Punishing Employees for Using Social Media Outside the Scope of Their Employment: What Are the Potential Legal Repercussions to the Private Employer?

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I. I. INTRODUCTION

On June 6, 2011, Representative Anthony Weiner of New York admitted that he had publicly lied when he claimed that his Twitter feed had been hacked--allowing a lewd photo of a man's crotch to be posted publicly on his Twitter account. [1] Further, Weiner admitted that he had actually sent the photo of himself to a young woman in Seattle, Washington, a week earlier and he also acknowledged his involvement in "several inappropriate" electronic relationships with numerous women over a three-year-period. [2] Weiner's actions raised several questions, including whether the congressman should resign from his job. [3] On June 16, 2011, ten days after his first press conference concerning the matter, Weiner announced his resignation from his congressional position.[4]

The question of whether an individual's use of social media outside the scope of employment[5]--meaning in no way furthering the employer's interests-- should affect his or her ability to maintain employment is not limited to politicians like Representative Weiner.[6] Instead,

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[1] Chris Cuomo, *Rep. Anthony Weiner: "The Picture Was of Me and I Sent It'*, ABCNEWS.COM, Jun. 6, 2011, *available* at http://abcnews.go.com/Politics/rep-anthony-weiner-picture/story?id=13774605 (last visited on Jun. 8, 2011); *see also*, Megan H. Chan, *Rep. Anthony Weiner Admits Sending Lewd Photos*, USA TODAY, Jun. 6, 2011, *available at* http://content.usatoday.com/communities/onpolitics/post/2011/06/anthony-weiner-lewd-photos/1 (last visited on Jun. 8, 2011).

[2] Cuomo, *supra* note 1; *see also*, Chan *supra* note 1**.**

[3] *See* Chan *supra* note 1; *see also***,** *Anthony Weiner: Nancy Pelosi Calls for Investigation*, ABC NEWS, *available at* http://blogs.abcnews.com/thenote/2011/06/anthony-weiner-nancy-pelosi-calls-for-ethics-investigation.html (Following Weiner's press conference, Nancy Pelosi, the House Democratic leader "called for an ethics panel investigation".) (last visited on Jun. 8, 2011).

[4] *Congressman Weiner Resigns*, MSNBC.COM, *available at* http://www.msnbc.msn.com/id/43425251/ns/politics-capitol_hill/t/nbc-news-rep-anthony-weiner-resign/?GT1=43001 (last visited on Jun. 16, 2011).

[5] When activities are conducted outside the scope of employment, this means that the activities are not "within the scope of employment." Under the doctrine of *respondeat superior*, holding an employer vicariously liable for the tortuous conduct the term, "within the scope of employment" encompasses acts done "in furtherance of the employer's business and authorized by the employer." Therefore, it stands to reason that activities conducted outside the scope of employment, such as employees' social media activities, are not in furtherance of the employer's business and are not authorized by the employer. Barclay v. Ports Am. Baltimore, Inc., 18 A.3d 932 (Md. Ct. Spec. App. 2011) (*quoting* S. Mgmt. Corp. v. Taha, 836 A.2d 627 (Md. App. 2003)) ("For an employee's tortuous acts to be considered within the scope of employment, the acts must have been in furtherance of the employer's business and authorized by the employer.").

[6] *See* Susan Ferrechio, *Pressure Builds for Weiner to Resign*, EXAMINER, *available at* http://washingtonexaminer.com/politics/2011/06/pressure-builds-weiner-resign ("Some of the circulated photos showed a shirtless Weiner, reminiscent of a picture sent earlier this year by former Rep. Christopher Lee, R-N.Y., to

this question is routinely being posed in the private employment sector involving regular employees like the case of the Red Bull Racing crew member who was terminated on June 28, 2011, for posting what was perceived to be an anti-gay Tweet on his Twitter page.[7] Approximately nine months earlier, in October 2010, the National Labor Relations Board ("NLRB") filed an unfair labor practice charge against an ambulance service company on behalf of an emergency medical technician after the company fired her for criticizing her boss on Facebook.[8]

The aforementioned cases, involving the racing crew member and the emergency medical technician, are just two examples of numerous instances that have recently emerged where private employers have disciplined or terminated employees because of their use of social media.[9] As a result of this modern trend, numerous legal questions have arisen, including whether this violates employees' privacy rights and whether it violates their rights to engage in "concerted activities" under the National Labor Relations Act. Because the technological advances establishing social networking sites have outpaced the legal precedent in this area, there are neither clear-cut cases that specially resolve these issues nor statutory clarity to provide guidance for reaching a resolution when these issues arise.[10] Thus, this area of law can be referred to as an emerging area of law. [11]

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a woman he met on Craigslist who was not his wife. Lee was quickly forced to resign his seat by John Boehner, R-Ohio, who has upheld something of a zero tolerance policy for GOP lawmakers caught in scandals or breaking the law.") (last visited on Jun. 8, 2011).

[7] *Red Bull Crewman Fired for Anti-Gay Tweet*, Jun. 29, 2011, NASCAR.COM, *available at* http://www.nascar.com/news/110629/crewman-fired-anti-gay-tweet/ (last visited Jul. 7, 2011) ("A Red Bull Racing crewman was fired for an anti-gay tweet he posted Sunday night following the Sprint Cup race at Infineon Raceway.); *see also*, *Red Bull Crew Member Fired for Alleged Anti-gay "Tweet*," GLOBE AND MAIL, Jun. 29, 2011, *available at* http://www.theglobeandmail.com/sports/more-sports/red-bull-crew-member-fired-for-alleged-anti---gay-tweet/article2081191/ (last visited on Jul. 7, 2011) ("A crew member of the Red Bull Sprint Cup team has been fired for tweeting an anti-gay message Sunday night following the race earlier that day at Infineon Raceway in Sonoma Calif.").

[8] Jolie O'Dell, *Employee Fired Over Facebook Comment Settles Lawsuit*, MASHABLE, Feb.8, 2011; *see also*, Randi W. Kochman, *Think You Can Fire Employees Based Upon their Facebook Comments? Think Again. . .*, EMPLOYMENT LAW MONITOR, Dec.7, 2010, *available at* http://www.employmentlawmonitor.com/2010/12/articles/employment-policies-and-practi/think-you-can-fire-employees-based-upon-their-facebook-comments-think-again/ (last visited on Jul. 4, 2011).

[9] *See infra* notes 34-45.

[10] *See generally*, Corey Ciocchetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 AM. BUS. L.J. 285, 324 (2011) ("Like many technologies, electronic monitoring advancements have out-paced the ability of legislatures to react with reasoned solutions and courts to issue relevant court precedent.")

[11] *See* Ian Byrnside, Note: *Six Clicks of Separation: The Legal Ramifications of Employers Using Social Networking Sites to Research Applicants*, 10 VAND. J. ENT. & TECH. L. 445, 453 (2008) ("Although employers have begun using social networking sites to assist with hiring decisions, the potential legal ramifications of such a practice are unclear, to say the least. No case has been brought on the basis of such a use of these social networking sites. However, the increasing popularity of such sites brings with it the potential for numerous legal problems to arise in this 'emerging area of law' bolstering the chance that such a case may arise in the not-so-distant future."); *see generally*, John S. Wilson, Comment: *MySpace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1209 ("As the courts began to fill with litigants requesting electronic discovery, members of the judiciary were forced to feel their way through this emerging area of the law.").

Nevertheless, in an attempt to analyze this emerging area of law, the paper will define social media and discuss specific circumstances where private employers have disciplined or terminated employees for using this media outside the scope of their employment. It will also discuss the potential legal liability that employers may face for engaging in this type of behavior. Finally, the paper will conclude with recommendations that employers and human resource managers can implement to reduce the risk of being exposed to lawsuits for using an employees' social media activities as a basis to discipline or terminate employees.

II. THE USE OF SOCIAL MEDIA

Social media has been defined as "forms of electronic communication ([such] as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content [such] as videos."[12] Thus, the term social media is broadly defined to encompass things such as creating websites for social networking purposes or microblogging, which is "a blog that contains brief entries about the daily activities of an individual or company" and is "created to keep friends, colleagues and customers up-to-date."[13] For purposes of this article, this broad definition of social media will apply.

Usually, social media sites provide users with an opportunity to create a private profile, which contains information such as "the user's picture, likes and dislikes, interests, blog entries, geographic location, gender, links to the profiles of other friends on the site, and various other types of information."[14] Although there are numerous social media sites that exist today, the

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[12] *Definition of Social Media*, MERRIAM-WEBSTER.COM, *available at* http://www.merriam-webster.com/dictionary/social%20media (last visited on Jan. 24, 2012); NLRB Memorandum OM 11-74, Office of the General Counsel (Aug. 18, 2011) ("Social media include various online technology tools that enable people to communicate easily via the internet to share information and images, podcasts, and other multimedia communications).

[13] *Microblog*, DICTIONARY.COM, *available at* http://dictionary.reference.com/browse/microblogging, (last visited on Jan. 24, 2012).

[14] Byrnside, *supra* note 11 at 453 ("Social networking sites are virtual communities on the Internet where people may go to find and 'connect with others who have similar interests.'"); *see also, Settings & Personalization Overview*, LINKEDIN LEARNING CENTER, *available at* http://learn.linkedin.com/settings/ (last visited on Jul. 4, 2011) ("We realize it's important to have control over your information and privacy. The Account & Settings section allows you to choose how your information is displayed, how you want to be contacted, and your overall privacy preferences."); *Controlling How You Share*, FACEBOOK, *available at* http://learn.linkedin.com/settings/ (last visited on Jul. 4, 2011) ("Facebook is about sharing. Our privacy controls give you the power to decide what and how much you share."); *Privacy Settings on MySpace: What You Need to Know*, MYSPACE, *available at* http://www.myspace.com/pages/privacysettings (last visited on Jul. 4, 2011) ("At MySpace, we understand the importance of privacy and allowing you to control your information. Here's a quick overview of our simplified privacy settings to help you create a personalized environment."); *About Public and Protected Tweets*, TWITTER HELP CENTER, *available at* http://support.twitter.com/entries/14016-about-public-and-protected-accounts (last visited on Jul. 4, 2011) ("When you sign up for Twitter, you have the option of keeping your Tweets public (the default account setting) or protecting your Tweets. Accounts with public Tweets have profile pages that are visible to everyone. Accounts with protected Tweets require approval of each and every person who may view that account's Tweets. Only approved followers can view Tweets made on these accounts.").

main sites utilized are LinkedIn, Facebook, MySpace and Twitter.[15] And, among these four, each has its own specific identity and overall objective.

For example, LinkedIn, which was founded in 2004, "operates the world's largest professional network on the Internet with more than 100 million members in 200 countries and territories."[16] Moreover, this social networking site has been characterized as "a tool for displaying your work and credentials to colleagues and potential clients, gathering intelligence about trends and competitors from others in your industry or profession, and keeping in touch with alumni and other groups that matter to you."[17] In general, this social media site provides its users with the ability to look for job opportunities; to research prospective employers; to establish professional connections; to promote users' professional qualifications; and to obtain prospective clients.[18]

Unlike with LinkedIn, Facebook, which was also founded in 2004, does not, for the most part, focus on connecting its users for professional purposes.[19] Instead, this social media site mainly connects users for personal purposes and is described as "a social utility that helps people communicate more efficiently with their friends, family and coworkers."[20] It is the world largest social network and as of July 2010, there were 500 million Facebook users around the world.[21]

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[15] *See* Elizabeth Ebanks, *Social Networking Sites in the Labor and Employment Realm: Harness the Power or Be Left Behind*, EMPLOYMENT AND LABOR UPDATE-SEPTEMBER 2009, *available at* http://www.lorman.com/newsletters/article.php?cd=18198:1349:1:2:11&article_id=1349&newsletter_id=289&category_id=1 (last visited on May 25, 2011) ("There are hundreds of social networking sites, and that number is growing by the day, but four major players stand out LinkedIn, Facebook, MySpace and Twitter."); Renee M. Jackson, *Social Media Permeate the Employment Life Cycle*, NATIONAL LAW JOURNAL, Jan. 11, 2010, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202437746082&Social_media_permeate_the_employment_life_cycle&slreturn=1&hbxlogin=1 (last visited on Jun. 8, 2011) ("In the workplace, the prevalent social media are video-sharing Web sites (You Tube), social networking Web sites (Facebook, MySpace, LinkedIn, Twitter), online multiuser virtual worlds (Second Life, World of Warcraft) and personal or corporate blogs.").

[16] *About Us*, LINKEDIN PRESS CENTER, *available at* http://press.linkedin.com/about/ (last visited on Jun. 13, 2011).

[17] Sue Shellenbarger, *Making LinkedIn Work for You*, WALL ST. J., *available at* http://blogs.wsj.com/juggle/2011/05/18/making-linkedin-work-for-you/ (last visited on Jun. 20, 2011).

[18] *See What is Linkedin?*, LINKEDIN LEARNING CENTER, *available at* http://learn.linkedin.com/what-is-linkedin/ (last visited on Jun. 20, 2011) ("By connecting on LinkedIn, your address book will never go out of date. Your contacts update their profiles, keeping you current with their latest jobs, projects and contact info."); *see also*, Michelle Dumas, *Benefits of Using Linkedin for Your Job Search and Career Networking*, EZINE ARTICLES, *available at*,

http://ezinearticles.com/?Benefits-of-Using-LinkedIn-for-Your-Job-Search-and-Career-Networking&id=1052139 (last visited on Jun. 20, 2011) ("Through LinkedIn, then, you can search for jobs, you can easily make personal 'inside' connections in relation to job opportunities, you can promote your personal brand and qualifications and be found and pursued for job opportunities, and you can form relationships that are critical to your career success and progression."); Shellenbarger, *supra* note 17 ("LinkedIn can help you find a job and research prospective employers by contacting current and former employees."); *LinkedIn*, *supra* note 14 ("LinkedIn is a fast-growing professional networking site that allows members to create business contacts, search for jobs, and find potential clients.").

[19] *Fact Sheet*, FACEBOOK, *available at* http://www.facebook.com/press/info.php?factsheet (last visited on Jun. 14, 2011).

[20] *Id.*

[21] *See id.*; *see also*, *Facebook*, N.Y. TIMES, May 27, 2011, *available at* http://topics.nytimes.com/top/news/business/companies/facebook_inc/index.html (last visited on Jun. 14, 2011) (Facebook was founded by a "Harvard sophomore, Mark Zuckerberg, who began life catering first to Harvard

The main feature of Facebook is that it provides its users with a "Home page and Profile."[22] "The Home page includes NewsFeed, a personalized feed of his or her friends' updates" and the "profile" includes information the individual chooses to share such as "interests, education and work background and contact information."[23]

Like Facebook, MySpace, which was founded in 2004 as well, is used for social connections.[24] In particular, MySpace is referred to as "an online community that lets you meet your friends' friends" and has been characterized as "a social entertainment destination for Gen Y." [25] Further, its focus is on developing "a rich, highly-personalized experience for people to discover relevant content and connect with fans who share their interests."[26] However, the company has recently seen a decline in the number of visitors. As a matter of fact, Comscore[27] reported that between January and February 2011, MySpace visitors declined by 14.4% from 73 million visitors to 63 million visitors, which was approximately half of the audience that it had one year earlier.[28] Additionally, the company has redesigned the network as "the place where people can follow their favorite musicians and other celebrities" and it has "added the ability to integrate user accounts with Facebook."[29]

Finally, Twitter, which was founded in 2006, is a "social networking and microblogging service" that provides "a real-time information network" to connect its users to the latest information.[30] Twitter's users obtain information through "tweets," which are up to 140 characters in length.[31] As of January 1, 2011, the number of registered Twitter accounts reached

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students and then to high school and college students. It has since evolved into a broadly popular online destination used by both teenagers and adults of all ages.").

[22] *Fact Sheet*, *supra* note 19.

[23] *Id.*("Facebook also includes core applications – Photos, Events, Videos, Groups, and Pages – that let people connect and share in rich and engaging ways. Additionally, people can communicate with one another through Chat, personal messages, Wall posts, Pokes, or Status Updates.")

[24] *About Us*, MYSPACE.COM, *available at* http://collect.myspace.com/index.cfm?fuseaction=misc.about (last visited on Jun. 14, 2011).

[25] *Fact Sheet*, PRESS ROOM, *available at* http://www.myspace.com/pressroom/fact-sheet/ (last visited on Jun. 14, 2011).

[26] *Id.*

[27] "ComScore is a global leader in measuring the digital world and the preferred source of digital marketing intelligence." *About ComScore*, COMSCORE, *available at* http://www.comscore.com/About_comScore (last visited on Jun. 14, 2011).

[28] Michael Arrington, *Amazingly, MySpace's Decline is Accelerating*, TECHCRUNCH, Mar. 23, 2011, *available at* http://techcrunch.com/2011/03/23/amazingly-myspaces-decline-is-accelerating/ (last visited on Jun. 14, 2011).

[29] Matthew Ingram, *MySpace vs. Facebook-There Can Be Only One*, GIGAOM, *available at* http://gigaom.com/2011/01/11/myspace-vs-facebook-there-can-be-only-one/ (last visited on Jun. 14, 2011).

[30] *About*, TWITTER, *available at* http://twitter.com/about (last visited on Jun. 14, 2011); *see also*, *What is Twitter and Why Does it Keep Following me Around*?, TWEETERNET, *available at* http://tweeternet.com (last visited on Jun. 14, 2011); *Twitter*, CRUNCHBASE, *available at* http://www.crunchbase.com/company/twitter (last visited on Jun. 14, 2011).

[31] *About*, *supra* note 30.

200 million, with 110 million tweets posted per day, up from 160 million registered accounts and 95 million tweets per day in September 2010.[32]

III. THE POTENTIAL LEGAL LIABILITY FOR PRIVATE EMPLOYERS PUNISHING EMPLOYEES FOR USING SOCIAL MEDIA OUTSIDE THE SCOPE OF EMPLOYMENT

Recently, many private employers have begun monitoring their employees' social media activities.[33] Private employers are not just investigating employees' social media behavior, but are also using the employees' social media activities outside the scope of employment as grounds for disciplining or terminating employees. One example where a private employer terminated an employee for social media activities conducted outside the scope of her employment involved a professor at DeVry University Westminster Campus, a private college in Westminster, Colorado, who was fired in December 2005 for criticizing the school on her blog.[34] Likewise, Chestnut Hill College, a private Catholic college, terminated the teaching contract of an adjunct professor for blogging about his 15 year homosexual relationship with another man.[35]

Besides teachers, the employees affected by the latest movement of private employers disciplining or terminating employees for their social media activities range from airline crew members to hospital employees.[36] As a matter of fact, thirteen Virgin Atlantic cabin crew

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[32] *Twitter Hits Nearly 200M Accounts, 110M Tweets Per Day, Focuses on Global Expansion*, FORBES, Jan.19, 2011, *available at* http://blogs.forbes.com/oliverchiang/2011/01/19/twitter-hits-nearly-200m-users-110m-tweets-per-day-focuses-on-global-expansion/ (last visited on Jun. 14, 2011); *see also*, *Twitter on Pace to Reach…200 Million Users by 2011*, TGDALY, *available at* http://www.tgdaily.com/software-brief/52284-twitter-on-pace-to-reach200-million-users-by-2011 (last visited on Jun. 14, 2011); *200 Million Twitter Accounts… But How Many Are Active?*, Feb. 3, 2011, *available at* http://socialtimes.com/200-million-twitter-accounts-but-how-many-are-active_b36952 (last visited on Jun. 14, 2011).

[33] *See, e.g.*, Pietrylo v. Hillstone, No. 06-5754 (FSH) 2008 U.S. Dist. LEXIS 108834 at *1 (July 24, 2008), (holding, among other things, that there was a genuine issue of material fact as to whether an employer violated two employees' privacy rights by terminating them for using a password protected website to vent about events occurring at work); Konop v. Hawaiian Airlines, Inc. 302 F.3d 868, 872 (9th Cir. 2002), (addressing the issue of whether an employer violated the federal Stored Communications Act by gaining access without an invitation to an employee's invitation only private password protected website).

[34] Jennifer Brown, *Prof's Firing Stirs Blog Debate First Amendment Questions Raised Other at U.S. University Say They've Been Asked to Tone Down Comments or have Tried to Police Themselves*, DENVER POST, Jan. 8, 2006 at C-01; Richard Martin, *What First Amendment? When Blogging Costs You Your Job*, NEWWEST BOULDER, *available at* http://www.newwest.net/topic/article/when_blogging_costs_you_your_job/C120/L3/ , Jan. 8, 2006 (last visited on Jul. 3, 2011).

[35] *See* Bonnie Cook, *Catholic College Fires Gay Teacher*, PHILLY.COM, Feb. 27, 2011,*available at* http://www.philly.com/philly/news/breaking/116984063.html (last visited on Jun. 21, 2011); *see also*, Catholic College Fires Gay Part-Time Professor, THE ASSOCIATED PRESS, Feb. 28, 2011, *available at* http://www.philly.com/philly/news/breaking/116984063.html?c=r (last visited on Jun. 21, 2011) ("A Catholic college in Philadelphia said it has fired a part-time professor after learning from a post on his blog that he has been in a same-sex relationship for a decade and a half which officials called contrary to church teaching.").

[36] *See* Madden, Kaitlin Madden, *12 Examples of People Getting Fired Over Facebook*, WHAS11.COM. *available at* http://www.whas11.com/home/12-examples-of-people-getting-fired-over-Facebook-101977118.html (last visited on Jun. 21, 2011); Jennifer Fink, *Five Nurses Fired for Facebook Postings*, Jun. 14, 2010, *available at* http://scrubsmag.com/five-nurses-fired-for-facebook-postings/ (last visited on Jul. 7, 2011) ("Five California nurses were recently fired after allegedly discussing patients on Facebook."); *Waitress Fired for Gripe About Tip on Facebook*, ASSOCIATED PRESS, May 17, 2010, *available at*

members were fired in 2008 after the company discovered that the employees were posting inappropriate comments about their employer on Facebook.[37] Likewise, in 2010, an employee at the Oakwood Hospital, a private hospital in Dearborn, Michigan, was fired for posting on her Facebook page a comment about coming face to face with a cop killer and her thoughts that she wished he "rotted in hell."[38] The hospital claimed that the posting violated regulations under the Health Insurance Portability and Accountability Act ("HIPPA") because it disseminated protected health information about the patient and it also included "disparaging and disrespectful remarks."[39]

Another instance of a private employee who was penalized because of her social media activities is the case cited earlier in this article involving Dawnmarie Souza, an emergency medical technician who was fired by the American Medical Response of Connecticut, Inc. ("AMRC"), an ambulance services company, for complaining about her supervisor on Facebook.[40] Souza's criticisms of her boss arose because she requested union representation in assisting her in preparing a written incident report.[41] Souza alleged that her supervisor denied her request for union representation, which led to her posting the following comment: "love how the company allows a 17 to become a supervisor."[42] Interestingly, according to company lingo a 17 refers to a psychiatric patient.[43] Following Souza's Facebook post, other coworkers posted additional negative comments about the same supervisor.[44] The case between Souza and the AMRC was eventually settled with the AMRC agreeing to modify its blogging and Internet

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http://www.msnbc.msn.com/id/37192342/ns/technology_and_science-tech_and_gadgets/t/waitress-fired-gripe-about-tip-facebook/ (last visited on Jun. 21, 2011) ("A North Carolina waitress is out of a job after griping on her Facebook page about the $5 tip she got from a couple who sat at their table for three hours.").

[37] *Virgin Atlantic has Fired 13 Cabin Crew After they Posted Comments on Facebook, Calling Passengers "Chavs" and Suggestion the Planes were Full of Cockroaches*, SKYNEWSHD, Nov. 1, 2008, *available at* http://news.sky.com/skynews/Home/UK-News/Virgin-Atlantic-Fires-13-Cabin-Crew-Staff-After-They-Criticised-The-Airline-In-A-Facebook-Group/Article/200810415139568 (last visited on Jun. 15, 2011) ("Virgin Atlantic has fired 13 cabin crew after they posted comments on Facebook, calling passengers "chavs" and suggesting the planes were full of cockroaches.");

[38] Ronnie Dahl, *Oakwood Hospital Employee Fired for Facebook Posting*, *available at* http://www.myfoxdetroit.com/dpp/news/local/oakwood-hospital-employee-fired-for-facebook-posting-20100730-wpms (last visited on Jun. 14, 2011).

[39] *Id.*; *see also*, Jeff Gray, *Think Before You Tweet; The Law Makes it Easy to Fire Employees who Vet About Work on Twitter or Facebook, Experts Say*, GLOBE AND MAIL, May 25, 2011 at B9 ("A Canadian broadcaster employed with Rogers Sportsnet, who used his Twitter account to speak out against same-sex marriage was terminated for his comments.").

[40] Complaint and Notice of Hearing for International Brotherhood of Teamsters, Local 443 v. American Medical Response of Connecticut, Inc., Case No. 34-CA-12576; *see also*, Steven Greenhouse, *Company Accused of Firing Over Facebook Post*, N.Y. TIMES, Nov. 8, 2010, *available at* http://www.nytimes.com/2010/11/09/business/09facebook.html?_r=1&partner=rss&emc=rss (last visited on Jul. 7, 2011).

[41] Complaint and Notice of Hearing for International Brotherhood of Teamsters, Local 443, *supra* note 40.

[42] *Id.*

[43] *Id.*

[44] *Id.*

policies so as to no longer completely ban employees from discussing the company on all social media sites.[45]

The recent development of private employers disciplining and terminating employees for their social media activities gives rise to numerous potential legal claims including: (1) invasion of employee's privacy; (2) violation of the Stored Communications Act; and (3) violation of the National Labor Relations Act. Each of these will be discussed separately.

A. Potential Invasion of Privacy Claims

One claim that may arise when employers punish employees for their social media activities conducted outside of the scope of employment is an invasion of privacy claim.[46] Usually, this type of claim can be brought when, among other things, there is an "intrusion upon the plaintiff's seclusion or solitude, or into his private affairs."[47] The two elements necessary to establish a privacy violation based on the common law tort of intrusion are: (1) "the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy" and (2) the intrusion must occur in a manner that is highly offensive to a reasonable person."[48]

The plaintiff bringing an intrusion claim must show a "subjective expectation of privacy and that the expectation is objectively reasonable."[49] The subjective expectation of privacy may

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[45] Greenhouse, *Company Accused of Firing Over Facebook Post*, *supra* note 40.

[46] *See, e.g.*, Pietrylo v. Hillstone, No. 06-5754 (FSH), 2008 U.S. Dist. LEXIS 108834 at *1 (July 24, 2008); *see also*, Ebanks, *supra* note 15 ("Employees and applicants may challenge an employer's search of a social networking site as an invasion of privacy."); Michael Z. Green, Article: *A 2001 Employment Law Odyssey: The Invasion of Privacy Tort Takes Flight in the Florida Workplace*, 3 FL. COASTAL L.J. 1, 8 (2001) (quoting Mark A. Rothstein et al., EMPLOYMENT LAW § 1.27 at 325) ("The two most often applied claims for invasion of privacy in the workplace are public disclosure of private facts . . . and intrusion upon seclusion . . . with public disclosure of private facts being 'the tort most often asserted by employees in invasion of privacy actions.'").

[47] *See* Allstate Ins. Co. v. Ginsberg, 863 So.2d 156, 160 (Fla. 2003) ("The tort of invasion of privacy is considered to encompass four categories, one of which consists of intrusion upon the plaintiff's physical solitude or seclusion."); *see also*, Loft v. Fuller, 408 So.2d 619, 622 (Fla. App. 1982). ("Florida decisions have filled out the contours of this tort right of privacy by accepting the following four categories recognized by Prosser in his Law of Torts . . .: (1) Intrusion, i.e., invading plaintiff's physical solitude or seclusion; (2) Public disclosure of Private Facts; (3) False Light in the Public Eye, i.e., a privacy theory analogous to the law of defamation; and (4) Appropriation, i.e., commercial exploitation of the property value of one's name."); Daniel P. O'Gorman, Article: *Looking out for Your Employees: Employers' Surreptitious Physical Surveillance of Employees and the Tort of Invasion of Privacy*, 85 NEB. L. REV. 212, 224 (2006).

[48] Hernandez v. Hillsides, Inc., 211 P.3d 1063, 1072 (Cal. 2009) ("A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person."); *see also*, Jones v. U.S. Child Support Recovery, 961 F.Supp. 1518, 1521 (D. Utah 1997) ("To establish an invasion of privacy of intrusion upon seclusion, a complaining party must prove by a preponderance of the evidence that intentional substantial intrusion, physically or otherwise, upon the solitude or seclusion of the complaining party would be highly offensive to the reasonable person."); Plaxico v. Glenn Michael, 735 So.2d 1036, 1039 (Miss. 1999) ("To recover from an invasion of privacy, a plaintiff must meet a heavy burden of showing a substantial interference with his seclusion of a kind that would be highly offensive to the ordinary reasonable man, as a result of conduct to which the reasonable man would strongly object.").

[49] Stengart v. Loving Care Agency, Inc., 990 A. 2d. 650, 660 (N.J. 2010); *see also*, In re Asia Global Crossing, Ltd., 322 B.R. 247, 257 (2005) ("one claiming an 'intrusion of seclusion must show, *inter alia*, a subjective expectation of privacy and that the expectation is objectively reasonable").

be shown by comparing any precautions taken by a plaintiff "to safeguard his privacy interest with precautions he might reasonably have taken."[50] Applying this standard to cases where employers monitor employees' social media sites, it may be argued that employees who protect their information contained on these sites through privacy settings may have less difficulty proving a subjective expectation of privacy than those employees who take no such precautions and have allowed this information to be open freely to the public.[51]

The objective standard of the reasonable expectation of privacy means that a plaintiff must show that his expectation of privacy is one "that society is prepared to recognize as reasonable."[52] Although not specifically a case involving social media since it did not relate to the use of electronic communications for social networking purposes, in *Stengart v. Loving Care Agency, Inc.*, the court did address the issue of whether an employee has a reasonable expectation of privacy when an employer monitors the employee's private, personal, password-protected web-based email account that was accessed by the employee on an employer issued computer.[53] The case arose out of an employment discrimination lawsuit that plaintiff Marina Stengart instituted against her former employer- defendant Loving Care Agency, Inc.[54]

Before the lawsuit was filed and while Stengart still worked for Loving Care, she was issued a company laptop computer to conduct company business.[55] This laptop allowed her to send emails using her company email account and access the Internet.[56] She was unaware of the fact that browser software on the computer automatically saved a copy of each web page she viewed on the computer's hard drive.[57] In December 2007, Stengart used her laptop to access a personal, protected email account on Yahoo's website to communicate with her attorney about her situation at work.[58] Shortly thereafter, Stengart left her employment with Loving Care and returned the laptop. In February 2008, she filed the discrimination lawsuit against Loving Care.[59]

To prepare for the discovery process, Loving Care "hired experts to create a forensic image of the laptop's hard drive, including temporary Internet files."[60] The image of the files

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[50] Kemp v. Block, 607 F.Supp. 1262, 1264 (D. Nev. 1985) (citing Dow Chem. Co. v. United States, 749 F.2d 307, 312-13 (6th Cir. 1984)) ("A comparison of what precautions he took to safeguard his privacy interest with the precautions he might reasonably have taken is appropriate.")

[51] *See* Azuncena Sanchez-Scott v. Alza Pharmaceuticals, 103 Cal. Rptr.2d 410, 415 (Cal. Ct. App. 2001) (The intrusion tort "is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source."); *see generally*, Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr.3d 858 (Cal. Ct. App. 2009) (holding that author of an article posted in her online journal on MySpace did not have a reasonable expectation of privacy to sustain an invasion of privacy claim for the disclosure of private facts where she made her article available to anyone with Internet access.).

[52] Kemp, 607 F.Supp. at 1264.

[53] Stengart, 990 A.2d. at 650.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

revealed approximately seven or eight emails Stengart had exchanged with her lawyer through her Yahoo account.[61] When Loving Care's attorneys used these emails in discovery, Stengart's lawyer "demanded that the emails be identified and returned."[62] Loving Care's attorney's disclosed the emails but argued that Stengart had no reasonable expectation of privacy in "files on a company-owned computer in light of the company's policy on electronic communications."[63] The policy stated that Loving Care "may review, access, and disclose 'all matters on the company's media systems and services at any time.'"[64] Further, it stated that "emails, Internet communications and computer files are the company's business records and 'are not to be considered private or personal' to employees."[65]

In reviewing the case, the court in *Stengart* noted that Loving Care's policy on electronic communications was unclear as to whether it covered "use of personal, password-protected, web-based email accounts via company equipment."[66] Additionally, the policy did not discuss personal accounts, thereby failing to give employees "express notice that messages sent or received on a personal, web-based email account are subject to monitoring if company equipment is used to access the account."[67] Based on the ambiguity of the policy, the court determined that the policy did not limit any reasonable expectation of privacy that Stengart may have had.[68]

Also, the court indicated that Stengart had a subjective expectation of privacy in the emails sent to her attorney because of the steps she took to protect her privacy by using a personal, password-protected email account instead of her company email address and she never saved the email account's password on her computer.[69] The court also found that given the attorney-client nature of the communication and the inadequacy of Loving Care's policy on electronic communication to provide notice as to its applicability to personal, web-based email accounts accessed through company equipment, this expectation of privacy was objectively reasonable.[70] Thus, the court held that under the circumstances Loving Care had violated Stengart's privacy rights under the common law tort of "intrusion on seclusion."[71]

The *Stengart* case did not specifically answer the question of whether employees have a reasonable expectation of privacy when the situation does not relate to attorney-client communications. Nevertheless, it can be argued that the case is analogous to social media activities conducted outside of the scope of employment since these activities are done within the realm of employees' private lives and are not done in furtherance of the employer's business. Therefore, a viable claim can be made that employees' social media activities conducted outside

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[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 663.

[69] *Id.*

[70] *Id.*

[71] *Id.*

the scope of employment are akin to the private, confidential attorney-client communications in *Stengart* and as a result, employers should not be privy to information concerning employees' social media activities outside the scope of employment.

The specific issue of whether there is a reasonable expectation of privacy for social media activities conducted outside the scope of employment was raised in the unpublished opinion of *Pietrylo v. Hillstone Rest. Group*.[72] In this case, the court was asked to make a determination regarding the validity of two former employees' invasion of privacy claims after they were terminated because they used a private-invitation only group on MySpace.com ("MySpace") for the purpose of venting "about any BS we deal with [at] work without any outside eyes spying on us."[73] The evidence in the record revealed that one of the invited members of the MySpace group who worked for the defendant gave access to the site to at least one of the defendant's managers.[74] However, there was a factual dispute as to whether the invited member's consent was voluntarily given or given under an implied threat that some adverse action would be taken against her.[75] In ruling on the defendant's motion for summary judgment, the court noted that the plaintiffs "created an invitation-only internet discussion space" and as such "they had an expectation that only invited users would be able to read the discussion."[76] The court also explained that the question of whether the plaintiffs could recover on this claim depended on whether the invited member of the MySpace group who gave the defendant access to the site did so voluntarily.[77]

Regarding the second element of an invasion of privacy claim requiring that the intrusion must occur in a manner that is highly offensive to a reasonable person, the fact that an employee is monitored in his or her private life may not necessarily be enough to satisfy this element. Indeed, employer-monitoring of employees' private lives may be justified if it is for a business purpose, such as situations involving potential sources of legal liability—like the example above of the employee at Oakwood Hospital who made Facebook comments about a patient that potentially violated HIPPA regulations.[78] But, employers must be careful when monitoring employees' social media activities outside the scope of employment because this type of behavior could be viewed as highly offensive to a reasonable person, especially when there is no justifiable business reason for doing so.[79]

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[72] Pietrylo v. Hillstone, No. 06-5754 (FSH), 2008 U.S. Dist. LEXIS 108834 at *1 (July 24, 2008).

[73] *Id.*

[74] *Id.* at *4.

[75] *Id.* at *10-11.

[76] *Id.* at *18.

[77] *Id.* at *20.

[78] *See, e.g.*, Saldana v. Kelsey-Hayes Co., 443 N.W.2d 382, 384 (Mich. Ct. App. 1989) (holding that in a lawsuit brought against the employer for injuries the employee sustained from falling off a bike on company property in the course of his employment, the employer did not violate the employee's privacy rights by monitoring his home activities since the employer had a right to investigate matters that are potential sources of legal liability); *see also*, Sarah DiLuzio, *Comment: Workplace E-mail: It's Note as Private as You Might Think*, 25 DEL. J. CORP. L. 741, 751 (2000) ("courts have held that business interests can even justify activities that are extremely invasive"); Ronnie Dahl, *supra* note 38.

[79] It is important to note that even if employees are unsuccessful in pursuing a common law tort claim of intrusion when employers monitor their social media sites—like in the case where the employee has failed to protect the information contained on these sites though privacy settings—an employer may still be subject to employee privacy

B. Potential Claims for Violation of the Stored Communications Act

Besides the tort claim of invasion of privacy, private employers who decide to investigate employees' social media sites may expose the company to potential legal claims for violating the federal Stored Communications Act.[80] This Act was enacted in 1986, as part of the Electronic Communications Privacy Act ("ECPA"), for the purpose of affording privacy protections to electronic communications.[81] The issue of whether a private employer violated this Stored Communications Act was asserted in the case of *Konop v. Hawaiian Airlines*, in which a pilot created and maintained a website where he posted bulletins criticizing his airline employer, its officers and incumbent union representatives.[82] Many of those criticisms related to his

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claims under statutory law. In fact, through statutory law, some states have enacted legislation, which are commonly referred to as "off-duty conduct statutes," that protects employee privacy for certain legal off-duty conduct, including political and recreational activities. An example of one such state that has enacted an off-duty conduct statute is Colorado, which makes it unlawful for an employer to terminate an employee for the employee's lawful conduct off-duty and off the employer's premises unless the conduct creates a conflict of interest or relates to a bona fide business purpose *See* Lindsay Noyce, Private Ordering of Employee Privacy: Protecting Employees' Expectations of Privacy with Implied-in-Fact Contract Rights, 1 Am. U. Labor & Emp. L. F. 27, 35 & 58 (2011) ("In the employment context, there are three basic kinds of intrusions that may give rise to any employee privacy claim: surveillance, such as monitoring e-mail and telephone communications; testing, such as drug testing or medical testing; and inquiry into an employee's off-duty conduct, such as political and recreational activities."); *see, e.g.*, COLO. REV. STAT. § 24-34-402.5(1) ("It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction . . .[r]elates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or . . .[i]s necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest."); N.Y. Lab. Law § 201-d(2) (McKinney 2009) (**"**Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to . . . to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of . . . an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal"); *see also*, Jessica Jackson, Comment, Colorado's Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law, 67 U. COLO. L. REV. 143, 148-58 (1996) (explaining that Colorado's off-duty statute called the Lifestyle encompasses protection for a wide class of individual activities, such as sexual orientation, interoffice dating, political affiliation, and membership in groups such as the Klu Klux Klan).

[80] *See, e.g.*, Pietrylo v. Hillstone, No. 06-5754 (FSH), 2008 U.S. Dist. LEXIS 108834 at *7-8 (July 24, 2008) (holding that there was a material issue of dispute as to whether the defendant-employer's access was "authorized" under the terms of the Stored Communications Act since there was a factual dispute regarding whether the consent of the invited member who gave the defendant access to the MySpace group was given under duress.

[81] Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 872 (9the Cir. 2002); *see* also, 18 USCS § 2701 (2012); In re Subpoena Duces Tecum to AOL LLC, 550 F.Supp.2d 606 (E.D. Va. 2008) (The Stored Communication Act "creates a zone of privacy to protect internet subscribers from having their personal information wrongfully used and publicly disclosed by 'unauthorized private parties."); *Chapter 3-The Stored Communications Act*, COMPUTER CRIME & INTELLECTUAL PROPERTY SECTION, UNITED STATES DEPARTMENT OF JUSTICE, *available at* http://www.cybercrime.gov/ssmanual/03ssma.html (last visited on Jan. 18, 2012)(it "sets forth a system of statutory privacy rights for customers and subscribers of computer network service providers." it "sets forth a system of statutory privacy rights for customers and subscribers of computer network service providers.").

[82] Konop, 302 F.3d at 872.

opposition to labor concessions that the airline sought from the union.[83] Additionally, since the union supported management's concessions, the pilot, through this site, encouraged the company employees to consider another union.[84]

To maintain the privacy of the site, the pilot controlled access by requiring visitors to log in with a user name and password.[85] He also developed a list of other company employees, mainly comprised of pilots, who qualified to have access to the site.[86] Any individual on this list who wanted access to the site had to agree to terms and conditions which provided that all members of the airline's management were prohibited from viewing the site and the information contained on the site could not be disclosed to anyone else.[87]

In December 1995, a vice president of the airline asked one of the airline's employees for permission to use his access to view the site, and the employee complied with this request.[88] The vice president also used another employee's access to view the site on a different occasion.[89] Consequently, the pilot who brought the lawsuit against the airline claimed that the company's vice president "accessed a stored electronic communication without authorization in violation of the S[tored] C[ommunications] A[ct]."[90] In his complaint, the pilot claimed that the vice president was able to log onto the restricted site over thirty four times during April 1996.[91]

Both parties to the lawsuit acknowledged that for purposes of the Stored Communications Act, the pertinent "electronic communication" was the pilot's website and this site was in "electronic storage."[92] A violation of this Act occurs when someone: (1) "intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage of such system."[93] The party who has been harmed by a violation of this law may pursue a civil action for damages.[94] In *Konop*, the United States Court of Appeals for the Ninth Circuit did not

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[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 873.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 879.

[91] *Id.*

[92] *Id.* at 879.

[93] 18 U.S.C.S. § 2701(a); *see also*, Sayler v. Sayler Am. Fresh Foods, No. C 05-03562, 2006 U.S. Dist. Lexis 15290 at *10 (N.D. Cal. March 15, 2006) (holding that that the claim for violation of the Stored Communications Act should be dismissed without prejudice).

[94] *See* 18 U.S.C. § 2707(a) ("any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter [18 U.S.C.S. §§ 2701 et seq.] in which conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate."); *see also*, 18 U.S.C.§ 2707(c) ("The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000. If the violation is willful or intentional, the court

address the specific issue of whether there was a violation of the Act because the court accepted the parties' supposition that the vice president's means of obtaining access to the pilot's website constituted "access without authorization" under the Act.[95]

Thus, the only question that the United States Court of Appeals for the Ninth Circuit addressed in *Konop* regarding the Stored Communications Act was whether the district court properly found that the airline was exempt from liability under the Act's exemption of liability for "conduct authorized . . . by a user of that service with respect to a communication of or intended for that user."[96] In particular, this exemption under the Act "allows a person to authorize a third party's access to an electronic communication if the person is (1) a 'user' of the 'service' and (2) the communication is 'of or intended for that user.'"[97] A user under the Act is "'any person or entity who (A) uses an electronic communications service; and (B) is duly authorized by the provider of such service to engage in such use.'"[98] Based on this definition, the district court determined that the two employees who gave the vice president access to the site had the authority to consent to the vice president's use because the pilot put these two employees on the list of eligible users.[99]

In reviewing the district court's decision, the *Konop* Court stated that "the plain language [of the Stored Communications Act set forth in] Section 2701(c)(2) indicates that only a 'user' of the service can authorize a third party's access to the communication."[100] Because this statute did not define the meaning of the word "user," the court applied the common definition of the word "use."[101] The ordinary definition that the court gave to the term "use" was "to put into action or service, avail oneself of, employ."[102] Under the plain meaning of the word "use," the court could not find any evidence in the record that one of the two airline employees who gave the vice president access to the site had ever used the site before giving this access.[103] As to the other employee who gave the vice president access to the site, the *Konop* Court acknowledged that there was some evidence that this employee may have used the website, but it was unclear from the evidence in the record as to when this use took place.[104]

Furthermore, the court pointed to the fact that the district court did not make any findings on whether the two employees who gave this access had in fact used the site.[105] According to the *Konop* Court, the district court merely assumed that because these two employees were on the

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may assess the punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.").

[95] Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 879 (9th Cir. 2002).

[96] *Id.* at 879-80 (quoting 18 U.S.C. § 2701(c) (2)).

[97] *Id.* at 880 (citing 18 U.S.C. § 2701 (c) (2)).

[98] *Id.* (quoting 18 U.S.C. § 2510(13)).

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

list of eligible users that they could authorize the vice president's access to the site—a conclusion, which removed the "user requirement" from the Stored Communications Act.[106] Therefore, viewing the evidence in the light most favorable to the pilot, the court held that it could not assume that either of the two employees who gave the vice president access to the site were "users" of site at the time they authorized this access.[107] For that reason, the court reversed the district court's grant of summary judgment to the employer airline on the pilot's claim that there was a violation of the Stored Communications Act.[108]

Approximately eight years after the *Konop* decision, in May 2010, a district court judge for the United District Court for the Central District of California held that private communications on the third-party social networking sites Facebook and MySpace are covered under the federal Stored Communications Act.[109] Although this decision was merely a case of first impression for the district and its is not binding on other courts, it is useful in advising employers and human resource managers to refrain from obtaining information on employees' social networking sites without authorization as this behavior could potentially violate the Stored Communications Act.

C. Potential Claims for Violation of the National Labor Relations Act

An employee who has been disciplined or terminated for his or her social media activities conducted outside the scope of employment may be able to bring a claim for violation of the National Labor Relations Act ("NLRA"). This Act was enacted in 1935 "to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."[110] It specifically excludes public sector employees, agricultural and domestic workers, independent contractors, workers employed as a supervisors, and workers employed by a parent or spouse.[111]

This issue of whether employers violate the NLRA by punishing employees for their social media activities was raised in the case of Dawnmarie Souza previously discussed in this article.[112] Souza's case revealed the overly broad social media policy that existed at the AMRC before the NLRA filed an unfair labor practice claim on behalf of Souza.[113] Particularly, the AMRC's policy prohibited "employees from depicting the company 'in anyway' on Facebook or other social media sites in which they post pictures of themselves."[114] Indeed, following, the

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[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *See* Crispin v. Audigier, 717 F.Supp.2d 965 (C.D. Cal. 2010).

[110] National Labor Relations Act, National Labor Relations Board, *available at* https://www.nlrb.gov/national-labor-relations-act (last visited on Jan. 18, 2012).

[111] See 29 U.S.C. § 152(3).

[112] *See supra* notes 40-45.

[113] Complaint and Notice of Hearing for International Brotherhood of Teamsters, Local 443, *supra* note 40; *see also*, Greenhouse, *Company Accused of Firing Over Facebook Post*, *supra* note 40.

[114] *Id.*; *see also*, Complaint and Notice of Hearing for International Brotherhood of Teamsters, Local 443, *supra* note 40 (The specific wording of the AMRC's Blogging and Internet Policy was as follows: "Employees are prohibited

NLRB's complaint against the AMRC, at least one law firm sent a lawflash advisory to its clients to take note of the case and advising that "[e]mployers . . . review their Internet and social media policies to determine whether they are susceptible to an allegation that the policy would 'reasonably tend to chill employees'" in the exercise of their rights to discuss wages, working conditions and unionization."[115] Additionally, the issue of whether employers' violate the NLRA by punishing employees was raised in April 2011 when a Newspaper Guild and Publishing Company reprimanded a reporter for posting a critical comment about management on Twitter; however, before the issue could be resolved a settlement was reached between the parties.[116]

On May 9, 2011, the NLRB issued a complaint claiming that the Hispanics United of Buffalo, a nonprofit that provides social services to low-income clients, unlawfully discharged five employees after they criticized working conditions on Facebook.[117] In particular, an employee posted on her Facebook page before a meeting with management comments made by her coworker that "employees did not do enough to help the organization's clients."[118] As a result of this post, other employees posted responses "defending their job performance and criticizing working conditions, including the workload and staffing issues."[119]

Similarly, on May 20, 2011, the NLRB issued a complaint against Karl Knauz Motors, Inc., which operates a Chicago BMW dealership for unlawfully terminating an employee who posted photos and comments on Facebook.[120] The facts surrounding the case against the car dealership were that the terminated employee and his coworkers "were unhappy with the quality of food and beverage at a dealership event promoting a new BMW model" and following the event employees complained amongst themselves that "their sales commissions could suffer as a result."[121] Thereafter, the employee posted photos and critical comments about the dealership on his Facebook page and these postings were accessible to other employees.[122] In both the complaint against the Hispanics United of Buffalo and the complaint against Karl Knauz Motors,

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from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval . . . in advance of the posting.").

[115] *See* Complaint and Notice of Hearing for International Brotherhood of Teamsters, Local 443, *supra* note 40.

[116] *See* Steven Greenhouse, *Labor Panel to Press Reuters Over Reaction to Twitter Post*, N. Y. TIMES, Apr. 6, 2011) available *at* http://www.nytimes.com/2011/04/07/business/media/07twitter.html (last visited on Jul. 2, 2011) ("In what would be the first government case against an employer involving Twitter, the National Labor Relations Board told Thomson Reuters on Wednesday that it planned to file a civil complaint accusing the company of illegally reprimanding a reporter over a public Twitter posting she had sent criticizing management.").

[117] *Complaint Issued Against New York Nonprofit for Unlawfully Discharging Employees following Facebook Posts*, NATIONAL LAW REVIEW, May 23, 2011,*available at* http://www.natlawreview.com/article/complaint-issued-against-new-york-nonprofit-unlawfully-discharging-employees-following-faceb (last visited on Jul. 2, 2011).

[118] *Id.*

[119] *Id.*

[120] *Chicago Car Dealership Wrongfully Discharged Employee for Facebook Posts, Complaint Alleges*, NATIONAL LABOR RELATIONS BOARD, May 24, 2011, *available at* http://www.nlrb.gov/print/489 (last visited on Jun. 30, 2011).

[121] *Id.*

[122] "Unless it is settled, the case will be heard by an administrative law judge on July 21, 2011 in the Chicago Regional Office of the NLRB." *Id.*

Inc., the NLRB alleged that "the employees' Facebook postings and discussions were protected concerted activity within the meaning of Section 7 of the NLRA.[123]

Although there are no cases specifically involving the question of whether an employee's actions of complaining about his supervisor or working conditions on social networking sites would constitute concerted activities under Section 7 of the NLRA, the existing law in this area may provide some guidance regarding the legal parameters under which employers and human resource managers should operate when dealing with this issue. Section 8(a)(1) of the NLRA does prohibit employers from interfering with, restraining or coercing "employees in the exercise of the rights guaranteed by Section 7 of the Act."[124] Under Section 7 of the NLRA, employees have "the right to self-organization . . . and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."[125]

Concerted activity occurs when an employee acts "with or on the authority of other employees"[126] and not "solely by and on behalf of the employee himself.'" [127] And, it also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group actions" and where individual employees bring "truly group complaints" to management's attention.[128] Concerted activities protected under Section 7 can include activities such as: workers engaging in work stoppage to protect working conditions;[129] workers refusing to work late;[130] workers protesting discriminatory conditions at work; [131] and workers protesting

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[123] *See Complaint Issued Against New York Nonprofit for Unlawfully Discharging Employees following Facebook Post, supra* note 117; *see also, Chicago Car Dealership Wrongfully Discharged Employee for Facebook Posts, Complaint Alleges, supra* note 120.

[124] 29 U.S.C. § 158(a)(1); *see also,* NLRB v. Kearney & Trecker Corporation, 237 F.2d 416 (7th Cir. 1956) (holding that the National Labor Relations Act was not violated when an employer, desiring to preserve its neutrality between two warring unions, implemented a rule to the effect that grievances would be handled on an individual rather than a group basis).

[125] 29 U.S.C. §157; *see also,* NLRB v. Jasper Seating Co., Inc., 857 F.2d 419 (7th Cir. 1988) (holding that employees who walked off the job in response to a dispute over working conditions had the right to engage in concerted activity regardless of the merits of their claims).

[126] Meyers Industries, Inc., 268 N.L.R.B. 493, 494 (1984) (Meyers I) (the case that replaced prior case law involving the presumption that individual action for "mutual aid or protection" was "concerted" within the meaning of Section 7 of the NLRA with an objective test requiring some linkage to group action before finding an act "concerted."); *see also,* NLRB v. Portland Airport Limousine Co., Inc., 163 F.3d 662, 666 (1st Cir. 1998) (holding that a truck driver's complaint and refusal to drive his truck because it was unsafe did not constitute a concerted activity under the NLRA).

[127] Meyers Industries, Inc., 281 N.L.R.B. 882, 885 (1986) (Meyers II) (On remand, this case reconsidered and expanded Meyers I and the NLRB noted numerous instances where, under the Meyers rule, it would deem individual action "concerted.").

[128] *Id*. at 887.

[129] *See, e.g.*, NLRB v. Washington Aluminum Co., 370 U.S. 9, 16 (1962) (upholding employees' right to engage in a work stoppage to protest working conditions, even though their conduct might have been "unnecessary and unwise" because the "company was already making every reasonable effort to repair the furnace and bring heat into the shop"); *see also,* Molon Motor & Coil Corp. v. NLRB, 965 F.2d 523, 525 (7th 1992) (holding that workers' actions of engaging in a strike for higher wages constituted protected concerted activities under Section 7 of the NLRA).

[130] *See, e.g.*, NLRB v. Yurosek & Son, Inc., 53 F.3d 261 (9th Cir. 1995) (holding that workers' refusal to work late constituted protected concerted activity because the employees acted as a group and were protesting over the reduction in hours and the inconsistency concerning their hours of work).

the treatment of a coworker or supporting a fellow employee in a complaint "connected with his work or his employer's conduct."[132]

But, all concerted activity is not protected under the law.[133] To be protected "the activity must in some fashion involve employees' relations with their employer and thus, constitute a manifestation of a 'labor dispute.'[134] A labor dispute is defined under the NLRA as "any controversy concerning terms, tenure and conditions of employment."[135] Therefore, when the employee's activity is related to situations other than conditions of employment, it does not constitute a protected concerted activity under Section 7 of the NLRA.[136]

In August 2011, the NLRB issued a memorandum presenting recent case developments involving social media.[137] Particularly, the memorandum involved "emerging issues concerning the protected and/or concerted nature of employees' Facebook and Twitter postings, the coercive impact a union's Facebook and Youtube postings, and the lawfulness of employers' social media policies and rules."[138] In its memorandum, the NLRB found "protected concerted activity" in four cases involving employee social media activity.[139] One such case involved the five employees who were working for the Hispanics United of Buffalo and were unlawfully discharged after they criticized working conditions on Facebook discussed above.[140]

The NLRB described the facts presented in this case as "a textbook example of concerted activity, even though it transpired on a social network platform."[141] The Board determined that the employees' Facebook posting constituted concerted activity since one coworker began the discussions on Facebook in an appeal for her coworkers to help her prepare for an anticipated meeting with management and for the purpose of surveying her coworkers on the issue of job

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[131] *See, e.g.*, Fortuna Enterprises, LP v. NLRB, 2011 U.S. App. LEXIS 24436 (D.D.C. Sept. 2011) (finding that employees gathering to express their shared concern about discrimination against union supported constituted protected concerted activities).

[132] *See id.*

[133] *See* Washington Aluminum Co., 370 U.S. at 16.

[134] Brady v. NFL, 640 F.3d 785, 785 (8th Cir. 2011) ("The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in . . . seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.") (quoting 29 U.S.C. § 113(a)).

[135] 29 U.S.C. § 152 (9); *see also*, Washington Aluminum Co., 370 U.S. at 16.

[136] *Id.*; *see, e.g.*, Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749 (4th Cir. 1949) (holding that the circulation of a petition by an employee for the removal of a foreman against whom the employee held a personal grudge was not a protected activity); AHI Machine Tool and Die, Inc. v. NLRB, 432 F.2d 190 (6th Cir. 1970) (holding that a walkout protest of the discharge of a fellow employee who had "violently and unlawfully slugged a supervisor" was unprotected).; Cleaver-Brooks Manufacturing Corp. v. NLRB, 264 F.2d 637 (7th Cir. 1959) (holding that a strike protesting the replacement of a supervisor where the evidence showed the strike to be based on mere personal antipathy toward the new foreman was unprotected).

[137] Notably, protection under Section 7 of the NLRA for concerted activity can be lost if employee's actions are so egregious or so disloyal, reckless, or maliciously untrue. NLRB Memorandum OM 11-74, Office of the General Counsel (Aug. 18, 2011).

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

performance to prepare for the meeting.[142] The initial Facebook post led to the "resulting conversation among coworkers about job performance and staffing levels" or concerted activity.[143] Because these postings involved job performance and staffing levels, the Board found that the postings directly implicated terms and conditions of employment or were protected concerted activity under the NLRA.[144]

Another case where the NLRB found the employees' action constituted protected concerted activity was the case discussed above involving the Karl Knauz Motors, Inc.'s employee who was terminated after posting photos and comments on Facebook.[145] Although the employee posted the photographs on Facebook and wrote the comments himself, the Board found that he was vocalizing the sentiments of his coworkers and continuing the concerted activity that had begun earlier following the staff meeting.[146] The Board also determined that since the employees worked completely on commission, they were worried about the effect the employer's choice of refreshments would have on sales and their commissions.[147] Thus, they were concerned about terms of conditions of employment, which is protected concerted activity.[148]

The NLRB did not find "protected concerted activity" in five cases involving employee social media activity.[149] For instance, in a case concerning a bartender who was discharged for posting a message on his Facebook page that referenced the employer's tipping policy, the Board determined the employee was not engaged in protected activity.[150] The reason for the Board's finding is because the employee had a conversation about his working conditions on Facebook with a relative, who did not work for the employer.[151] In essence, the employee never discussed the posting with any of his coworkers and they did not respond to his posts.[152] Moreover, "there had been no employee meetings or any attempt to initiate group action concerning the tipping policy or raises."[153]

Likewise, the Board found that an employer of a nonprofit facility for homeless people did not violate the NLRA when it discharged an employee for inappropriate Facebook posts that referred to the employer's mentally disabled clients.[154] The specific circumstances of the case were that an employee engaged in a conversation on her Facebook wall with two Facebook

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[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

friends who did not work for the nonprofit facility.[155] The employee stated that it was spooky being alone overnight in a mental institution and she did not know whether one of the clients was laughing at her or at the client's own voices.[156] Here, the Board determined that the employee's statements were not protected concerted activity since none of the Facebook comments were made to her coworkers and the statements did not relate to any terms or conditions of employment.[157]

Based on the NLRB's August 2011 memorandum, employee social media activity will constitute protected concerted activity when the activity is done on behalf of a group and relates to terms and conditions of employment. Thus, employers and human resource managers should be cognizant of the fact that an employee's actions of complaining about his employer or supervisor on social media sites may constitute protected concerted activity under the NLRA.[158] Also, employers must recognize that postings on social media sites made by a single employee that could possibly solicit or invite responses from other employees may constitute concerted activity.[159] In essence, employers and human resource managers must be cautious in deciding whether to discipline or terminate an employee for complaining about his supervisor or his employer on social networking sites since this type of behavior could result in the employer interfering with the employee's rights under the NLRA.[160]

IV. RECOMMENDATIONS FOR REDUCING POTENTIAL LIABILITY FOR PUNISHING EMPLOYEES FOR USING SOCIAL MEDIA OUTSIDE THE SCOPE OF EMPLOYMENT

Because of the potential legal liability that could result from private employers disciplining or terminating employees based on their social media activities, employers and human resource managers must take affirmative steps to reduce the likelihood of these types of lawsuits being filed. The most significant step in warding off these suits is for employers to have a social media policy for the company that specifically sets forth the company's rules concerning the employee's usage of social media both within and outside the employee's scope of employment.[161] Nonetheless, it is advisable that employers and human resource managers seek the advice of legal counsel when drafting these policies to ensure that the provisions are not so expansive that they intrude upon an employee's "seclusion or solitude" or intrude upon the employee's "private affairs."[162] Appointing a Social Media Officer and implementing formal social media strategies further aid in policy development and legal positioning.

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[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *See* 29 U.S.C. §157.

[159] *See* Dayton Typographic Service, Inc. v. NLRB, 778 F.2d 1188, 1191 (6th Cir. 1985) (holding that an employer had committed two unfair labor practices by discharging an employee for engaging in protected concerted activities) (quoting ARO, Inc. v. NLRB, 596 F.2d 713, 718 (6th Cir. 1979)).

[160] *See* 29 U.S.C. § 158(a)(1).

[161] *See* Anne E. Larson, *Three Key Things Employers and Employees Should Know about Social Media*, Mar. 22, 2011, *available at* http://www.muchshelist.com/key-things-employers-and-employees-should-know-about-social-media-alert.htm, (last visited on May 25, 2011) ("If your company does not yet have a social media policy, it's time to implement one.").

[162] *See* Allstate, 863 So.2d at 160; *see also*, Loft, 408 So.2d at 622; *see also*, O'Gorman, *supra* note 47 at, 224.

What is more, the question as to the terms under which the social media policy can preclude employees from complaining about supervisors and working conditions must be discussed with legal counsel to ensure that the policy does not interfere with the employee's rights to engage in concerted protected activity. Also, it is essential for the social media policy to thoroughly detail those circumstances under which employees may be disciplined or terminated for violating this policy.[163] Again, this issue must be discussed with legal counsel to make sure that the basis for the employer's adverse actions taken against employees does not violate their rights under the NLRA.[164] And, even with a well drafted social media policy, it is wise for employers to seek legal counsel before disciplining or terminating employees for social networking activities—especially when the activities occur while outside the scope of employment.[165]

In addition to establishing a well drafted social media policy, employers and human resource managers can minimize the number of possible lawsuits resulting from disciplinary or termination actions due to employees' social media activities, by establishing clear and cogent procedures for monitoring and obtaining information contained on these social networking sites.[166] Specifically, when monitoring employees' social media sites, employers "should not employ questionable tactics to gain access to profiles or other information."[167] Questionable tactics would include efforts by employers to "friend" an employee for the sole purpose of investigating him.[168] Employers should consider avoiding the tendency to obtain access to these social networking sites from other employees, "as the other employees may feel compelled or obligated to provide the employer with such information."[169] In general, employers and human resource managers should only obtain access to employees' social media sites when the sites are accessible to the public or with the express permission of the employee.[170]

III. CONCLUSION

The existence of social media sites, including LinkedIn, Facebook, MySpace, and Twitter, has provided private employers with new means of monitoring their employees. These sites have also afforded these employers with grounds for disciplining and terminating employees even in those situations where the social media activity was conducted outside the scope of employment. This latest development in the area of employment law has raised various legal questions, including whether using an employee's social media activities conducted outside the scope of employment as a basis for taking adverse employment actions against the employee:

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[163] *Larson*, supra note 161.

[164] *See* Guernsey- Muskingum Electric Co-Operative, Inc., 285 F.2d at 8.

[165] *See* Nexsen Pruet, PLLC, *Employment Law Update - July 2011: NLRB Targets "Facebook Firings" and Social Media Policies*, Jun. 28, 2011, *available at* http://www.nexsenpruet.com/publications-576.html (last visited on Jul. 2, 2011).

[166] *See* Ebanks, *supra* note 15.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *See* Pietrylo v. Hillstone, No. 06-5754 (FSH), 2008 U.S. Dist. LEXIS 108834 at *1 (July 24, 2008).

(1) invades the employee's privacy rights; (2) violates the Stored Communications Act; and (3) violates the National Labor Relations Act.

Although there are no clear decisions as of yet on these legal issues, employers and human resource managers who decide to monitor employees' social media sites should make every effort to reduce the likelihood of being exposed to such litigation by establishing-- with the assistance of legal counsel--clear social media policies. In particular, these policies should advise employees that their social media activities will be monitored and employees should also be advised of the terms under which they can be disciplined or terminated under this policy. Finally, employers and human resource managers can reduce the likelihood of employee lawsuits by developing clear procedures for monitoring employees' social media activities and by avoiding any dubious methods of obtaining information contained on these sites.