

NOTES

BLOGGERS BEWARE: A CAUTIONARY TALE OF BLOGGING AND THE DOCTRINE OF AT-WILL EMPLOYMENT

“The stereotypical ‘blogger’ is sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way.”¹

INTRODUCTION

The internet explosion of the early 1990s created a public forum for the average person to express their ideas and opinions. Initially, the internet was primarily used for research and correspondence through e-mail. Today, the relatively low cost of computers has enabled the majority of American adults to access the world wide web. The current trend for internet users is creating online diaries, a form of expression known as blogging.²

“Blogging” has become the newest craze for teens and twenty-somethings. While in 2004, only five percent of internet users created online blogs,³ that percentage rose to nine percent by 2005.⁴ In addition,

1. Jeffrey Schlossberg & Kimberly Malerba, *Employer Regulation of Blogging*, N.Y.L.J., Oct. 31, 2005, col. 4, at 4 available at <http://www.ruskinmoscou.com/Schlossberg%20Malerba%20-%20Blogging%20NYLJ%20article%2011.05.pdf> (quoting *In re Grand Jury Subpoena of Miller*, 397 F.3d 964 (D.C. Cir. 2005)).

2. See Mark Huffman, *‘Blog’ Trend Provides Virtual Soapbox*, UNITED PRESS INT’L, Jan. 18, 2003, <http://www.upi.com/archive/view.php?archive=1&StoryID=20030118-122004-6980r>. A weblog (or blog) is “a website that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.” Merriam-Webster’s Online Dictionary, <http://www.m-w.com/dictionary/blog>.

3. Memorandum from Lee Rainie, Dir., PEW Internet & Am. Life Project on the State of Blogging (Jan. 2005), http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf.

4. Posting of Lee Rainie to PIP comments, <http://www.pewinternet.org/PPF/p/1083/pipcomments.asp> (May 2, 2005).

the online population of those who read blogs increased substantially from seventeen percent in 2004 to twenty-seven percent in 2005.⁵ According to Kate Lorenz, the article and advice editor for careerbuilder.com,

Bloggers write about their lives to keep friends and family up-to-date, talk about their industry, discuss hobbies or rant about their favorite reality TV show. But posting pictures of you at work, disclosing confidential information about your employer, or bad-mouthing your co-workers could get you in hot water for committing inappropriate behavior.⁶

Just as the legal community was faced with problems related to the First Amendment that grew out of e-mail, it now faces legal uncertainties brought about by blogging.⁷ The recent issue is the growing number of employees who have been fired for the content of their blogs.⁸

Bloggers such as Joyce Park, a former employee of Friendster, have been fired for such minor infractions as posting already public information on their personal blogs.⁹ Friendster, a dot-com that promotes networking and community among web-users, terminated Ms. Park for blogging.¹⁰ Her blog mentioned events at work, such as the fact that Friendster launched a “platform rearchitecture based on loose-coupling, web standards, and a move from JSP (via Tomcat) to PHP”¹¹ Although Ms. Park only discussed the technological improvement of the website and only encouraged users to give her feedback, the company ultimately made the decision to fire her.¹² This is not the only instance in which an employee has lost his or her job for discussing work-related information on their personal blog.

5. Rainie memorandum, *supra* note 3, at 1-2.

6. See Kate Lorenz, *Avoid Getting Fired for Blogging*, April 6, 2005, <http://cnn.com/2005/US/Careers/04/05/blogging/>.

7. See generally, Schlossberg & Malerba, *supra* note 1 (discussing the current dearth of case law addressing blogging and the inevitability of future litigation given blogging's popularity).

8. See Posting of Ellen Simonetti to The Bloggers' Rights Blog, <http://rights.journalspace.com> (Jan. 4, 2005) (listing organizations that have fired, threatened, disciplined, fined or not hired people because of their blogs).

9. Stefanie Olsen, *Friendster Fires Developer For Blog*, Aug. 31, 2004, http://news.com.com/Friendster+fires+developer+for+blog/2100-1038_3-5331835.html.

10. *No Friendster of Mine*, RED HERRING, Sept. 9, 2004, <http://www.redherring.com/PrintArticle.aspx?a=10839§or=Industries>.

11. Posting of Troutgirl to Friendster Goes PHP, http://troutgirl.com/blog/intex.php?/archives/22_Friendster_goes_PHP.html (June 29, 2004 00:09 EST).

12. *No Friendster of Mine* *supra* note 10.

A Starbucks supervisor used a blog to keep in touch with family and friends and to vent frustration about personal life and work.¹³ When a manager refused to let him go home one day because he was feeling ill, he complained from his home computer by posting on his blog.¹⁴ Even though he did not use his real name, and only gave the blog's address to a select group of people, he was terminated after six years of service and on the first day of his scheduled management training.¹⁵

Although the former Friendster and Starbucks employees have not yet taken legal action, the case of a former Delta flight attendant has recently made its way to court.¹⁶

On September 7, 2005, a former Delta Air Lines flight attendant filed a federal sexual discrimination lawsuit claiming that she was suspended and later fired because of material she posted on her personal blog.¹⁷ Ellen Simonetti was laid off after her "Queen of the Sky" blog showed a picture of her in her Delta uniform. The blog, a moderately fictionalized account of life in the air, never named Delta as her employer, but one photo did show a pin indicating she worked for the airline.¹⁸ Delta's decision to terminate her was based on "inappropriate photographs" of plaintiff in her uniform on the website.¹⁹ Ms. Simonetti claims that she was not aware of any company anti-blogging policy.²⁰ According to a BBC News source, "[t]here is guidance which suggests the company uniform cannot be used without approval from management, but use in personal pictures on websites is unclear."²¹

Ms. Simonetti asserts a claim based on sex discrimination, illegal retaliation, and discharge in violation of the Railway Labor Act, due to her support of the Association of Flight Attendants.²² Because there is currently no legal recourse for claims related to blogging, lawyers and former employees are forced to ignore the issue and focus their claims on what may be secondary issues, such as sex discrimination. It is

13. Jason Koulouras, *Employer Fired by Starbucks Over Blog*, BLOGCRITICS MAG., Sept. 4, 2004, <http://blogcritics.org/archives/2004/09/04/04/141004.php>.

14. *Id.*

15. *Id.*

16. Complaint, *Simonetti v. Delta Air Lines Inc.*, No. 1: 05-CV-2321, 2005 WL 2407621 (N.D. Ga. 2005).

17. *Id.*

18. Jo Twist, *Blogger Grounded by Her Airline*, October 27, 2004, <http://news.bbc.co.uk/1/hi/technology/3955913.stm>.

19. *Id.*

20. *Id.*

21. *Id.*

22. Complaint, *Simonetti v. Delta Air Lines Inc.*, No. 1: 05-CV-2321, 2005 WL 2407621 (N.D. Ga. 2005).

unclear whether the law will provide a remedy for these bloggers or even give them an opportunity to get through the courthouse doors. An issue of the utmost concern for these bloggers is to determine whether their termination was wrongful.

Blogging may be characterized as a new form of journalism.²³ However, bloggers may have a false sense of security because many times they do not intend their blogs to be taken seriously.²⁴ According to Jeffrey Schlossberg and Kimberly Malerba, “because the internet and blogging are largely unregulated and easily accessible, many individuals view a blog as a viable medium for venting their frustrations about their employer and coworkers.”²⁵

Blogging creates many concerns for employers, including protecting trade secrets, facing liability for statements made by their employees, and maintaining a positive public image.²⁶ Employers have a valid fear of retaliation against them. For example, if employees are unhappy with their salary, status in the company, or just because they had a bad day at work, they may choose to disclose confidential information on their blog.²⁷ A Google employee was recently fired for complaining on his blog that the company’s benefits were less generous than his former employer’s (Microsoft).²⁸ There is also a concern that a naive employee will not recognize the confidentiality of information and mindlessly disclose proprietary secrets on their blog.²⁹ As a result, it is easy to understand why companies would aim to prohibit employee blogging. However, this contradicts company policies that embrace blogging for its marketing and advertising opportunities.

Blogs are used by both small and large companies in an effort to gain customers and improve services.³⁰ For example, GreenCine, a small

23. Larry E. Ribstein, *Initial Reflections on the Law and Economics of Blogging*, August 28, 2005, at 3, <http://home.law.uiuc.edu/~ribstein/bloggingarticle.pdf>.

24. Thierry Nabeth, *Privacy in the Context of Digital Social Environments: A Cyber Sociological Perspective*, http://www.calt.insead.edu/project/Fidis/documents/2005-PET-Privacy_in_the_Context_of_Digital_Social_Environments_A_Cyber-Sociological_Perspective.pdf (last visited Feb. 19, 2007).

25. Schlossberg & Malerba *supra* note 1 at 4.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Ilana DeBare, *The Business of Blogging / Small Companies Promote Themselves Through Web Logs*, SAN FRANCISCO CHRONICLE (May 5, 2005), available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/05/05/BUG41CGI4>; Jena McGregor, *It's A Blog World After All*, FAST COMPANY April 18, 2004, at 84, available at <http://www.fastcompany.com/magazine/81/blog.html>.

San Francisco DVD rental company, uses blogs to increase their sales by drawing people to read about film festivals and the world of independent and alternative cinema.³¹ Since the creation of its blog GreenCine's sales have doubled.³² Similarly, Microsoft has actually hired an employee to communicate with customers on the Web through a blog.³³ Robert Scoble, "The Scobleizer," as he is known by his daily readers, posts information on his blog, mostly about Microsoft, which is even critical of his employer at times.³⁴ In addition, he receives feedback from his readers on how to improve Microsoft's products.³⁵ Companies such as GreenCine and Microsoft that allow employees to engage in this permanent form of conversation expose themselves to the dangers discussed above.³⁶

The purpose of this Note is to examine whether employees may be terminated for the content of their blogs. Part I will discuss the legal history of doctrines that play an important role in analyzing cases regarding blogging such as at-will employment, freedom of speech, trade secrets, privacy and employment related tort claims. Part II sets forth the current law regarding these legal doctrines as it relates to modern technology and the internet. Part III will discuss various predictions of future rules regarding blogging. Because blogging is a relatively new use of the internet for communication there is no settled law based solely on the issue of blogging. This only perpetuates the problem the legal community faces due to the avoidance of the new issues concerning blogs. Part III also analyzes issues relating to blogging according to well-settled legal doctrines that can be expanded to accommodate the concerns of employers and employees. This Note urges employers to take affirmative steps to ensure that their employees understand and comply with company policies. Due to the public nature of blogging, an employee's reasonable expectation of privacy is diminished. Therefore, employees should be aware of the repercussions of their actions, should they decide to make negative statements about their employers on their blogs.

31. DeBare, *supra* note 30.

32. *Id.*

33. McGregor, *supra* note 30.

34. *See id.*

35. *Id.*

36. *Id.*

I. LEGAL HISTORY

A. *The Doctrine of At-Will Employment*

The doctrine of at-will employment lies at the heart of the relationship between employer and employee. At-will employment permits job termination with or without cause unless the termination would somehow violate a public policy exception.³⁷ The doctrine further provides that employment contracts for an indefinite term are at-will agreements,³⁸ unless there is a clear and definite promise of permanent or fixed duration employment.³⁹ Contracts of indefinite duration are terminable at the will of either party.⁴⁰ Lastly, an at-will employee does not have a constitutionally protected property interest in his continued employment.⁴¹ An examination of case-law supports this conclusion.

In *Parker v. City of Elgin* the plaintiff worked as a City Manager for the city of Elgin.⁴² Her tenure as a manager was marked by an ongoing dispute with the mayor of the city.⁴³ She also suffered from “a debilitating eye condition.”⁴⁴ The City Council asked for her resignation and the plaintiff sued for numerous causes of action, including breach of her employment contract.⁴⁵ The court granted the defendant’s motion for summary judgment.⁴⁶ It reasoned that there existed an at-will employment relationship between the defendant, the city of Elgin, and the plaintiff, the city manager.⁴⁷ According to the doctrine of at-will employment, an at-will employee may be terminated with or without cause.⁴⁸ Although the plaintiff’s employment contract provided that it would apply for an indefinite term, the court concluded that contracts of indefinite duration are terminable at the will of either party.⁴⁹ The contract also provided that the plaintiff may terminate the agreement

37. *Smith v. Farmers Coop. Ass’n of Butler*, 825 P.2d 1323, 1326 (Okla. 1992).

38. *Parker v. City of Elgin*, No. 03-C-0171, 2005 WL 2171159, at *11 (N.D. Ill. Aug. 30, 2005).

39. *Id.*

40. *Smith*, 825 P.2d at 1326.

41. *Parker*, 2005 WL 2171159, at *12.

42. *Id.* at *1.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See id.* at *13.

47. *See id.* at *12.

48. *See id.* (citing *Harris v. Auburn*, 27 F.3d 1284, 1286 (7th Cir. 1994)).

49. *Id.* at *11.

upon written notice, and that the contract may be terminated by the city “acting through its corporate authorities.”⁵⁰ The defendant argued that those provisions created an at-will employment relationship, and the court agreed.⁵¹ Furthermore, the court concluded that because the plaintiff was an at-will employee of the City, she had no constitutionally protected property interest in continued employment.⁵²

In *Duldulao v. St. Mary of Nazareth Hospital Center*,⁵³ the plaintiff, a hospital employee, brought suit alleging that the defendant hospital discharged her in violation of the terms of the employee handbook.⁵⁴ She alleged that the handbook distributed by the defendant created enforceable contractual rights and the court agreed.⁵⁵ The court held that the handbook was a binding contract on the defendant and that the defendant breached its contract by terminating the plaintiff in a manner inconsistent with the handbook.⁵⁶ The court agreed with the majority of courts, which interpret the general “employment-at-will rule” as a rule of construction mandating only a presumption that a hiring without a fixed term is at-will and can be overcome by demonstrating the parties contracted otherwise.⁵⁷ The court reasoned in this case that the plaintiff and defendant contracted through the distribution of the employee handbook.⁵⁸ The court held in this instance, that the employee handbook created enforceable contractual rights, because traditional requirements for contract formation were present.⁵⁹ The court determined that the employee reasonably believed an offer had been made since the language was clear and unambiguous.⁶⁰ Further, the handbook was disseminated to the employee in a manner that the employee would be aware of its contents.⁶¹ Finally, the employee accepted the offer by continuing to work after learning of the policy statement.⁶² The court reasoned that when these conditions are present, the employee’s continued work constitutes valid consideration for the promises

50. *Id.*

51. *See id.*

52. *See id.* at *12 (citing *Harris*, 27 F.3d at 1286).

53. 505 N.E.2d 314 (Sup. Ct. Ill. 1987).

54. *Id.* at 315.

55. *Id.*

56. *Id.* at 320.

57. *Id.* at 318.

58. *See id.*

59. *Id.*

60. *See id.*

61. *Id.*

62. *Id.*

contained in the statement, and under traditional doctrine, a contract has been formed.⁶³

Although the doctrine of at-will employment permits an employer to terminate an employee with or without cause, the doctrine is not unassailable. The protection of “whistle-blowers, workers’ compensation claimants, and other classes of employees subject to discrimination by their employers has generated the most significant source of exception” to the doctrine of at-will employment.⁶⁴ As such, a public policy exception to the doctrine of at-will employment developed. Under this exception, an employer cannot discharge an employee for refusing to violate a criminal statute, exercising a statutory right, complying with a statutory duty, or in any other way that violates the general public policy of the state.⁶⁵

B. First Amendment in Employment Situations

1. Government Employees

In order to establish that speech is constitutionally protected, a plaintiff employee “must show that she spoke on matters of public concern and that her interest in speaking was not outweighed by the defendants’ interest in promoting the efficient operation of the public service which they perform.”⁶⁶ In determining this question, the court must consider the content, form, and context of a specific statement so that it can fairly characterize if the expression as a whole relates to a matter of political, social or community concern.⁶⁷

In *Rankin v. McPherson*,⁶⁸ the Supreme Court ruled “a state may not discharge an employee on a basis that infringes that employee’s constitutionally protected interest in freedom of speech.”⁶⁹ In *Rankin*, the respondent was terminated from her position as a deputy constable when

63. *Id.* at 318-19.

64. J. Thomas Sullivan, *The Arkansas Remedy for Employer Retaliation Against Workers’ Compensation Claimants*, 16 U. ARK. LITTLE ROCK L. REV. 373, 393 (1994) (citing *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 383-385 (Ark. 1988)).

65. *Sterling Drug*, 743 S.W.2d at 383-85.

66. *Wooley v. Madison County, Tenn.*, 209 F. Supp 2d 836, 842 (W.D. Tenn. 2002) (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

67. *Wooley*, 209 F. Supp. 2d at 842 (citing *Connick*, 461 U.S. at 147-48; *Chappel v. Montgomery County Fire Prot. Dist. No. One*, 131 F.3d 564, 574 (6th Cir. 1997)).

68. 483 U.S. 378 (1987).

69. *Id.* at 383 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

a co-worker overheard a comment she had made regarding a recent presidential assassination attempt.⁷⁰ The Court weighed the speech, which was a matter of public concern, against petitioner's interest in maintaining discipline in the workplace.⁷¹ It was found that respondent had not discredited her office by making the comment, since the comment was made in private, in an informal conversation, with only one other employee.⁷² The Court concluded that the termination was improper given the function of the agency, respondent's position in the office, and the nature of her statement.⁷³ The Court reasoned that in determining a public employee's right of free speech, the task of the Supreme Court is to arrive at a balance between the interests of the employee as a citizen and those of the state, as an employer.⁷⁴ It concluded a state may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.⁷⁵

However, in *Connick v. Myers*⁷⁶ the Supreme Court of the United States held that a discharge will not offend the First Amendment when it is based upon statements made by a public employee on matters of personal interest and not public concern.⁷⁷ In *Connick*, the respondent was employed as an Assistant District Attorney, and was opposed to her transfer to another section of criminal court.⁷⁸ She expressed her opposition to several of her supervisors including the District Attorney.⁷⁹ She then prepared a questionnaire soliciting the views of her co-workers, expressing grievances regarding transfers, and office morale.⁸⁰ Soon after, the District Attorney ordered her termination.⁸¹ The employee contended her job was wrongfully terminated because she had exercised a constitutionally protected right of free speech.⁸² Both the trial and appellate courts agreed.⁸³ However, the Supreme Court of the United

70. *Id.* at 379-80. The respondent, upon hearing of the attempt on President Ronald Reagan's life, commented to another co-employee "[i]f they go for him again, I hope they get him." *Id.*

71. *Id.* at 388 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 570-73 (1967)).

72. *Id.* at 389.

73. *Id.* at 392.

74. *Id.* at 388.

75. *Id.* at 383.

76. 461 U.S. 138 (1983).

77. *Id.* at 153.

78. *Id.* at 140.

79. *Id.*

80. *Id.* at 141.

81. *Id.*

82. *Id.*

83. *Id.* at 141-42.

States reversed.⁸⁴ The Court stated the employee's questionnaire touched upon matters of public concern in only a most limited sense.⁸⁵ According to the Court, her survey was better characterized as an employee grievance concerning internal office policy.⁸⁶ The Court held that the limited First Amendment interest involved in this case did not require the employer to tolerate the action, particularly because this was a self-interested action, which he reasonably believed would disrupt the office and undermine his authority.⁸⁷

2. Private Employees

The traditional doctrine of at-will employment permits an employer to discharge an employee at-will for any reason or for no reason at all, without incurring liability.⁸⁸ However, as an exception to this rule, an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law.⁸⁹

In *Schultz v. Industrial Coils*, an employee wrote a letter to a local newspaper, which criticized his employer and several of its officers.⁹⁰ Soon after the letter was published, the employee was fired.⁹¹ The employee sued and alleged his discharge was wrongful because it was grounded solely upon his exercise of free expression and thus directly contravened the express public policy of the State of Wisconsin.⁹² The employer contended the letter was not against public policy, was detrimental to the employer's interests and the employee's termination was the result of a valid business judgment.⁹³ The court found the employee was employed upon an at-will basis, which permitted his employer to discharge an employee at-will for any reason or for no reason at all, without incurring any liability.⁹⁴ The court looked to *Connick*, where the court recognized that an employer need not tolerate actions which undermine authority or discipline, or are otherwise

84. *Id.* at 142, 154.

85. *Id.* at 154.

86. *Id.*

87. *Id.*

88. *Schultz v. Industrial Coils, Inc.*, 373 N.W.2d 74, 75 (Wis. Ct. App. 1985).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 74.

93. *Id.*

94. *Id.*

disruptive of office routine or employment relations, in the name of a limited free speech interest.⁹⁵ The court here concluded the employee's termination did not contravene public policy and did not contravene his First Amendment rights.⁹⁶

C. Freedom of the Press and Journalism

1. Federal Privilege

The Supreme Court began to consider the implications of a federal journalist privilege as early as 1972 in the case of *Branzburg v. Hayes*.⁹⁷ However, *Branzburg*, the plaintiff journalist in that case, did not prevail on his First Amendment argument. He argued journalists should have a qualified privilege not to testify before the grand jury if the outcome is to reveal a confidential source.⁹⁸ Freedom of the press includes furnishing publishable information.⁹⁹ The Court stated that requiring a reporter to testify and divulge a confidential source is detrimental to the free flow of information, which is vital to the First Amendment.¹⁰⁰

The argument in favor of affording a privilege to journalists rests on the proposition that the government cannot infringe upon a citizen's First Amendment right to free speech any more than necessary "to achieve a permissible government purpose."¹⁰¹ The Court concluded that grand jury investigations are certainly necessary.¹⁰² Further, the investigations also meet the more stringent test of a "compelling" or "paramount" interest to justify an indirect burden on First Amendment rights.¹⁰³ The majority's opinion focused on problems involved in defining a class of people as "journalists."¹⁰⁴ The result of defining such a class could leave out people who perform the same functions as journalists and would be constitutionally suspect.¹⁰⁵ Freedom of the press is "a 'fundamental personal right' which is not confined to

95. *Id.* at 76.

96. *Id.* at 77.

97. 408 U.S. 665, 667 (1972).

98. *Id.* at 680.

99. *Id.*

100. *Id.* at 725, 737-38 (Stewart, J., dissenting).

101. *Id.* at 699.

102. *Id.* at 680.

103. *Id.*

104. *Id.* at 705.

105. *Id.*

newspapers and periodicals.”¹⁰⁶ Moreover, defining the class too broadly would deprive the courts of well-informed witnesses.¹⁰⁷ The Court also noted that proceedings to determine whether the privilege should be upheld in each specific case would overwhelm the courts and make it difficult for them to function efficiently.¹⁰⁸

Many lower federal courts later applied *Branzburg* only to grand jury proceedings and continued to endorse the use of a journalist privilege in other proceedings.¹⁰⁹ However, since *Branzburg*, only a few federal courts have dealt with this issue on more than one occasion and the support given to the privilege is weak.¹¹⁰ Although federal support for the journalist privilege is volatile, many state legislatures have provided shield laws to protect certain defined groups of journalists or media.¹¹¹

D. Privacy

Privacy, protected by the Fourth Amendment’s search and seizure provision,¹¹² rests on whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place, and whether that expectation be one that society is prepared to recognize as reasonable.¹¹³ Although the constitutional right to privacy cannot be invoked against a private employer, a cause of action against a private employer for invasion of privacy can arise under state law. An example is illustrated in section 652B of the Restatement (Second) of Torts.¹¹⁴ The Restatement requires there be an “intentional[] intru[sion] . . . upon the solitude or seclusion of another or his private affairs or concerns” that would be “highly offensive to a reasonable person.”¹¹⁵

E. Trade Secrets

A trade secret is “any formula, pattern, device or compilation of

106. *Id.* at 704.

107. *Id.* at 705.

108. *Id.* at 703-04.

109. Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn From the States*, 11 COMM. L. & POL’Y 35, 39 (2006).

110. *Id.*

111. *Id.* at 46.

112. U.S. CONST. amend. IV.

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

114. RESTATEMENT (SECOND) OF TORTS: INTRUSION UPON SECLUSION § 652B (1977).

115. *Id.*

information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."¹¹⁶ A trade secret must be a secret, which is a question of fact.¹¹⁷ In deciding a trade secret claim, several factors are considered including: the extent to which the information is known outside of the business, the extent to which it is known by employees and others involved in the business, the extent of measures taken by the business to guard the secrecy of the information, the value of the information to the business and its competitors, the amount of effort or money expended by the business in developing the information, and the ease or difficulty with which the information could be properly acquired or duplicated by others.¹¹⁸

In order to obtain trade secret protection, a trade secret owner must demonstrate that he actively pursued conduct designed to prevent the unauthorized disclosure or use of the information.¹¹⁹ The following measures are sufficient to trigger this protection: (1) security, so that except by the use of improper means, acquisition of the information would be difficult; and (2) confidentiality, so that the trade secret owner can communicate the information to employees who are involved in the use of the trade secret.¹²⁰ However, it is not necessary for a trade secret owner to build an "impenetrable fortress."¹²¹ He need only make efforts that are reasonable under the circumstances to maintain secrecy.¹²²

*Vickery v. Welch*¹²³ was the first case brought involving trade secrets.¹²⁴ The case involved a recipe for chocolate, whereby the buyer contracted to purchase the seller's chocolate business and the exclusive right to use the seller's secret chocolate recipes.¹²⁵ After the seller attempted to retain the right to sell the recipes to others, the buyer

116. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939). There is no generally accepted definition of trade secret but the first Restatement of Torts § 757 has been cited with approval by courts. *See, e.g.,* *Ashland Mgmt. Inc. v. Janien*, 624 N.E.2d 1007, 1012 (N.Y. 1993).

117. *Ashland*, 624 N.E.2d at 1013.

118. *Id.* (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939)).

119. David G. Majdali, Comment, *Trade Secrets Versus the Internet: Can Trade Secret Protection Survive in the Internet Age?* 22 WHITTIER L. REV. 125, 136 (2000) (citing *Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921, 925 (Mass. 1972)).

120. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

121. Majdali, *supra* note 119, at 136 (citing *E. I. Du Pont de Nemours & Co. v. Christopher*, 431 F.2d 1012, 1017 (5th Cir. 1970)).

122. UNIF. TRADE SECRETS ACT § 1(4)(ii) (amended 1985), 14 U.L.A. 538 (1985).

123. 36 Mass. (19 Pick.) 523 (1837).

124. Majdali, *supra* note 119, at 127.

125. *Vickery*, 36 Mass. (19 Pick.) at 525.

brought a cause of action.¹²⁶ The court held in favor of the buyer and found that the transfer of the seller's secret recipe to the buyer would not harm the public, because the public did not care who owned the exclusive right to use the recipe.¹²⁷ The court further stated the seller's refusal to give the secret recipe to the buyer, despite the existence of the contract, was entirely inconsistent with his obligation to the buyer.¹²⁸ The court noted that it was known to both parties that there was no patent right granted to the seller, that it was for his exclusive secret, and the secret would not be kept if put at large upon the records.¹²⁹ However, this right was validly granted to the buyer, and should have been done so in private so that he would have been able to preserve his right for his own use and enjoyment.¹³⁰ Instead, the seller chose to defeat his obligation and communicate the secret to others.¹³¹ As such, damages were awarded to the buyer.¹³²

F. Tort Causes of Action in Employment Situations: Defamation

A viable action for defamation turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation.¹³³ In *Northport Health Services Inc. v. Owens*, nurses were fired from the work facility.¹³⁴ They sued the facility, alleging, among other causes of action, wrongful termination and defamation.¹³⁵ The question before the court was whether the facility acted in good faith when reporting their complaints about the nurses.¹³⁶ The court affirmed the lower court's holding and held the facility acted in bad faith when making its report.¹³⁷ The court stated that in order to prove defamation, plaintiffs must establish the following: the defamatory nature of the statement of fact, that statement's identification of or reference to the plaintiff, the publication of the statement by the defendant, the defendant's fault in the publication, the statement's

126. *Id.*

127. *Id.* at 527.

128. *Id.*

129. *Id.* at 526.

130. *Id.* at 527.

131. *Vickery*, 36 Mass. at 527.

132. *Id.*

133. *Northport Health Serv. Inc. v. Owens*, 158 S.W.3d 164, 172 (Ark. 2004).

134. *Id.* at 168.

135. *Id.*

136. *Id.* at 170.

137. *Id.* at 171.

falsity, and that the allegedly defamatory statement implies an assertion of an objective viable fact.¹³⁸ The court reasoned the plaintiffs were able to establish actual damage to their reputations.¹³⁹ They maintained their burden by proving that the defamatory statements were communicated to others and the statements detrimentally affected their relations.¹⁴⁰

II. CURRENT LAW

A. The Doctrine of At-Will Employment

Over time, many legal doctrines have been altered to correspond with issues presented as a result of technological progress. However, the doctrine of at-will employment is well-settled law with little room for change. Even when faced with the latest technology such as communication forums created by the internet, at-will employment permits very few exceptions.¹⁴¹ Since at-will employees enjoy no property interest in their employment¹⁴² it is of little significance when use of the internet spurs a termination.

In Pennsylvania, an at-will employment jurisdiction, an employee of Pillsbury Co. was terminated because of the content of his e-mail.¹⁴³ Although the e-mail in question was sent over Pillsbury's e-mail system, it was sent from the plaintiff's home computer and employees were assured their e-mail communications would remain confidential.¹⁴⁴ The plaintiff claimed invasion of privacy, but the court did not believe the situation violated a "clear mandate of public policy" that would "strike at the heart of a citizen's social right[s]"¹⁴⁵ As a result, the plaintiff could be terminated regardless of the fact that the e-mail was understood to be confidential and sent on his own time.¹⁴⁶

138. *Id.*

139. *Id.* at 172.

140. *Id.* at 172.

141. *See generally* Smyth v. Pillsbury Co., 914 F. Supp. 97 (E.D. Pa. 1996) (maintaining that the Pennsylvania superior courts have only recognized three public policy exceptions to the at-will employment doctrine; jury duty, prior convictions and reporting violations of federal regulations to the Nuclear Regulatory Commission).

142. Parker v. City of Elgin, No. 03-C-0171, 2005 WL 2171159 at *12 (N.D. Ill. Aug. 30, 2005).

143. *See Smyth*, 914 F. Supp. at 98-99.

144. *Id.* at 98.

145. *Id.* at 99-100.

146. *Id.* at 101.

The introduction of the internet to the workplace may in fact give employers more leeway, if possible, in terminating an at-will employee.¹⁴⁷ Employees who have a future compensation that reflects past services, such as a bonus, can lose their right to compensation for failure to comply with a company internet policy.¹⁴⁸ For example, Mr. Goldstein, an employee of PFPC Inc., was terminated and deprived of his bonus for sending an e-mail that contained a photograph of a partially nude woman.¹⁴⁹ This e-mail was a clear violation of the company policy.¹⁵⁰ The claim stated that PFPC Inc. violated the covenant of good faith and fair dealing because the e-mail was not the true reason for his termination.¹⁵¹ Instead, Mr. Goldstein claimed the actual ground for termination was that the company did not want to pay him the compensation he had earned as a bonus.¹⁵² The court was of the opinion that the plaintiff's termination was permissible despite his anticipated bonus because it was not in fact reflective of past services.¹⁵³ The covenant of good faith and fair dealing was not violated because Mr. Goldstein violated the company policy, and as an at-will employee, could be fired.¹⁵⁴ The doctrine of at-will employment does not change simply because the internet is involved.¹⁵⁵ However, the internet may raise concerns that spur exceptions to other basic rules of law.

B. First Amendment and the Internet

1. Government Employees

Many people trust that their internet posts cannot be regulated because they enjoy the right to speak freely under the First Amendment of the United States Constitution.¹⁵⁶ While a government employee does not forfeit all of their rights to free speech simply by virtue of their

147. See *Goldstein v. PFPC, Inc.*, No. 0202145, 2004 WL 389107 (Mass. Super. Feb. 19, 2004).

148. *Id.* at *1.

149. *Id.*

150. *Id.*

151. *Id.* at *3.

152. *Id.*

153. *Id.*

154. See *id.* at *1-3.

155. See *id.*

156. U.S. CONST. amend. I.

employment,¹⁵⁷ a government employer does have the capacity to restrict the speech of their employees in circumstances which would be unconstitutional if applied to the general public.¹⁵⁸ As previously discussed, public employees enjoy the right to free speech on matters of public concern as well as on issues unrelated to their employment that take place on their own time.¹⁵⁹ As a matter of policy, if there is a governmental justification that is “far stronger than mere speculation” regulating the topic, and if there is a “reasonable ground to fear that serious evil will result if free speech is practiced,” then there may be a suppression of free speech.¹⁶⁰

For example, Joseph Roe, a former police officer for the city of San Diego was terminated after he sold home made videotapes containing sexually explicit material via the internet.¹⁶¹ Roe brought suit claiming that his termination violated his right to free speech.¹⁶² The city agreed that the acts in question were unrelated to Roe’s employment; however, it took the position that this particular speech was contrary to city regulations and harmful to the proper functioning of the police force.¹⁶³ Applying the threshold test set out in *Connick*, discussed *supra*, the Court decided the *Pickering* balancing test did not apply here because the speech was not a matter of public concern.¹⁶⁴ “Roe’s activities did nothing to inform the public about any aspect of the San Diego Police Department’s functioning or operation.”¹⁶⁵ In fact, the Court held that Roe’s speech was “widely broadcast, linked to his official status as a police officer . . . designed to exploit his employer’s image” and therefore detrimental to the San Diego Police Department.¹⁶⁶ The Court applied the general tests used for freedom of speech issues with regard to public employees. It did not focus specifically on the fact that the

157. *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004).

158. *Id.*; see also *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (holding that when a public sector employee is speaking pursuant to his job duties, he does not have first amendment protection).

159. *Id.*

160. *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 475 (1995).

161. *Roe*, 543 U.S. at 78.

162. *Id.*

163. *Id.* at 81.

164. *Id.* at 83-84. The *Pickering* Court adopted a balancing test that requires the court to evaluate restraints on a public employee’s speech to balance “the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

165. *Roe*, 543 U.S. at 84.

166. *Id.*

internet was used as the vehicle of expression. However, relevant components of the Court's decision were the fact that the speech was so "widely broadcast,"¹⁶⁷ and the fact that the internet was what provided the vehicle for this information to be publicly distributed.

2. Private Employees

While it is true that people enjoy the right to speak freely under the First Amendment of the United States Constitution,¹⁶⁸ at-will employees can be terminated for the content of their speech. In addition, space over the internet is privately owned by Internet Service Providers.¹⁶⁹ These Internet Service Providers have the authority to control the content posted on the space they own.¹⁷⁰ Actually, Congress encourages Internet Service Providers to regulate content because they do not have the authority to do so on their own.¹⁷¹ In fact, the law provides protections for those who provide users with interactive computer services.¹⁷²

Internet Service Providers cannot be held liable on account of "action[s] taken in good faith to restrict access or availability of material . . . considered to be obscene, lewd . . . or otherwise objectionable."¹⁷³ This is true even if the material is constitutionally protected.¹⁷⁴ Along with the Internet Service Providers ability to decide what content is posted and remains on their site, in some situations, courts can demand Internet Service Providers to release the identity of users to enforce other laws.¹⁷⁵ Over the years there have been a number of cases in which courts have required Internet Service Providers to release information sufficient for identification of a user or the identity of the user themselves.¹⁷⁶

167. *Id.*

168. U.S. CONST. amend I.

169. See Vasilios Toliopoulos, *Regulating Your Internet Diet: The Can Spam Act of 1999*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 175, 177 n.15 (1999).

170. *Id.* at 18-82.

171. *Id.* at 181.

172. *Id.*

173. *Id.*

174. *Id.*

175. See generally *Doe v. Cahill*, 884 A.2d 451,458 (Del. 2005) (discussing the policy underpinnings of the judiciary's selection of the plaintiff's burden to be met before revelatory information about anonymous bloggers must be turned over in discovery).

176. See generally *In re Baxter*, No. 01-00026-M, 2001 WL 34806203, at *12-16 (W.D.La. Dec. 20, 2001); *Immunomedics, Inc. v. Doe*, 775 A.2d 773, 776-78 (N.J. Super. Ct. App. Div. 2001).

3. Anonymous Speech

Internet speech including blog postings are often anonymous and are entitled to First Amendment Protection. Recently, the Delaware Supreme Court recognized the rights of on-line bloggers in the case of *Doe v. Cahill*.¹⁷⁷ The blog at issue contained allegedly defamatory material, which concerned Mr. Cahill, a public figure.¹⁷⁸ Mr. Cahill sought to compel disclosure of Doe's identity from a third party Internet Service Provider who had the information.¹⁷⁹ In an attempt to keep his identity unknown, Doe filed an "Emergency Motion for Protective Order."¹⁸⁰ The court was clear in their attempt to protect the competing rights of both parties and emphasized that the right to free speech did not protect defamatory statements.¹⁸¹ The court acknowledged the internet as "a unique democratizing medium unlike anything that has come before. The advent of the internet dramatically changed the nature of public discourse by allowing more and diverse people to engage in public debate."¹⁸²

Ultimately, the court required a defamation plaintiff to satisfy a summary judgment standard before revealing the identity of an anonymous internet user.¹⁸³ The court distinguished the reliability of information found on the internet from other more reliable sources of information.¹⁸⁴ "Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts . . . upon which a reasonable person would rely."¹⁸⁵ Another court recently referred to blogs and chat rooms in a similar light, stating these forums tend to be "replete with grammar and spelling errors . . . many of the messages are vulgar and offensive In this context, readers are unlikely to view the messages posted anonymously as assertions of fact."¹⁸⁶

177. 884 A.2d at 456.

178. *Id.* at 454.

179. *Id.* at 454-55.

180. *Id.* at 455.

181. *Id.* at 456.

182. *Id.* at 455.

183. *Id.* at 457.

184. *Id.* at 465.

185. *Id.*

186. *Rocker Mgmt. LLC v. John Does*, No. 03-MC-33, 2003 WL 22149380, at *2 (N.D. Cal. May 29, 2003).

C. Freedom of the Press, Journalists and the Internet

1. Federal Privilege

Once a trade secret is posted on the Internet for all to see, by an employee, former employee or third party, companies encounter difficulties uncovering the identity of the misappropriator.¹⁸⁷ A third party claiming to be a journalist can complicate matters further. A California court recently avoided the issue of whether a blogger qualifies as a journalist for purposes of the laws protections.¹⁸⁸

Apple Computer Inc, brought suit against unnamed individuals claiming they “had leaked specific, trade secret information about new Apple products to several online websites.”¹⁸⁹ During discovery Apple requested a number of documents that would reveal the defendants’ identities.¹⁹⁰ The “John Does” brought a motion seeking a protective order based on their claim that they were “journalists” and thus entitled to invoke a privilege against disclosing their sources.¹⁹¹ The court stated, “some might refer to the moving parties as ‘bloggers’”¹⁹² and went on to define a blog as an “online diary: a personal chronological log of thoughts published on a web page.”¹⁹³ Rather than making a distinction between bloggers and journalists, the court rested its decision on the fact that both the United States and California Supreme Courts apply trade secret laws to everyone regardless of their status.¹⁹⁴ The California legislature has not made any exception for journalists or bloggers.¹⁹⁵

Circuit Judge Sentelle briefly addressed the issue of bloggers in

187. See e.g., *Apple Computer Inc., v. Doe*, No. 1-04-CV-032178, 2005 WL 578641 at *1 (Cal. Super. Mar. 11, 2005).

188. See *id.*

189. *Id.*

190. *Id.* Apple requested all documents relating to the identity of any person or entity who supplied information regarding an unreleased Apple product with specific code-names including; (a) all documents identifying any individual or individuals who provided information relating to the Product; (b) all communications from or to any Disclosing Person(s) relating to the Product; (c) all documents received from or sent to any Disclosing Person(s) relating to the Product; and (d) all images, including photographs, sketches, schematics and renderings of the Product received from or sent to any Disclosing person(s). *Id.* at *1-2.

191. *Id.* at *2.

192. *Id.*

193. *Id.* at n.4. In defining the word “blog,” the court relied on the definition provided by an online dictionary. *Id.* (citing Dictionary.com, <http://dictionary.reference.com/browse/blog> (last visited February 20, 2007)).

194. *Apple Computer Inc.*, 2005 WL 578641, at 4.

195. *Id.*

relation to a journalistic privilege in his concurring opinion of the controversial case involving *New York Times* reporter, Judith Miller.¹⁹⁶ In discussing whether a constitutional or federal common law privilege existed which gave journalists the right to refuse to disclose confidential sources from grand jury investigations, Justice Sentelle pointed out the difficulties that would arise in identifying the persons who would be entitled to the protection of the privilege.¹⁹⁷ Consistent with the idea that freedom of the press is a basic fundamental right, which includes “every sort of publication which affords a vehicle of information and opinion”¹⁹⁸ it seems that courts should include the “proprietor of a weblog.”¹⁹⁹ Justice Sentelle refers to that informal stereotypical blogger in their pajamas discussed *supra*, and recognizes that because of the broad breadth afforded to the freedom of the press, it would be difficult to exclude bloggers and remain consistent with the view of the courts.²⁰⁰ He expresses his concern that a blog can be utilized for unlawful purposes and a journalistic privilege will protect the blogger by forbidding them to disclose the identity of the confidential source.²⁰¹

D. Privacy and the Internet

Privacy, afforded by the Fourth Amendment of the Constitution’s search and seizure provision,²⁰² also deals with internet communications.²⁰³ A defendant is afforded a limited reasonable expectation of privacy in e-mail messages.²⁰⁴ While an e-mail message bears some resemblance to sending a letter through the mail, the Fourth Amendment right diminishes when an individual sends information via a

196. *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 979-81 (D.C. Cir. 2005) (Sentelle, D., concurring) *cert. denied*, 545 U.S. 1150 (2005). Judith Miller refused to reveal a confidential source to the grand jury claiming, among other things, that the First Amendment afforded journalists a constitutional right to conceal their confidential sources from grand jury subpoenas. *Id.* at 967.

197. *Id.* at 979-81.

198. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

199. *Miller*, 379 F.3d at 979.

200. *Id.*

201. *Id.* at 979-80. If the court does not have the ability to draw a line that would eliminate bloggers from the protection of a journalistic privilege, many problems could arise. It would be possible for a governmental official to call a trusted friend or a political ally, advise him to set up a web log (understood to take about three minutes) and then leak unlawful information, which the law forbids the official to disclose, under a promise of confidentiality. *Id.*

202. U.S. CONST. amend. IV.

203. *See U.S. v. Charbonneau*, 979 F. Supp. 1177, 1184-85 (S.D. Ohio 1977).

204. *Id.* at 1184.

computer.²⁰⁵ The extent to which this expectation diminishes depends upon the type of e-mail sent and the intended recipient.²⁰⁶ The more “open” a form of communication over the Internet, the further the privacy rights are diminished.²⁰⁷ For example, the court in *Maxwell* afforded AOL users more privacy rights than users of other less secure internet communications because by using AOL they had a reasonable expectation of privacy.²⁰⁸ This view of the internet is premised on the inability of police officials to intercept the communication without a search warrant, and is a clear example of how courts regard internet privacy.²⁰⁹

These issues of privacy in e-mail and internet communications have had similar outcomes when dealing with employment situations.²¹⁰ For example, in *Garrity v. John Hancock Mutual Life Insurance Company*, the plaintiff’s claim rested on the fact that an employer led the plaintiff to believe personal e-mails could be kept private by the use of passwords and e-mail folders.²¹¹ The cause of action was for unlawful interception of wire communications and wrongful termination in violation of public policy, among other things.²¹² Even in the absence of a company e-mail policy, the messages would at some point be accessible by a third party. With this knowledge the plaintiff communicated the information voluntarily.²¹³ As a result, the court concluded the plaintiff had no reasonable expectation of privacy in e-mail messages.²¹⁴ The court noted, “Even if plaintiffs had a reasonable expectation of privacy in their work e-mail, defendant’s legitimate business interest in protecting its employees from harassment in the workplace would likely trump plaintiffs’ privacy interests.”²¹⁵

205. *Id.*

206. *Id.* at 1185 (citing U.S. v. Maxwell, 45 M.J. 406, 418-419 (C.A.A.F 1996)).

207. *Maxwell*, 45 M.J. at 417.

208. *Id.*

209. *Id.* at 418.

210. *See generally* *Garrity v. John Hancock Mut. Life Ins. Co.*, No. CIV.A. 00-12143-RWZ, 2002 WL 974676 (D. Mass. May 7, 2002) (noting that because the e-mails were voluntarily sent over a system utilized the entire company and the plaintiff knew they could be accessible by a third party there was no reasonable expectation of privacy in the communications).

211. *Id.* at *1.

212. *Id.*

213. *Id.* at *2 (quoting *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996)).

214. *Id.*

215. *Id.*

E. Trade Secrets and the Internet

As a matter of policy and law, companies possess the right to, and are in fact required to, protect their trade secrets.²¹⁶ Usually threats of misappropriation arise through a breach of confidence and theft.²¹⁷ However, a misappropriator can use the internet to post information and have a worldwide audience at their disposal.²¹⁸ Accordingly, the internet may make it easier for people to leak company trade secrets and make it more difficult for companies to prevent it. Once an alleged trade secret is posted on the internet, the information loses its trade secret status.²¹⁹ A series of cases that arose in 1995 involving the Religious Tech Center concluded that “once a trade secret is posted on the Internet, it is effectively part of the public domain, impossible to retrieve.”²²⁰ The party who revealed the information may be liable for misappropriation but the parties who actually download the information are free of any liability.²²¹ Since trade secrets are ultimately forfeited when posted on the internet, a company who possesses trade secrets has an immeasurable interest in preventing the use of the internet to “publish” company information.

F. Tort Causes of Action and the Internet

There are also various tort causes of action that companies may be able to assert based on use of the internet.²²² The internet enables people to engage in certain tortious activity entirely online and anonymously.²²³ This is a problem because companies will find themselves chasing the tortfeasor from one Internet Service Provider to another with practically no hope of success.²²⁴ Courts tend to direct their attention to the casual

216. *Vickery v. Welch*, 36 Mass. (19 Pick.) 523, 526 (1837).

217. *Majdali*, *supra* note 119 at 141 (citing *Kewanee Oil Co. v. Bicon Corp.*, 416 U.S. 470 (1974)).

218. *Id.* at 142.

219. *See generally* *Religious Tech Ctr. v. Netcom On-Line Commc'n Serv., Inc.*, 923 F. Supp. 1231, 1256 (N.D. Cal. 1995); *Religious Tech Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp 1519, 1526 (D. Colo. 1995); *Religious Tech Ctr. v. Lerma*, 908 F. Supp. 1362, 1368 (E. D. Va. 1995).

220. *Lerma*, 908 F. Supp. at 1368.

221. *Netcom*, 923 F. Supp. at 1256; *F.A.C.T. NET*, 901 F. Supp at 1525; *Lerma*, 908 F. Supp. at 1368.

222. *See generally* *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999); *Rocker Mgmt. v. John Does*, No. 03-MC-332003, 1993 WL 22149380 at *1 (N.D. Cal. May 29, 2003); *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167 (Tex. 2003).

223. *Columbia Ins. Co.*, 185 F.R.D. at 578.

224. *Id.*

nature of the internet, which makes success with claims of libel or business disparagement difficult.

Since the First Amendment of the U.S. Constitution protects statements of opinion, a necessary element of the tort cause of action for libel is a statement of fact.²²⁵ In cases of libel the court must “put itself in the position of the . . . reader” to determine the meaning of the statement and the “natural and probable effect [it would have] upon the mind of the average reader.”²²⁶ The court also looks to whether the statements are factual in the sense that they are capable of being proven true or false.²²⁷ Statements made on the internet are typically assumed to be statements of opinion.²²⁸ Therefore, cases of improper spelling, grammar and capitalization support this assumption and quash the possibility of libel.²²⁹ Chat rooms in particular may pose a problem for a plaintiff looking for compensation based on a libel. For example, Yahoo message boards contain a warning that postings “are solely the opinion and responsibility of the poster” and courts find that readers are unlikely to view anonymous postings as assertions of fact.²³⁰

With regard to free speech, privacy, the possible disclosure of trade secrets and the capability of committing torts over the internet, courts are attempting to stay within the bounds of settled law. By depicting the internet as informal and shoddy in nature, the courts have characterized the content found on the internet as information upon which reasonable people would not rely. While courts consistently recognize and emphasize the value of the internet as a public forum for communication they also acknowledge the diminished right of privacy afforded to internet communications.

III. ANALYSIS

It is a frequent misconception that rights granted by the constitution are absolute and provide for an adequate defense.²³¹ In circumstances such as those presented here, these constitutional rights are subject to other areas of the law. The following discussion analyzes First Amendment rights, privacy, trade secrets and defamation based upon the

225. *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1101 (N.D.Cal. 1999).

226. *Rocker Mgmt.*, 1993 WL 22149380, at *2.

227. *Id.*

228. *See id.*

229. *Id.*

230. *Id.*

231. *See* U.S. CONST. amend. I; U.S. CONST. amend IV.

doctrine of at-will employment as it relates to blogging.

A. First Amendment Rights and Blogging

1. Government Employees

A government employer has a greater capacity to restrict the speech of their employees in circumstances which would be unconstitutional if applied to the general public.²³² For example, though the Court in *Roe*, discussed *supra*, found the speech in question was unrelated to Roe's employment, it found the speech to be harmful and contrary to regulations to the proper functioning of the police force.²³³ As a result, the Court deemed the speech not to be protected under the First Amendment.²³⁴ In addition, the Court determined Roe's speech was unprotected under the First Amendment because the information was widely disseminated.²³⁵ The internet provided Roe with the medium to sell his pornographic materials.²³⁶

Based upon the principles set forth in *Roe*, we can conclude a blogger who is a public employee, receives less protection from the First Amendment for the things posted on his or her blog. Should a blogger post sexually explicit information or defamatory speech that does not touch upon public concern on their blog, that public employee may be fired for such postings because the information is not protected by the First Amendment.

Similarly, if we apply *Connick* to the situation of a blogger who is also a public employee, we can conclude such a person's speech on their blog is not protected by the First Amendment.²³⁷ In *Connick*, the Supreme Court held a discharge did not offend the First Amendment when based upon statements made by a public employee upon matters of personal interest and not public concern.²³⁸ The method by which a public employee chooses to express grievances relating to their employer, whether through a questionnaire or by posting on a blog, makes little difference. In each instance, neither is protected by the First

232. *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004).

233. *Id.* at 81, 84-85.

234. *Id.* at 80, 84-85.

235. *Id.* at 84.

236. *Id.* at 78-79.

237. *Connick v. Meyers*, 461 U.S. 138 (1983).

238. *Id.* at 154.

Amendment because according to *Connick*, the statements made were pursuant to a personal interest and not a matter of public concern.²³⁹ Therefore, should a public employee in a similar situation to *Connick* (an Assistant District Attorney), choose to defame his employer on his blog, or solicit views of others regarding his employer through his blog, his employer is under no obligation to maintain his employment.

2. Private Employees

Pursuant to *Doe*, speech over the internet is entitled to First Amendment protection.²⁴⁰ This protection extends to anonymous internet speech, including speech in blogs or chat rooms, but does not extend to defamatory speech.²⁴¹ According to the court, "it is well understood that the right of free speech is not absolute at all times and under all circumstances."²⁴²

Although bloggers may believe they are entitled to First Amendment protection when posting on their blogs, the court in *Doe* makes clear that bloggers, like other internet users, do not enjoy absolute protection by the First Amendment.²⁴³ Therefore, because this First Amendment protection is not an absolute right, it does not shield bloggers from the doctrine of at-will employment. Bloggers can thus be fired with or without cause and cannot rely on their First Amendment rights as an adequate defense.

B. Freedom of the Press, Journalism and Blogging

According to caselaw, journalists are not afforded additional privileges from the Federal Government based on the First Amendment.²⁴⁴ However, state shield laws may protect bloggers from divulging sources from which they receive the information they post on the internet.²⁴⁵ Since some state shield laws define the term journalist so broadly it will not be difficult to fit a blogger into the statute.

Due to the nature of the blogs discussed *supra*, it would be less

239. *Id.*

240. *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005).

241. *Id.*

242. *Id.*

243. *Id.*

244. *See supra* notes Part I.C.

245. William E. Lee, *The Priestly Class: Reflections on a Journalists' Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 657 (2006).

likely for one of them to be protected by most state shield laws; however, more and more blogs are popping up that are owned by high-tech publishers and acquire followers in the media world.²⁴⁶ If these visible blogs are compared with the more traditional forms of publication it will be difficult for states to draw a line that eliminates bloggers as journalists.

C. Privacy and Blogging

The search and seizure provision of the Fourth Amendment does not apply to private parties; however, the law has been forced to evolve with the internet. The way courts view privacy of internet communications gives insight as to how they may deal with blogging in the future. An expectation of privacy wanes when communication is transmitted over the internet.²⁴⁷ Moreover, the more “open” a communication is, the less privacy a reasonable person will expect. A reasonable person should foresee decreased privacy when using a widely broadcast medium such as the internet as their forum of communication.²⁴⁸

Based on *Maxwell*, where the court afforded more privacy to AOL users based only on the secure quality of AOL, a blog user will likely receive a decreased right to privacy. Not only is a blog inherently open in nature, but the intended recipient of a blog is the “blogosphere” in general, comprised of approximately fifty million people.²⁴⁹ A popular blog host, blog.com, owned by Google, affords their bloggers the same privacy rights Google provides for other services.²⁵⁰ The issue here is that a blog is not comparable to e-mail, particularly in a privacy sense because e-mail is sent to specific recipients. However, bloggers are concerned with the anonymous character of the practice and do expect that their employers will not be aware they are the author of a blog.

246. See Clive Thompson, *Blogs to Riches: The Haves and Have-Nots of the Blogging Boom*, NEW YORK MAG., Feb. 20, 2006, at 26.

247. See generally *U.S. v. Charbonneau*, 979 F. Supp. 1177, 1179 (S.D. Ohio 1977) (discussing that Defendant could not have a “reasonable expectation of privacy while using AOL . . .”).

248. See generally *U.S. v. Maxwell*, 45 M.J. 406, 417 (C.A.A.F. 1996).

249. Rob McGann, *The Blogosphere by the Numbers*, Nov. 22, 2004, http://www.clickz.com/stats/sectors/traffic_patterns/article.php/3438891.

250. See generally Blogger Privacy Notice, <http://www.blogger.com/privacy> (noting that a user must type his username and password before entering Blogger.com, but Google keeps the information confidential).

Google's privacy policy,²⁵¹ for example, provides that Google will not divulge a blogger's personal information; however, nothing stops people outside of Google from communicating the identity of an anonymous blogger. Moreover, the use of passwords for blog access may increase the privacy expectation of a blogger, but it will most likely not be a material difference that would greatly affect the outcome of the law.

D. Trade Secrets and Blogging

Based upon the principles of law set forth in the *Religious Tech* cases, there is little doubt that an at-will employee who chooses to post information regarding his employer's trade secrets on a blog, will retain his employment.²⁵² The doctrine of at-will employment enables an employer to fire an employee with or without cause.²⁵³ In light of the increased use of the internet as means to dispel trade secrets, employers certainly have great cause for concern. The internet, and blogs in particular, present a fast, easy and affordable way for an employee to post his employer's trade secrets in an effort to perhaps take revenge against his employer for not giving him the raise he wanted. As such, it has become necessary for employees to enact precautionary measures, such as security schemes, in order to protect their trade secrets.²⁵⁴ Although an employer has a right to fire an employee based upon the doctrine of at-will employment for misappropriation,²⁵⁵ and that employee may be held directly liable for his actions,²⁵⁶ the cost to an employer of losing a trade secret can be a large one – including the loss of a business.

E. Tort Causes of Action and Blogging

The internet brought opportunities for people to engage in tortious activity with a low probability of being exposed. It would seem safe to conclude that because of this, courts address these issues in a particularly

251. See generally Google Privacy Center, <http://www.google.com/privacy.html> (noting that a user's personal information is confidentially safeguarded in Google's confidential computer database).

252. See *supra* text accompanying notes 220-21.

253. See *Parker v. Elgin*, No. 03 C0171, 2005 WL 2171159 at *9 (N.D. Ill. Aug. 30, 2005).

254. *Majdali*, *supra* note 119, at 145.

255. See *Parker*, 2005 WL 2171159, at *9.

256. See generally *Apple v. Doe*, No. 1-04-CV-032178, 2005 WL 578641 at *1 (Cal. Super. Mar. 11, 2005).

severe manner. This, however, is not the case. In fact, courts seem to be a bit more relaxed when faced with the fictional nature of information found on the internet.²⁵⁷ Much of the information posted on the internet is very informal and contains spelling and grammar errors. This would not lead an average reader to believe the statements are true or factual, which is necessary for a claim of libel. In contrast, it would lead an observer to believe that they are reading opinions.²⁵⁸ The very idea of a blog is to create an online diary. A diary, defined in Merriam Webster's Collegiate Dictionary, is "a record of events, transactions, or observations, kept daily or at frequent intervals."²⁵⁹ The use of the word 'observations' demonstrates that diaries contain opinions. When faced with cases which involve blogs, courts will most likely agree that online diaries are informal in nature. Therefore, a reasonable person would not perceive a blog as factual, making it difficult to state a claim of libel.

CONCLUSION

Bloggers such as Joyce Park, Ellen Simonetti and the former Starbucks supervisor have each learned the limits of their First Amendment Rights. Unfortunately for them, and many other employees who are similarly situated, the method in which they were held accountable for the content of their blog was through termination of their employment.²⁶⁰

Blogging is a form of publication that provides employers with tangible proof of negative statements made by employees. Not only are these statements capable of damaging a company's reputation but they may also destroy company morale. By not reacting to such behavior, employers run the risk of others becoming privy to confidential information held by the company.²⁶¹ This in turn can cause ramifications such as loss of trade secrets, decline in stock price, and other financial damage.²⁶²

257. *Rocker Mgmt. LLC v. John Does*, No. 03-MC-33, 2003 WL 22149380, at *2 (N.D. Cal. May 29, 2003).

258. *Id.*

259. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, (Merriam Webster Incorporated 1993). The definition of diary includes the definition of journal as "a daily record of personal activities, reflections or feelings." *Id.*

260. *See also* Schlossberg & Malerba, *supra* note 1, at 4.

261. *See* Majdali, *supra* note 119; *see also* *Religious Tech Ctr. v. Netcom*, 923 F. Supp. 1231 (N.D. Cal. 1995); *Religious Tech Ctr. v. F.A.C.T. NET*, 901 F. Supp. 1519 (D. Colo. 1995); *Religious Tech Ctr. v. Lerma*, 908 F. Supp. 1362 (E. D. Va. 1995).

262. *See Netcom*, 923 F. Supp. at 1231.

Since blogging is a relatively new trend, there is a shortage of case law to help predict where courts will come out on the issue.²⁶³ However, based upon our examination of the doctrine of at-will employment as it relates to First Amendment rights, privacy, trade secrets and defamation, bloggers will not be afforded any additional protections under the law.²⁶⁴ Therefore, bloggers should think twice before posting anything related to their employment on the internet. While blogging may seem to be a harmless act, taking a conversation between two co-workers at a water cooler and publishing it on a public domain takes company gossip to new level.

Courts have not yet had the opportunity to rule on whether the issue of blogging should be encompassed within the law.²⁶⁵ For this to happen, plaintiffs will need to bring a cause of action based upon a violation of their constitutional rights, or an employer's tortious conduct, rather than under the guise of sexual discrimination.²⁶⁶

In the meantime, bloggers should ask themselves if what they are posting on their online diaries is worth the price of losing their job.

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263. Schlossberg & Malerba, *supra* note 1, at 4.

264. *See generally* Schultz v. Indus. Coils, Inc. 373 N.W.2d 74, 75 (Ct. of App. Wis. 1985).

265. Schlossberg & Malerba, *supra* note 1 at 4.

266. *See, e.g.*, Complaint, Simonetti v. Delta Airlines Inc., No. 1: 05-CV-2321, 2005 WL 2407621 (N.D. Ga. 2005).

* We would like to thank the editors and staff of the *Hofstra Labor and Employment Law Journal*, without whom, this publication would not have been possible.