regulate workplace health and safety.\textsuperscript{134} Consequently, it appears that the New York law is enforced in significant measure by means of having the state Labor Commissioner impose monetary fines on employers for statutory violations.\textsuperscript{135} Finally, California's employee off-duty conduct law is part of that state's wage and hour laws, with the California Labor Commissioner empowered to help employees collect "loss of wages" resulting from adverse employer action due to lawful employee off-duty conduct.\textsuperscript{136} Thus, procedurally aggrieved employees file a complaint with the California Department of Labor for lost wages due to adverse employment actions taken because of their lawful off-duty activities. The California Labor Commissioner then has statutory authority to investigate said complaint and if necessary hold a formal "hearing" on this matter.\textsuperscript{137} After said hearing the California Labor Commissioner is empowered to issue an enforceable order regarding the complaint, although the Commissioner's order is appealable to state trial court.\textsuperscript{138}

In sum, the majority of states in the United States currently have state statutes protecting the off-duty activities of employees at least to the extent said off-duty activity involves the lawful usage of tobacco. Lawfully blogging employees in the states of California, New York, Colorado, and North Dakota thus appear to currently enjoy some legal protection although the degree of protection and the ease/effectiveness of its enforcement varies quite a bit.

3. Implications

Our argument in this section has been that employers' first response to the populating by the employees of the blogosphere has been one of prying. Employers have, as many other times in the history of the employer-employee relationship, sought to control the space where employees seek to interact. This space—the blogosphere—is, we argue, an important space. Thus, we have

\textsuperscript{133} See N.D. Dep't of Labor, \textit{supra} note 130.
\textsuperscript{134} See N.Y. Labor Code § 200 (McKinney 2002).
\textsuperscript{135} \textit{Id.} at §§ 201-d, 211 & 213.
\textsuperscript{136} See Cal. Lab. Code §§ 96, 98, 98.3 & 98.6 (West 2003).
\textsuperscript{137} \textit{Id.} at § 98.
\textsuperscript{138} \textit{Id.}
to think carefully about the implications of letting employers control what transpires in this space.

We note, however, that the existing legal framework generally provides very little protection to those employees that seek to engage in conversations by means of blogging during their off-duty time. Given the exponentially increasing numbers of employee bloggers, it will be interesting to see if over time lobbying pressures increase for legal reform in this domain.¹³⁹

V. INVADING EMPLOYEE PRIVACY THE UNCONVENTIONAL WAY

A. Overview

In this section we explore what we identify as the other major implication of the blogosphere for the employment relationship. In the prior section we argue that employers have been interested in prying into the “private” life of employees by finding out what employees blog about on their off-duty time. Moreover, we point out that, unfortunately perhaps, employees are frequently finding out that they have relatively little protection against adverse employment actions taken against them by their employers when what the employees share in their blogs is not to the liking of their employers. In this section we assert that employers have not only been interested in finding out what employees are talking about in their blogs, but that they are also beginning to show a very strong interest in sharing this space, and indeed, in potentially influencing employee behavior via the blogosphere.

The central argument we make is that employers are beginning to use blogs as a managerial tool. Some organizations have embraced blogs as a powerful communication device and some top executives now publish workplace related blogs.¹⁴⁰ This new tool, however, has the ability of serving as an extremely powerful tool in influencing or even manipulating employee behavior. Our basic premise is that employees make decisions regarding personal issues (e.g., choosing “suitable” partners, engaging in “acceptable” hobbies, deciding “appropriate” times to have children, or which volunteering organizations to support) in part, based on the expectation of the organizations in which they work. We suggest

¹³⁹. One special interest group, the Electronic Frontier Foundation, has already begun lobbying for increased legal protections for bloggers, especially “off duty” employee bloggers. See Electronic Frontier Foundation, http://eff.org (last visited Apr. 12, 2006).

that the blogosphere opens a totally new medium for employers to convey their messages to their employees, and that as such, organizations may have a much more pervasive influence on the private lives of employees than is currently recognized.

We acknowledge that the response to the issue we raise here is not legal. That is, we are not claiming that the employer is engaging in any illegal activity. But we suggest that in order to understand whether any type protection should be afforded to employees in the context of their blogging activities, it is important to understand the employers’ potential effective use of the blogosphere as a managerial tool. To help us frame this discussion, we begin by introducing the concept of “accountability.”

B. Accountability, the “Manipulating” Employer and the “Intuitive Politician”

Individuals make decisions, not within a vacuum, but within a social system in which they must, at times, justify their decisions to others. “Accountability,” or the pressure to justify one’s feelings, beliefs, and actions to others, provides a solution for how to coordinate social life by providing some degree of regularity. 141 That is, “accountability is a critical rule and norm enforcement mechanism—the social psychological link between individual decision-makers on the one hand and the social systems on the other.” 142

People are constrained by accountability, whether implicit or explicit, in many situations. 143 Accountability reminds individuals of the need to act with regard to established norms and provide satisfactory justifications for their actions that diverge from norms. 144 Those who fail to provide satisfactory accounts could experience unpleasant consequences ranging from contemptuous looks to loss of employment. 145 Conversely, those who provide

143. Id.
144. Id.
satisfactory accounts could encounter positive consequences ranging from monetary rewards (e.g., stock options) to career advancement.

Individuals respond to accountability pressures not only in response to shared norms and rules, but also to seek the approval of others. In this way, accountability causes individuals to act as "intuitive politicians," who seek the approval of those to whom they are accountable for both intrinsic and extrinsic reasons. Such approval from others assists in the protection and enhancement of one's own social and self-image. Approval from others facilitates the ability to control desirable resources. For instance, individuals within organizations are often in competition for scarce resources; and approval from others, especially those in high places, could facilitate the control of resources such as bonuses or promotions. Thus, individuals act with regard to accountability pressures to boost their own personal and social image, as well as to increase their own material standing.

The simple solution to accountability is to "adopt positions likely to gain the favor of those to whom they feel accountable," the so called, "acceptability heuristic." The acceptability heuristic allows individuals to make decisions without much cognitive work (e.g., without analyzing pros and cons). All that is necessary is to implicitly or explicitly discover the option that is most acceptable to those to whom one is accountable. In employment situations, one can normally determine the wishes of those to whom one is accountable (e.g., organizational leaders). Superiors might explicitly communicate their wishes to subordinates, but even without explicit communication subordinates still have the opportunity to determine the wishes of their boss by simply asking their superior their wishes, by recalling what their boss wished in similar situations, or by inferring how their superior would want them to behave. This reasoning implies that in the absence of an explicit communication, subordinates can implicitly determine the wishes of their superior. Therefore, according to the acceptability heuristic, when

146. See Tetlock, supra note 142, at 335.
148. See Tetlock, supra note 142 at 340.
149. Herbert A. Simon, Administrative Behavior 129 (1976). Simon theorized that subordinates are expected to anticipate the commands of their superiors by asking themselves: "How would my superior wish me to behave under these circumstances?"
subordinates can reasonably determine the wishes of their superiors—implicitly or explicitly—then subordinates will adopt their superior's position.

Researchers have found much support for the acceptability heuristic. For example, within organizations, if employees perceive that they are accountable for their actions outside the workplace, then those employees may feel compelled to act in accordance with organizational standards, thereby, socializing with the "correct" individuals, participating in "appropriate" gatherings, and choosing "suitable" partners. For example, with respect to employer-sponsored charitable giving, employers generally know exactly which employees have chosen to make "voluntary" contributions. In this instance, because employers are aware of employees' contributions, employees may feel pressure to justify the decision whether or not to contribute, and, thus, will be more likely to donate. Perhaps recognizing this type of pressure, the State of Minnesota has passed legislation prohibiting employers from taking any "reprisal against an employee for declining to participate in contributions or donations to charities or community organization.

Researchers have also explored some of the conditions likely to lead to a greater tendency for accountability. That is, researchers have identified the type of employees and the type of conditions which will lead to greater accountability seeking behavior. For instance, employees who have developed "personal capital" with their superiors have less pressure to articulate attitudes and engage in behaviors consistent with their organization's expectations in

150. See, e.g., David Antonioni, The Effects of Feedback Accountability on Upward Appraisal Ratings, 47 Personnel Psychology 349 (1994); Joel Brockner, Jeffrey Z. Rubin & Elaine Lang, Face-saving and Entrapment, 17 J. Experimental Soc. Psyc. 68 (1981) (noting that when individuals know or can anticipate the views of an audience to whom they are accountable, then individuals will shift their attitudes and/or behaviors to agree with the audience); Thomas A. Buchman, Philip E. Tetlock, E.P. Hollander & Ronald O. Reed, Accountability and Auditors' Judgment About Contingent Events, 23 J. Bus. Fin. & Acct. 379 (1996).

151. Philip E. Tetlock, Accountability and Complexity of Thought, 45 J. Personality & Soc. Psychol. 74 (1983). Tetlock reported the findings of an experiment in which college students were asked to report their thoughts and feelings about three social policy issues (i.e., capital punishment, affirmative action, and American defense spending) and made students accountable to another student who held consistently liberal, conservative, or unknown views. Students shifted their views based upon the audience to whom they were accountable—students reported more liberal views when they were accountable to a liberal student and more conservative views when they were accountable to a conservative student.

their private lives.\textsuperscript{153} High performers and well-connected employees, for example, may not be susceptible to organizational expectations for their personal activities.\textsuperscript{154}

Similarly, as employees move up the organizational hierarchy, so does the expectation of conformity with organizational expectations in one’s private life. Executives are the “face” of the organization and, therefore, the symbolic representation of the company. Thus, at the top of the organizational hierarchy, “private life becomes penetrable and not very private.”\textsuperscript{155} Conversely,

\textsuperscript{153} Idiosyncrasy credits were first described as “the degree to which an individual may deviate from the common expectancies of the group.” That is, those employees who have these valuable credits have the ability, but not the obligation, to violate group norms. These credits were believed to arise from two sources: 1) task performance or competence; and 2) characteristics outside of task performance that contribute to the workplace (e.g., social capital, extra-role performance). Because norm violations are tolerated, rather than punished or sanctioned, by those employees who possess idiosyncrasy credits, organizations may tolerate deviations from appropriate personal activities and attitudes from those who have them. E.P. Hollander, \textit{Conformity, Status, and Idiosyncrasy Credit}, 65 Psychol. Rev. 117, 120–21 (1958).

\textsuperscript{154} For example, in the infamous situation of Michael Jackson some questioned why the music industry essentially ignored the charges of bizarre behavior at the Neverland Ranch, Jackson’s private theme park. One plausible answer: the historical sales of his records and revenues garnered from his touring and merchandise outweighed the costs of being associated with Jackson’s strange activities. That is, Jackson possessed idiosyncrasy credits that he has cashed in during this and past scandals, and the music industry has yet to perceive that Jackson’s credits are in the red. The industry’s tolerance for Jackson’s possible misconduct is exemplified by Jackson’s receipt of a humanitarian award from the radio industry, well-after the news of the second child molestation charge broke. However, whether or not he has enough credits to make it through the current crisis is yet to be determined. As demonstrated by the Jackson example, organizations seem perfectly willing to turn a blind eye to undesirable personal behavior if employees are high performers or possess important resources that facilitate organizational activities. When employees possess idiosyncrasy credits, organizations exert less of an influence over the personal lives of employees, thereby allowing employees to make decisions within their private lives with little intrusion from their organizations. However, when those credits turn to debits, employees will lose the discretion to disregard the organizations wishes regarding their personal lives.

\textsuperscript{155} Ross M. Kanter, \textit{Men and Women in the Corporation}, 121 (1977). Moreover, organizational expectations for private life siphon down to spouses and children of executives. Spouse and children of organizational executives become part of the organizational team, with little freedom to refuse membership. For these individuals, every personal activity is shaded with the position held within the organization. For example, wives become heads of charity activities and entertain clients because of the expectation of their husbands’ companies. Corporate families “can be made into public figures, with no area of life remaining untinted with responsibilities for the company,” \textit{Id.} at 199. Thus, a Connecticut court recently ruled that because the role of being a
those in lower levels of the organization generally are not subject to the same amount of scrutiny from the organization in their private lives. Although not entirely free from the reigns of the organization, employees at low levels in the organizational hierarchy, at times, are free to disentangle their organizations from their private lives. For instance, some custodial employees can punch their card at five and, at the same time, physically and mentally leave their organizational roles to enter their private lives. Therefore, employees higher in the organizational hierarchy are more likely to articulate attitudes and engage in private activities, such as choosing friends, political candidates, hobbies, charities, and even whether or not to have children, consistent with their organization’s expectations in their private lives than those at lower levels.

C. Examples of Employers’ Blogs

Employers are beginning to realize the significance of the alternative dimension of blogging we describe in this section. A recent survey shows that currently about 10 percent of the CEOs at major corporations in the United States have established corporate blogs. Top executives just below the CEO level have also developed blogs at leading companies such as General Motors, Hewlett Packard, and Boeing.

Top corporate executive blogs often discuss both corporate news and personal matters. Sun Microsystems Corporation President Jonathan Schwartz, for example, has a prominent blog visited by about 5000 people per day. In his blog Schwartz mixes discussions about Sun’s competitive position with those about his personal life. Similarly, Hewlett Packard Corporation Senior Vice President Rich Marcello’s blog is specifically designed for him to interact with HP employees as a “person” rather than as a

“GE wife” was so pervasive, the spouse of top General Electric Corporation executive Gary Wendt was entitled to an unprecedentedly large portion of his $100 million in assets upon their divorce. Wendt v. Wendt, 1998 WL 161165 (Conn. Super. Ct. 1998).


158. Id.
Some top corporate managers may be as likely to talk on their blog about their vacation in Colorado, their relationship with their father, or their new golden retriever, as about their company’s stock price. Moreover, these blogs usually have comment features which may help engage employees and others to share their own related personal experiences. But such corporate blogs also clearly raise important boundary and accountability issues.

D. Implications of Employers Influencing Private Lives

Sun Microsystems President Jonathan Schwartz recently noted that his blogging allowed him to participate in Sun employees’ “communities.” The issue then becomes what are the implications of employers, in essence, crossing boundaries into employees’ private lives.

For example, in the context of union organizing campaigns, the National Labor Relations Board, for example, has in various cases prohibited employers from visiting employees at their homes during union organizing drives (while permitting unions to make such campaigns visits). The NLRB has asserted that an employer’s control over an employee’s tenure of employment and working conditions makes such visits inherently “coercive.” Could somewhat similar “virtual” corporate executive home visits, by way of Internet blogs, also be seen as having something of a “coercive” effect?

Clearly corporate executive blogging about non-work matters could, if nothing else, have a “suggestive” impact on employees. For example, if various top executives at a corporation talk regularly on their blogs about their tennis games, might this not be a clue for aspiring top executives at the company to take up the game of tennis. If top executives in their blogs talk glowingly about the economic policies of President George W. Bush, might this not potentially chill lower-level employee criticism of President Bush?

159. Id.
160. Id.
163. Plant City Welding, 119 N.L.R.B. at 133–34.
The society-level implication of organizations governing the private lives of their employees is that communities are full of individuals who seemingly endorse the values and actions seen desirable by firms within their personal lives. Communities, therefore, become increasingly socially and politically homogenous as organizations regulate the personal lives of their employees. This homogeneity may obviously restrict public debate and impede social change. For instance, if an employee's livelihood is threatened by his/her participation in public debate, then that employee likely will seriously consider not voicing his/her opinion because of the fear of getting fired. Some employees, possibly those low in accountability and possessing idiosyncrasy credits, choose to engage in political and social debate. However, it is entirely likely that other employees decide not to enter these debates to protect their organizational membership and potential advancement. While conformity in organizations is nothing new, clearly employer blogs, particularly those written by very top corporate executives, give employers a whole new and highly effective method for reaching and influencing employees.

VI. CONCLUSION

Blogging has become a highly important new form of communication, and increasing numbers of employees are blogging, at least to some extent, about their work. Moreover, many corporate executives are starting to blog as a way of reaching employees and other important constituencies. But with new technologies also come new ways for privacy rights to be encroached. Strong arguments seem to exist to support the right of employees to blog even about work without undue employer interference. Moreover, it appears that employer blogs should not be used to unduly try to influence employees off or working time.

164. We use the word "seemingly" because it is unknown whether these employees actually believe the notions that they assert and wish to conduct the behaviors that they perform or if employees speak and behave in a manner consistent with the ideology prescribed by their organizations because they feel compelled to do so. Although this is in an important distinction, it is entirely possible that employees are contributing to "acceptable" charities, attending "appropriate" social functions (i.e., church, operas, sporting events), and articulating "tolerable" political ideas because their organizations wish them to do so.

165. For an interesting discussion of these dynamics and how they may in certain situations constitute sex discrimination, see Theresa M. Beiner, Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?, 37 B.C. L. Rev. 643 (1996).