

COMMENT

MYSFACE OR YOURS: THE ABRIDGEMENT OF THE BLOGOSPHERE AT THE HANDS OF AT- WILL EMPLOYMENT*

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* This Comment received the Baker Botts, L.L.P. Award for the best paper in the area of employment law and the Labor and Employment Law Article Award given by the Labor and Employment Law Section of the State Bar of Texas. The Author would like to thank Bapa and her family for their support and guidance throughout the drafting of this Comment.

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I. INTRODUCTION

Despite extensive criticism of at-will employment,¹ most courts enforce the doctrine.² However, over the course of many opinions, courts have weakened the doctrine to afford at-will employees some protection.³ Recently, the adequacy of that protection has come under scrutiny in the blogging context.⁴

1. Stephen D. Sugarman, “Lifestyle” Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377, 426 (2003) (“At will’ employment has been criticized by many scholars, various task forces, and so on.”).

2. Under the employment at-will doctrine, which applies to privately employed individuals, either the employer or employee may terminate the relationship at any time, with or without cause. Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 677 (1996) (describing the at-will doctrine and explaining the vigor with which courts adopted the employment at-will doctrine).

3. See *id.* at 677–78 (explaining that the narrow statutory exceptions do not alter the doctrine’s original presumption but are necessary to “advance other legislative purposes”).

4. See *infra* Part V.A (addressing the inadequacy of the exceptions in the blogging

When at-will employees anonymously engage in off-duty blogging activities on their personal computers—about matters only tangentially related to the workplace—the employee may run the risk of termination.⁵ Neither case law nor statutory authority adequately defines the rights of at-will blogging employees or their employers.⁶ In nearly all disputes arising from a blogger's termination, employment rights conflict with the rights afforded to anonymous Internet speech.⁷ Because courts do not balance these competing interests, the rights of employers to terminate blogging employees unjustly triumph over anonymous bloggers' free-speech rights.⁸ Thus, the minimal protections of the at-will employment doctrine often leave the employee with little recourse.

Moreover, little has been mentioned about promoting the blog as a novel extension of modern communication. If employers retain the ability to terminate blogging employees, fear of retaliation may inhibit this new communication tool from reaching its full potential.⁹ Although blogging has its drawbacks, they are outweighed by its enormous potential societal impact.¹⁰ With the increasing popularity and social utility of blogs, bloggers should be afforded some protection.

In order to protect employees' freedom of expression and encourage the growth of this novel communication medium, privately-employed workers who engage in blogging should be

context and arguing that legal standards must evolve to protect privately employed bloggers).

5. See Chris Taylor, *10 Things We Learned About Blogs*, TIME, Dec. 19, 2004, at 110 (listing "Blogging Can Get You Fired" as the number one lesson learned about blogging and detailing one such example).

6. See Diane Stafford, *We'll Keep You Posted, Bloggers*, KAN. CITY STAR, July 21, 2005, at C1 (noting that there is only three years of case law and "spotty" existence of state law on the issue).

7. See Charles J. Duhigg, *World Wide Water Cooler: Can You Be Fired for Complaining About Your Boss Online?*, LEGAL AFF., Mar./Apr. 2004, at 8, available at 2004-APR Legal Aff. 8 (Westlaw) ("Contests between an employee's right to speak his or her mind and the company's right to object have a long legal history, and they are almost always won by the corporation.").

8. See *id.* (describing several instances in which employees were terminated because of comments posted to blogs).

9. Cf. Jennifer J. Lee, *The Internet and First Amendment Values: Reno v. ACLU and the Democratization of Speech in the Marketplace of Ideas*, 22 COLUM.-VLA J. L. & ARTS 61, 70 (1997) (noting that "[t]he goal of keeping an open and economically accessible environment for users should be incorporated into legal jurisprudence," and opining that "if a regulation hindered the democratizing value of the Internet" it should be invalid).

10. Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 395 (2006) ("Despite its foibles, this new medium of expression has growing import and possible significance for the future of how news and ideas are disseminated.").

sheltered from retaliatory dismissal by their employers.¹¹ Such protection can be found within the public policy exception to the employment at-will doctrine.¹² Specifically, blogging fits within three of the various grounds enumerated for invoking the public policy exception, namely: (1) whistleblowing; (2) refusal to engage in illegal conduct; and (3) exercise of a statutory right.¹³ Even if the exception, as traditionally articulated, does not encompass blogging, the public policy exception should be expanded to avoid contravening the protections afforded to anonymous Internet communications and to account for the public interest of promoting the growth of this contemporary communication device.¹⁴ In this manner, courts can achieve consistency between the two dueling doctrines as additional incidents of employee blogging-related termination arise.

This Comment is organized in six parts. Part II begins with a description of the blogosphere, describes employers' often fallacious concerns regarding blogging employees, and concludes with examples of blogging that have resulted in termination. Part III examines the benefits of blogging that warrant its protection. Part IV defines the employment at-will doctrine and its exceptions. Part V explains the need for an evolving standard for judging new forms of communication, proposes an application of the public policy exception to grant bloggers protection, and concludes that promoting the growth of the blogosphere is an important public policy, deserving of protection from the at-will doctrine. This Comment concludes in Part VI.

II. A BACKGROUND ON BLOGGING

The following section defines the key terms associated with the blogosphere and examines some of the central characteristics of blogs.

11. See *infra* Part V.E (arguing that encouraging blogging rises to the level of public policy and deserves protection).

12. See *infra* Part V.C (advancing reasons why neither the good faith and fair dealing exception nor the implied contractual obligation exception to employment at-will offer adequate protection for privately employed bloggers, but that the public policy exception might).

13. See *infra* Part V.B (discussing the application of the public policy exception for the benefit of bloggers and arguing for a broadening of the public policy exception to allow for the blogosphere's growth).

14. See *infra* Part V.D–E (demonstrating the courts' continued protection of Internet speech conducted anonymously and describing the social and political reasons for encouraging the growth of the blogosphere).

A. *The Rise of the Blogosphere*

The blogosphere boasts an array of jargon. The term “blog” is the abbreviation of the phrase “Web log.”¹⁵ A “blog” is a website in which journal-like entries are regularly posted.¹⁶ The activity of continually posting journal entries is referred to as “blogging,” and one who engages in this activity is deemed a “blogger.”¹⁷ The general Internet forum in which blogs are created has been coined the “blogosphere.”¹⁸ Lastly, one who is fired as a result of blogging is said to have been “dooced.”¹⁹ Blogs are characterized by their conversational atmosphere, vast world-wide audience, instant access, low barriers to entry, lack of an editorial process, permanent archiving of entries, and anonymous posting capabilities.²⁰

Blogs have been created for virtually every subject and hobby, ranging from photography to politics to love to law and everything in between.²¹ In addition, a key feature of blogs is the author’s and readers’ ability to post comments to the blog.²² Oftentimes, blogs reflect new journal entries in reverse chronological order, enabling viewers to read all of the previous postings.²³ The interaction numerous individuals by means of comments on the blog contributes to the relatively relaxed environment of the blogosphere.²⁴

15. Patrick Robben, *Welcome to the Blogosphere: A Primer for Business Lawyers*, BUS. L. TODAY, May/June 2006, at 43.

16. See Christopher P. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act’s Press Exemption to Online Political Speech*, 9 VA. J.L. & TECH. 6, 28 (2004) (describing further that these websites often contain links to other websites).

17. Robben, *supra* note 15.

18. *Id.*

19. Elizabeth R. Rita & Eric D. Gunning, *Navigating the Blogosphere in the Workplace*, COLO. LAW., May 2006, at 55, 56 (noting that the term “dooced” originates from an employee who was terminated for material revealed in her “personal Web journal entitled dooce.com”).

20. See *infra* notes 21–42 and accompanying text (examining these characteristics).

21. See Flanagan, *supra* note 10, at 396 (listing a variety of topics and categories of blogs).

22. See Jessica Brown, *Employee Blogging: What Employers Don’t Know Could Hurt Them*, 11 L. FIRM P’SHIP & BENEFITS REP. 1, 2 (Dec. 2005) (asserting that a blog without comments is merely another website).

23. Flanagan, *supra* note 10, at 396; see generally Heather Armstrong, *This Is Going to Be a Long One, So Don’t Say I Didn’t Warn You*, DOOCE.COM, May 19, 2003, http://www.dooce.com/archives/daily/05_19_2003.html (illustrating the regular use of comments, by both the author and the readers, posted in response to a blog entry).

24. See Brown, *supra* note 22 (observing that the addition of comments to a blog creates the “conversation model of blogs [which] encourages lack of formality”).

A blog is analogous to an online version of a diary that records the author's thoughts and concerns.²⁵ However, blogs also stand in stark contrast to the traditional notion of a diary. Blogs are readily available to millions of eyes across the world.²⁶ The blogosphere defeats the concept of limited access because "blogs are freely accessible to anyone in the world with a computer and Internet connection."²⁷ Additionally, the presence of blogs on the Internet provides readers immediate contact with the posted information, thus eliminating reliance on a third party for delivery of information.²⁸ In contrast to print media, which can only be viewed once printed and delivered, blog entries are available for review as soon as the author submits his comment.²⁹

Another defining attribute of the blogosphere is the relatively low barriers to entry.³⁰ Traditionally, maintenance of a blog required familiarity with technical information about website management.³¹ However, with the advent of "user-friendly blogging interface programs [and] search engines specifically tailored to searching blogs . . . , blogging is easily accessible to the average (and even below-average) technology-literate computer user."³² Additionally, entry into the blogosphere does not require extensive start-up costs.³³ Consequently, access to and participation in the blogosphere has grown at a phenomenal rate, "with a new blog created every second."³⁴

25. See Julie China, *Blogger's Anonymous*, FED. LAW., Mar./Apr. 2006, at 6, 6 (providing examples of the personal subjects and interests often discussed in blogs).

26. See Rita & Gunning, *supra* note 19, at 56 (noting that the potential audience for a blog—unlike the potential audience for e-mail—is not constrained by distribution lists with known targets).

27. *Id.* (cautioning, also, that a blog entry or comment may have "millions of readers").

28. See *MyEmployerSucks.com: Why You Need a Blogging Policy*, VA. EMP. L. LETTER, July 2005, at 4 (emphasizing the ease with which an individual can post material to his own blog by means of a "desktop computer, wireless device, or anything else that sends e-mail").

29. See Dave Beal, *Are Blogs Good for Business?*, ST. PAUL PIONEER PRESS, Feb. 27, 2005, at 4B ("Bloggers can spread news and opinions more rapidly than traditional media outlets.").

30. See Rita & Gunning, *supra* note 19, at 56 (observing that blogs are simple to create because they are commonly free of charge and require only a brief set-up process).

31. See Vincent Chiappetta, *Employee Blogs and Trade Secrets: Legal Response to Technological Change*, 11 NEXUS 31, 32 (2006) (addressing the decreased need for expertise and the resulting ease with which anyone may create a blog and disseminate material over the Internet).

32. Rita & Gunning, *supra* note 19, at 55.

33. See Chiappetta, *supra* note 31, at 32 (contrasting the minimal capital costs required for blogging with that of the "pre-[I]nternet world").

34. Rita & Gunning, *supra* note 19, at 55 ("[T]he number of blogs worldwide has virtually exploded—from 23 recorded blogs in 1999 to more than 33.2 million blogs as of

A significant aspect of blogging is the absence of an editorial process that is commonly associated with traditional forms of communication such as print media.³⁵ Unlike experienced writers, novice bloggers may not adequately scrutinize their written entries prior to publication.³⁶ While posting material that reflects their feelings at a particular moment, bloggers may risk crossing legal boundaries with no review mechanism to filter potentially inappropriate material.³⁷ Further, once a blogger posts a journal entry on the Internet, they cannot erase or delete it; it is permanently recorded.³⁸ Accordingly, because the blogs are archived or cached elsewhere, removal of entries and comments may give bloggers a false sense of assurance that those entries and comments will not be discovered by another.³⁹

Lastly, bloggers have, and often exercise, the option to blog anonymously.⁴⁰ Imaginative user names replace the real name of a blogger.⁴¹ Blogging under a pseudonym masks true identities more effectively than source-identifying e-mail.⁴² Before providing examples of blogging that have resulted in the termination of at-will employees, this Comment first discusses employer concerns about blogging.

March 23, 2006 . . .” (footnotes omitted)). The broadening of blogging’s own terminology and jargon is more evidence of its growing popularity. *See supra* text accompanying notes 15–18 (defining the key terms of the activity).

35. *See MyEmployerSucks.com: Why You Need a Blogging Policy, supra* note 28, at 4 (“[B]logs are devoid of any form of external checks or balances.”).

36. *See* Paul S. Gutman, *Say What?: Blogging and Employment Law in Conflict*, 27 COLUM. J.L. & ARTS 145, 153 (2003) (distinguishing bloggers from newspaper journalists and asserting that many bloggers “lack a newspaper’s institutional memory and the type of risk-averse restraint that might temper an [I]nternet diatribe”).

37. *See MyEmployerSucks.com: Why You Need a Blogging Policy, supra* note 28, at 4 (advising that “angry and disgruntled employees” who blog could be “disastrous” for a company because they post to a vast Internet audience instantaneously); *see also* Gutman, *supra* note 36, at 153 (warning that, because “a user may publish to the [I]nternet the instant a thought completes itself,” bloggers may not ensure that their statements are truthful and accurate).

38. *See* Rita & Gunning, *supra* note 19, at 56 (“[D]iamonds may be ‘forever,’ but diamonds last only a little longer than blogs. After it is posted, a blog is out there and available online—forever.”).

39. *See id.* (cautioning that deleting a blog itself is futile because the blog “remains searchable and available to anyone who looks for it”).

40. *See* China, *supra* note 25, at 6 (describing the trend of anonymous blogging).

41. Examples of creative user names include “Dooce” and “Queen of the Sky.” *See infra* Part II.C (discussing bloggers who were fired as a result of their blogging).

42. *See* Chiappetta, *supra* note 31, at 39 (observing that blogging provides “anonymity tools” that allow individuals to make statements about employers that they would otherwise not make); *see also* Rita & Gunning, *supra* note 19, at 56 (“The seeming anonymity and the vastness of the Internet can cause people to say things they would not consider saying in an e-mail.”).

B. Employer Fears Regarding Blogging Employees and Fallacies of Those Fears

Employers' fears regarding the use of blogs vary. In an effort to prevent both internal and external damage created by blogging, most employers quickly terminate the employee, rather than accurately assessing the harm resulting from the blog.⁴³ As the following section reveals, employees are essentially being terminated based on hurt feelings masked in corporate terminology.⁴⁴ Naturally, when an employer threatens termination, employees often refrain from blogging altogether.⁴⁵ Accordingly, such firings have the effect of stifling this novel medium of communication.⁴⁶

Admittedly, if an employee leaks trade secrets, that individual is rightfully terminated.⁴⁷ However, this Comment addresses the more challenging situation in which an employee, not using company time or equipment, either: (1) discloses personal information about himself; or (2) comments on his daily work experience at a company that has yet to implement a corporate policy forbidding use of the company name.⁴⁸ In either scenario, employer fears remain the same due to the problems blogging can create both inside and outside the organization. The perceived threats to the employer stem from the possibility of a tarnished public image, diversion of corporate resources, decreased camaraderie among staff members, and increased risk of litigation.⁴⁹

43. See *infra* notes 72–101 and accompanying text (discussing termination decisions based upon blogging activities and detailing employers' justifications in reaching those outcomes).

44. See, e.g., Armstrong, *supra* note 23 (describing her blogging-related termination, in which the human resources representative stumbled over her words to find the correct corporate lingo to justify her decision and concluded with: "Um, lemme think, um, we're not firing you for your website, I think. I guess we're not allowed to do that. Um, let's just say the official reason is that it's just not a good fit.").

45. See Gutman, *supra* note 36, at 150 (observing that employees will likely "self-censor" if they believe their employers are watching with the intention to reduce the number of employees).

46. See *id.* at 152–55 (stating that bloggers, if in danger of termination, will not be able to express their personal opinions, humor, or creativity).

47. See Marc Cole, *Getting Dooced: Employee Blogs and Employer Blogging Policies Under the National Labor Relations Act*, 82 WASH. L. REV. 121, 146 (2007) (noting that, under the NLRA, employers may validly terminate employees for discussing trade secrets).

48. See *infra* Section II.C (recounting incidents of employees terminated for blogging).

49. See Gutman, *supra* note 36, at 150–52 (examining typical employer concerns, including potential criminal liability, diversion of corporate resources, disruption of the work environment, tarnished corporate reputation, and violations of contractual covenants).

The first employer fear relates to the effect of blogging on the employer's reputation.⁵⁰ Because the potential audience of a blog is limitless, negative references to any aspect of a company can have serious implications for the company's public image.⁵¹ Accordingly, businesses wish to ensure that negative press does not originate from their own employees.⁵² However, these businesses often fail to contemplate the public image ramifications associated with regulating their employee's non-work related activity.⁵³

Another employer fear is that a shield of anonymity may encourage some bloggers to disclose trade secrets or sensitive information to the detriment of the employer.⁵⁴ As stated previously, terminations for such actions are justified and may result in the employee being liable to the employer.⁵⁵ The fact that blogs lack a delay period and an external review process prior to publication further augments employers' fears of disclosure of confidential information.⁵⁶ However, employers have

50. See *id.* at 151 (discussing employers' "legitimate concerns" about their corporate reputation when employees maintain blogs discussing corporate clients, co-workers, or business partners).

51. See Albert J. Solecki, Jr. & Melissa G. Rosenberg, *Employee Blogging*, EMP. L. STRATEGIST, Nov. 2005, at 1, available at 13 No. 7 Emp. L. Strategist 1 (Westlaw) (stating that "the nature of Internet blogs greatly exacerbates" the risk of reputational harm faced by employers).

52. *Id.* (recommending measures for employers to institute in order to reduce the potential for liability and avoid negative public attention).

53. See Philip L. Gordon & Katherine Cooper Franklin, *What You Should Be Doing About Your Employees' Wanderings Through the 'Blogosphere,'* CORP. COUNS., Aug. 2006, at 1, available at 21 No. 3 Corp. Coun. 1 (Westlaw) (cautioning that employers should anticipate a "public relations fallout" since many of the fired, blogging employees "have become celebrities," generating mass attention about the circumstances of their termination). Michael Hanscom's experience is but one example. He posted pictures on his personal blog of Apple computers being delivered to the Microsoft headquarters and was fired from his position with a Microsoft independent vendor. See, e.g., Duhigg, *supra* note 7, at 8 (discussing the ramifications resulting from the termination of an employee due to the contents of his blog). The public's reaction was substantial: "[w]ithin a day, hundreds of thousands of visitors had swamped [his] web pages, and he [received] approximately 250 e-mail messages an hour[,] [h]is story appeared on the front page of The Seattle Post-Intelligencer and was mentioned on CNN[, and] [c]oncerned citizens donated enough money to cover his rent for the next month." *Id.* at 9.

54. See Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger's Identity Before Service of Process is Effected*, 2006 DUKE L. & TECH. REV. 2, ¶¶ 1, 9–10, 19 (2006) (noting that disclosure of confidential information is a dangerous threat from anonymous anti-employer bloggers and would constitute a breach of the employee's duty of loyalty).

55. *Id.* ¶¶ 19, 23 (observing that employee bloggers who leak confidential information are likely to be terminated).

56. See Chiappetta, *supra* note 31, at 37–39 (commenting that the ease and rapidity with which a blog can be posted may make disclosures both more likely and more difficult to prevent).

broadly construed this justification to achieve their desired result and, in some instances, have applied this reasoning in situations that do not appear to be improper disclosure.⁵⁷

A third concern for employers is the likelihood of decreased camaraderie among staff members stemming from disparaging and discriminatory remarks posted on blogs.⁵⁸ Disclosing negative information concerning co-worker behavior tends to create animosity, which, in turn, leads to a disruptive work environment and decreased productivity.⁵⁹ However, it is unrealistic to expect all employees to work seamlessly with one another without occasional conflict.⁶⁰ Of course, many employees vent their frustrations about their colleagues to others, and blogs provide an alternative means to do so.⁶¹ Like traditional diary writing, bloggers often channel such thoughts into blog entries during their personal time, rather than carrying that resentment into the office and disrupting productivity.⁶²

The final cause of anxiety for employers with blogging employees relates to the heightened risk of litigation.⁶³

57. See Michael Hanscom, *Fifteen Minutes of Fame*, ECLECTICISM, Oct. 29, 2003, <http://www.michaelhanscom.com/eclecticism/2003/10/29/fifteen-minutes-of-fame> (detailing how Microsoft dismissed an employee for posting seemingly innocuous pictures on his blog).

58. See ESSENTIAL FACTS: EMPLOYMENT § 8:25 (2006) (recognizing the need for employers to be wary of the danger to them when employees engage in “cybersmear”).

59. See Gutman, *supra* note 36, at 151 (“Such targets may feel that their privacy is being invaded, that subjection to public scrutiny is undesirable in both personal or professional ways, or that the work environment as a whole is unfriendly to them.”).

60. See Mehul Srivastava, *Ring Tone Madness*, SACRAMENTO BEE, July 31, 2006, at D1 (noting that even the noise of cell phone ringers that play music has created increasing animosity and irritability among co-workers).

61. See Robben, *supra* note 15, at 43 (suggesting that a blog has become yet another forum where employees discuss matters relating to their job, including their opinions of coworkers and supervisors). The fact that people tend to relate personal disputes occurring in the workplace underscores the very notion that people utilize their blogs as an online journal with public access. For example, Nadine Haobsh anonymously blogged about her professional life as an associate beauty editor for a popular magazine and regularly included comments about her coworkers. Raakhee Mirchandani, *Behind the Blog—Gossip, Ambition and the Unmasking of ‘Jolie in NYC,’* N.Y. POST, July 21, 2005, at 43. Many posts contained her observations of coworkers’ attitudes, behaviors, and salaries. *Id.* After her identity was discovered, the blog was dismantled. *Id.*

62. See ESSENTIAL FACTS: EMPLOYMENT, *supra* note 58 (describing blogs as a diary encompassing both broad subjects and specific targets, such as “complaints about a supervisor, co-workers, or the workplace in general”). Recognized limitations, such as those relating to personal privacy, seem to govern what constitutes a permissible revelation. See Brown, *supra* note 22, at 1, 2–5 (observing that a number of states have passed statutes protecting employees’ lawful off-duty activities). In addition, bloggers may be held liable if their posts constitute sexual harassment or other forms of harassment. *Id.* at 2.

63. See generally Henry Hoang Pham, Comment, *Bloggers and the Workplace: The Search for a Legal Solution to the Conflict Between Employee Blogging and Employers*, 26

Employers may be vicariously liable for the posted statements of its employees if the online forum is found to be an extension of the workplace and in the context of the requisite principal-agent relationship.⁶⁴ When employers suspect that a large number of employees are participating in the blogosphere, their concerns about vicarious liability for defamatory or discriminatory statements are amplified.⁶⁵ In addition to vicarious liability, an employer may also be held directly liable in a claim for negligence, including negligent hiring or supervision of an employee.⁶⁶ However, blogging that occurs during personal time with one's own equipment will likely not be found to have occurred during the scope of employment, thereby failing an essential element of vicarious liability.⁶⁷

As the preceding discussion demonstrates, employer concerns often arise in good faith but tend to sweep with overly broad strokes. Additionally, those concerns are less justifiable in the context of anonymous personal blogs that are not written on company computers and time. This is due to the fact that employees are not wasting company time, and employers would be less likely to be held accountable for their blogging employees' behavior. The contrasting standards among anonymous Internet communications and employment law have often clashed in the workplace.⁶⁸ Unfortunately, employers' termination decisions

LOY. L.A. ENT. L. REV. 207, 225–26 (2006) (discussing a corporation's vicarious liability for the statements of its agents acting within the scope of their employment).

64. Cf. *Blakely v. Cont'l Airlines, Inc.*, 751 A.2d 538, 542–43, 552 (N.J. 2000) (finding that an Internet medium similar to a blog—an electronic bulletin board—can be an extension of the workplace and that the employer may be liable for a pattern of harassing statements made by employees against co-workers); see also *Pham*, *supra* note 63, at 228–31 (noting that employers' official blogging policies, in particular, may place them in jeopardy of being vicariously liable because the policies may bring blogging within the scope of employment).

65. See John S. Hong, *Can Blogging and Employment Co-Exist?*, 41 U.S.F. L. REV. 445, 455 (2007) (asserting that employer concerns about vicarious liability stem from the belief that employees often do not realize the ability of blogs to reach millions of readers).

66. See *Brown*, *supra* note 22, at 5–6 (observing that employers can be held directly liable for employee blogging through negligent hiring and negligent supervision of an employee or negligent protection of confidential information, or indirectly liable through respondeat superior).

67. Cf. *Pham*, *supra* note 63, at 225–26 (citing *Booker v. GTE.net L.L.C.*, 250 F.3d 515, 518–20 (6th Cir. 2003)); see also *Delfino v. Agilent Techs., Inc.*, 52 Cal. Rptr. 3d 376, 395–97 (Cal. Ct. App. 2006) (finding an employer not vicariously liable for its employee's threatening Web posts and e-mails, even though the employee used the company computer system, because such malicious behavior was “plainly outside the scope of his employment”); *Koch v. Prostep, Inc.*, Nos. Civ.A. 3:01CV1277AH, Civ.A. 3:01CV1378AH, 2002 WL 31360404, at *7 (N.D. Tex. Oct. 17, 2002) (finding that vicarious liability resulted from a CEO's e-mail sent “for the purpose of discharging his duties”).

68. See *infra* Part II.C (chronicling recent incidents in which private employees were fired for blogging and illustrating the discrepancy between employment and Internet

have ignored and prevailed over the rights afforded to anonymous Internet communications.⁶⁹ Permitting such behavior will inhibit blogs and other novel communication mechanisms from reaching their full potential as new literary devices.⁷⁰ Society should devote greater attention to the negative effects of such decisions.⁷¹ Nevertheless, employers' fears continue to dominate and, as the following section demonstrates, blogging is still a viable basis for termination.

C. *Blogging Resulting in Termination*

Although blogging may seem like a relatively new communication tool, the news is filled with stories of employee terminations based on the employees' participation in blogging activities.⁷² While termination decisions based on blogging at the workplace, during business hours, and on company computers may be justified,⁷³ the scope of this Comment focuses on those

communication rights); *see also* Hannah Marriott, *Should Employees Be Free to Blog?*, PR WEEK, Sept. 1, 2006, at 16, available at 2006 WLNR 15167012 (Westlaw) (observing that mobile phone company Orange's firing of Inigo Wilson, for posting conservative comments on his blog about Islam, Palestinians, and terrorists, received a "mixed reaction: while there was sympathy for Orange given the nature of Wilson's blog, others have cried foul over restricting freedom of speech"). *Compare infra* Part IV (examining the rights afforded to private employees), with *infra* Part V.D (discussing the protections given to anonymous communications conducted over the Internet).

69. *See, e.g.*, ESSENTIAL FACTS: EMPLOYMENT, *supra* note 58. Despite the fact that courts have afforded some rights to anonymous Internet communications, employers continue to fire employees for anonymous blogging. *See* Carson Strege-Flora, *Wait! Don't Fire that Blogger! What Limits Does Labor Law Impose on Employer Regulation of Employee Blogs?*, 2 SHIDLER J. L. COM. & TECH. 11 (2005) (noting that "many companies," including Microsoft and Friendster, "have reacted to employee blogs by disciplining or firing the blogging employees").

70. *See* David L. Hudson, Jr., *Blogs and the First Amendment*, 11 NEXUS 129, 132 (2006) ("It is essential that bloggers can participate in the public discourse without fear that someone can file a meritless lawsuit and then use the power of the courts to discover their identities The possibility that a frivolous claim could pierce the veil of anonymity might silence a blogger, and remove a valuable voice from the debate." (quoting FixYourThinking.com, *Are Bloggers Journalists? The Courts Seem to Think So. OR Oops Did I Just Lose Apple's Lawsuit Against Think Secret?*, <http://jackwhispers.blogspot.com/2006/03/are-bloggers-journalists-courts-seem.html> (Mar. 28, 2006)).

71. *See infra* Part III (indicating that limiting participation in the blogosphere will thwart debate in this innovative setting and will overlook a strategic business tool).

72. *See* Curt Hopkins, *Statistics on Fired Bloggers*, MORPHEME TALES, Oct. 8, 2006, <http://morphemetales.wordpress.com/2006/10/09/statistics-on-fired-bloggers/> (reporting a comprehensive list of people who have been fired, disciplined, or eliminated from consideration of employment for blogging activities, with the oldest incident of termination occurring in March of 2001).

73. *See* ESSENTIAL FACTS: EMPLOYMENT, *supra* note 58 (recognizing that most companies have policies explicitly forbidding the use of company equipment for personal use during office hours, thereby permitting termination of employees who violate such policies).

employees who blog with a pseudonym during their personal time and on their personal computers. The latter behavior creates a grey area in which the employment at-will doctrine collides with the right to anonymous Internet speech.⁷⁴ In nearly all of the disputes arising from this gray area, the employer has prevailed under the shield of the employment at-will doctrine, unfairly leaving the employee without recourse.⁷⁵ Arguably, companies should pay closer attention to the poor public image created by what the public may perceive as a harsh overreaction to employee blogs.⁷⁶ Yet, despite potential public image consequences, numerous employers have fired blogging employees.⁷⁷ The following are illustrations of such employer termination actions.

Heather Armstrong was one of the first employees to be fired for blogging.⁷⁸ She was a web designer who maintained a personal website discussing the details of her life.⁷⁹ Armstrong

74. Compare *infra* Part IV (examining the rights afforded to at-will private employees), with *infra* Part V.D (discussing the protections given to anonymous Internet communications).

75. See, e.g., Kahn v. U.S. Sec'y of Labor, 64 F.3d 271, 279 (7th Cir. 1995) ("It is well-settled in this circuit and other circuits that an employer may terminate an employee for any reason, good or bad, or for no reason at all, as long as the employer's reason is not proscribed by a Congressional statute."); Rita & Gunning, *supra* note 19, at 56–57 (recalling highly publicized instances of employees terminated for blogging); see also Gutman, *supra* note 36, at 156–57 (noticing that although a majority of states have eased their stringent at-will presumptions with exceptions, six have not, and that the presumption still maintains a powerful hold over many employment decisions); Heather Armstrong, *Tell It to Their Face for Christ's Sake*, DOOCE.COM, Feb. 27, 2002, http://www.dooce.com/archives/daily/02_27_2002.html (recalling that when Armstrong was terminated for posts made on her blog about co-workers, she was fired almost immediately and received no severance pay).

76. See, e.g., James O. Castagnera, Patrick J. Cihon & Andrew P. Morriss, 21 TERMINATION OF EMP. BULL. at 12.1 (Dec. 2005) (noting that Delta's firing of a flight attendant "for posting 'inappropriate' photos of herself in a Delta uniform on her blog" was an "over-reaction [that] gave the company far worse press than anything on [her] blog might have done").

77. See *supra* notes 50–54 and accompanying text (commenting on the argument that employee blogging should be restricted due to blogging's ability to shape public opinion against the employer and the counter-concern that such rigid restrictions can taint the employer's public image).

78. See Gutman, *supra* note 36, at 147–50 (describing four bloggers' firings, including Armstrong's, as indicative of a developing conflict between blogging and employment law); Heather Armstrong, *Collecting Unemployment*, DOOCE.COM, Feb. 26, 2002, http://www.dooce.com/archives/daily/02_26_2002.html. At the time of her termination, her name was Heather Hamilton, the name with which most are familiar. Heather Armstrong, *About This Site*, <http://www.dooce.com/about.html> (last visited Sept. 1, 2007).

79. Rafael Gely & Leonard Bierman, *Workplace Blogs and Workers' Privacy*, 66 LA. L. REV. 1079, 1087 (2006) (labeling Armstrong's blog as "the most common type of employee blog" because her "primary focus [was] on some other aspect of her life" and she only irregularly blogged about work).

blogged under the pseudonym “Dooce.”⁸⁰ Amidst her daily entries, she only occasionally discussed her coworkers and supervisors.⁸¹ In a blog entry, Armstrong commented on her “hate” of a supervisor that “wasn’t born with an ‘indoor’ voice, but with a shrill, monotone, speaking-over-a-passing-F16 outdoor voice” who “loves to hear himself speak, even if just to himself.”⁸² She made similar negative comments about other employees.⁸³ Armstrong’s company fired her on the grounds that her negative attitude, as conveyed through her writing, was contrary to company policy and would not be tolerated.⁸⁴

Delta Airlines flight attendant, Ellen Simonetti, began blogging under the pseudonym “Queen of the Sky” about the life of an international flight attendant.⁸⁵ Simonetti never mentioned the name of her employer airline in her blog but, rather, used the term “Anonymous Airlines” to describe Delta.⁸⁶ On one occasion, Simonetti posted suggestive pictures of herself in a Delta uniform on her personal blog.⁸⁷ The company terminated her on the

80. Gutman, *supra* note 36, at 149 (explaining that Armstrong’s real name was rarely used and asserting that because the names “Heather” and “Hamilton” are common, discerning her true identity would have still been a formidable task).

81. See Gely & Bierman, *supra* note 79, at 1087 (revealing that Armstrong occasionally blogged about topics related to work, focusing mostly on other events in her life).

82. Heather Armstrong, *I Have Something to Say*, DOOCE.COM, Feb. 12, 2002, http://www.dooce.com/archives/daily/02_12_2002.html.

83. *Id.* (making statements such as: “I hate that the Enabling Producer enables nothing but my never-ending agony,” and “I hate that the Tech Producer doesn’t know how to use e-mail”).

84. See Armstrong, *supra* note 75 (narrating that her blog was grounds for removal because it was “influencing the younger, more impressionable members of the company”); Gutman, *supra* note 36, at 149 (recounting that a co-worker found Armstrong’s blog, likely through pictures that she posted to her blog, and anonymously forwarded the blog’s address to Armstrong’s supervisors).

85. See George Lenard & Michael Harris, *Firing Bloggers to Protect Company Image: Part I—The Stories*, GEORGE’S EMPLOYMENT BLAWG, Nov. 23, 2004, <http://employmentblawg.blogspot.com/2004/11/firing-bloggers-to-protect-company.html> (reproducing the details surrounding Simonetti’s termination, observing Delta’s ensuing negative press, and analyzing whether Simonetti had a valid cause of action against Delta). Simonetti’s blog is located at <http://queenofsky.journalspace.com>.

86. Ellen Simonetti, *Queen of Sky Story Summary*, DIARY OF A FIRED FLIGHT ATTENDANT, Oct. 11, 2005, <http://queenofsky.journalspace.com/?cmd=displaycomments&dcid=471&entryid=471> (stating that Simonetti never used Delta’s name in her blog); see also Ellen Simonetti, *I was Fired for Blogging*, CNET NEWS, Dec. 16, 2004, http://news.com.com/I+was+fired+for+blogging/2010-1030_3-5490836.html?tag=nefd.ac&tag=nl.e540-2 (explaining that she began the blog as a form of self-therapy to deal with recent emotional hardships, not to criticize her employer).

87. Ellen Simonetti, *It’s Over*, DIARY OF A FIRED FLIGHT ATTENDANT, Oct. 29, 2004, <http://queenofsky.journalspace.com/?cmd=displaycomments&dcid=393&entryid=393> (displaying the pictures in question).

grounds that the pictures were “inappropriate.”⁸⁸ However, much of the public viewed this as an overreaction because the “mild cleavage and leg shots” in the pictures seem tame compared to much of the advertising seen today.⁸⁹

A third widely publicized blogging incident involved Michael Hanscom, an independent contractor who worked for Microsoft.⁹⁰ While walking past the loading docks, Hanscom noticed that Apple brand computers were being delivered to Microsoft.⁹¹ Hanscom took a picture of the delivery truck, careful to not include any identifying material in the picture.⁹² In his blog entry titled “Even Microsoft Wants G5s,” he posted the image with a caption that read: “It looks like somebody over in Microsoft land is getting some new toys.”⁹³ In addition to the caption, Hanscom mentioned that the picture was taken in the same building as Microsoft’s print shop.⁹⁴ Shortly thereafter, Hanscom’s company fired him, stating that his post was a security risk because anyone could use it to decipher the location of Microsoft’s shipping and receiving dock.⁹⁵ Hanscom was terminated without an opportunity to remove the post from his blog.⁹⁶

Mark Pilgrim, a programmer who maintained a personal blog, was also terminated for his blogging activities.⁹⁷ Pilgrim’s

88. See Ellen Simonetti, *Queen of Sky Story Summary*, DIARY OF A FIRED FLIGHT ATTENDANT, Oct. 11, 2005, <http://queenofsky.journalspace.com/?cmd=displaycomments&dcid=471&entryid=471> (asserting that Simonetti is still unaware as to what “inappropriate” means because Delta has yet to inform her of which pictures they deemed inappropriate).

89. See Lenard & Harris, *supra* note 85 (reporting on the extensive press attention Simonetti has received to the detriment of Delta, including an appearance on the Today Show and coverage in the New York Times).

90. Michael Hanscom, *Fifteen Minutes of Fame*, ECLECTICISM, Oct. 29, 2003, <http://www.michaelhanscom.com/eclecticism/2003/10/29/fifteen-minutes-of-fame> (providing a personal narrative of the events of his blogging-related termination).

91. Todd Bishop, *Microsoft Fires Worker over Weblog*, SEATTLE POST-INTELLIGENCER, Oct. 30, 2003, at A1 (reporting Hanscom’s firing and describing the events leading up to it).

92. See Hanscom, *supra* note 90 (“I thought that the picture was taken in such a way that it would not cause any issues, revealing only an unmarked truck with some computers, and a small section of loading dock that could be nearly any loading dock on any building across America.”).

93. Michael Hanscom, *Even Microsoft Wants G5s*, ECLECTICISM, Oct. 23, 2003, <http://www.michaelhanscom.com/eclecticism/2003/10/23/even-microsoft-wants-g5s>.

94. Jon Bonné, *Blogger Dismissed from Microsoft*, MSNBC, Oct. 30, 2003, <http://www.msnbc.msn.com/id/3341689> (acknowledging that the description of the location of the loading dock probably prompted Hanscom’s dismissal).

95. See Bishop, *supra* note 91 (questioning Microsoft’s rationale for firing Hanscom).

96. See Bonné, *supra* note 94 (finding that many bloggers remain puzzled over Microsoft’s decision because of the minor nature of the infraction).

97. Mark Pilgrim, *Now Extremely Available*, DIVE INTO MARK, Oct. 9, 2001, http://diveintomark.org/archives/2001/10/09/now_extremely_available (“Welcome to my weblog. I hope you enjoy it. I just got fired for it.”).

blog contained an essay detailing his “past addiction to nicotine, alcohol, and marijuana.”⁹⁸ After Pilgrim’s manager discovered the addiction essay, the manager asked Pilgrim to remove the entire blog because he felt that it “had become a liability to the company.”⁹⁹ However, Pilgrim refused to do so and posted his résumé on his blog, in the event that he would need to secure an alternative source of work.¹⁰⁰ Pilgrim’s employer then fired him on the grounds that his résumé posting constituted “gross insubordination.”¹⁰¹

An employer’s ability to freely terminate blogging employees, such as those in the preceding examples, arises from the employment at-will doctrine.¹⁰² If the employment at-will doctrine continues to overshadow the right to exercise anonymous Internet speech and to deter private employees from blogging, society may fail to realize the many advantages that blogging provides, as the following section illustrates.

III. ADVANTAGES WARRANTING THE PROTECTION OF BLOGS

The advantages that blogging provides to society include an innovative forum for debate, a platform for developing literary pieces, and a strategic business tool.¹⁰³ Because blogging is a developing modern communication device, society should focus its efforts on cultivating this instrument and reaping its advantages.¹⁰⁴

98. See Hong, *supra* note 65, at 451 (“Pilgrim had already overcome his addictions and the substances posed no threat to his work productivity . . .”); Mark Pilgrim, *Dark Tunnel*, DIVE INTO MARK, Feb. 10, 2002, http://diveintomark.org/archives/2002/02/10/dark_tunnel (offering insight on Pilgrim’s personal struggle with a smoking addiction, such as that found in the essays his employer criticized).

99. Mark Pilgrim, *Assume We Have a Can Opener*, DIVE INTO MARK, Oct. 5, 2001, http://diveintomark.org/archives/2001/10/05/assume_we_have_a_can_opener (opining that people in positions of authority may attempt to silence employee blogs because “[w]eblogs give everyone in the company a voice”).

100. Gutman, *supra* note 36, at 148–49 (noting that Pilgrim’s employer refused any option short of removing the entire blog because of his concern that “the world had ‘shrunk too much’”).

101. See Pilgrim, *supra* note 97 (surmising that the true cause of his termination was his narration of past addictions, not his posted résumé).

102. Cf. *Young v. Dillon Cos.*, 468 F.3d 1243, 1253 (10th Cir. 2006) (defining a privately employed at-will worker as “someone whose employment may be terminated lawfully by either party without reason or notice”).

103. See *infra* Parts III.A–C (discussing each advantage in greater detail).

104. See Gutman, *supra* note 36, at 172 (reasoning that “[I]nternet speech is of such value to the public that restrictions on it by employers might be inappropriate”).

A. An Innovative Forum for Debate

The first advantage of blogging is that it provides an innovative forum for debate.¹⁰⁵ The instantaneous quality of blogs allows for immediate discussion of pressing issues, avoiding the delays inherent to traditional print media.¹⁰⁶ In fact, on numerous occasions “bloggers [have] led the mainstream media” in reporting breaking news stories.¹⁰⁷ For example, bloggers were “primarily responsible” for discovering the falsity of CBS’s story about President Bush’s service with the Texas Air National Guard.¹⁰⁸

In addition, the continual feedback by means of comments posted on the blog enables the free exchange of opinions and opposing viewpoints.¹⁰⁹ The expanse of the Internet brings together many people of varying backgrounds and allows them to interact easily.¹¹⁰ Essentially, bloggers are the twenty-first century “pamphleteers,” cutting-edge and often influential disseminators of ideas and information.¹¹¹ This ability to cultivate and disseminate new ideas warrants protection from the traditional employment at-will doctrine.¹¹²

B. A Platform for Developing Literary Pieces

The second advantage of blogging is that it serves as a platform for novel thinking, from which ideas can evolve into fully developed theories.¹¹³ The casual, interactive style of blogging represents a “sketch pad” for first drafts of new books and theses.¹¹⁴ In fact, because blog comments provide almost

105. See Donald J. Kochan, *The Blogosphere and the New Pamphleteers*, 11 NEXUS 99, 101–02 (2006) (clarifying that the free flow of ideas in the blogosphere is facilitated by its lack of barriers to entry and minimal transaction costs).

106. See *id.* at 102 (emphasizing the usefulness of legal blogs because of their capability to discuss pressing issues immediately, rather than waiting weeks for opinions to be published in print format).

107. Hudson, *supra* note 70, at 130–31 (listing several such occasions).

108. *Id.* at 130 (identifying three bloggers who initially made the discovery).

109. See *supra* notes 22–24 and accompanying text (discussing comments as a common characteristic of blogs).

110. See Kochan, *supra* note 105, at 99–100 (extolling blogging’s power to create “communities of conversations” among strangers).

111. *Id.* at 100–02 (comparing the blogger to the traditional pamphleteer and drawing the conclusion that blogging is the modern era’s pamphleteering).

112. See Gutman, *supra* note 36, at 169–70 (encouraging protection of Internet speech because it “embodies the very heart of free speech: the free exchange of ideas”).

113. See *id.* at 170 (viewing blogs as promoting “artistic flowering online”).

114. *Id.*

instantaneous feedback, authors can easily refine drafts of literary pieces as they progress.¹¹⁵

The Internet allows numerous editors to evaluate a blogger's evolving theorem.¹¹⁶ Easy access to the blogosphere, along with low barriers to entry, enables virtually anyone to be a "publisher."¹¹⁷ For this reason, those who were previously unable to launch an emerging school of thought due to a lack of resources may now be able to do so.¹¹⁸

C. A Strategic Business Tool

An often overlooked advantage of blogging is its use as a strategic business tool. Employers can use blogs to connect with customers, promote company strategy, or spread news about forthcoming products.¹¹⁹ Blogs are a rapid and direct way to communicate with clients about the desirability and adequacy of products in the market.¹²⁰ Blogs can be used "as an effective means of communication by putting a human face on the corporation, countering negative publicity . . ." ¹²¹ In fact, several companies have created company-sponsored blogs to generate and maintain a direct connection with their employees and customer base.¹²² Additionally, blogs by high-ranking officials offer an exclusive look into the life and strategy of their company, providing insight that traditional media cannot parallel.¹²³

115. See *id.* (contending that blogs enable publication without the expense or support of a publishing company).

116. See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 850 (1997) (reporting that the Internet "now enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world"). "From the publishers' point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Id.* at 853.

117. *Id.* (defining possible publishers as "government agencies, educational institutions, commercial entities, advocacy groups, and individuals").

118. See *id.* at 851–53 ("Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods.").

119. See Solecki, *supra* note 51 (identifying the benefits of employee blogging to employers, such as screening applicants, promoting current employees, and attracting favorable attention to company products and strategy).

120. Alan R. Nye, *Blog Wars: A Long Time Ago in an Internet Far, Far, Away . . .*, 20 ME. B. J. 102, 102–03 (2005) (noting that blogs are the new tactical business tool because blogs can supplement business strategy and establish relations with customers).

121. Jacqueline Klosek, *Corporate Blogs: Handle with Care*, BUSINESSWEEK.COM, Dec. 14, 2006, http://www.businessweek.com/technology/content/dec2006/tc20061214_594367.htm.

122. See Nye, *supra* note 120, at 102–03 (discussing company-sponsored blogs and reporting that Microsoft has more than six hundred blogging employees).

123. See *id.* (reporting that the Vice Chairman of General Motors and the President and Chief Operating Officer of Thomas Nelson Publishers maintain blogs about company news and events); Traci Purdum, *C-Level*, INDUSTRY WK., Aug. 2006, at 13 (stating that

During campaign season, candidates such as Howard Dean and Eliot Spitzer benefited from blogs detailing life on the campaign trail, which attracted numerous readers.¹²⁴ It is unlikely that the information provided in these types of online journals would appear elsewhere.¹²⁵

Rather than concentrating solely on employers' fears, courts should focus on blogging's strengths and support the advancement of this social and technological movement. As the following section demonstrates, the employment at-will doctrine offers employers the freedom to terminate private employees for blogging and inhibits the blogosphere's growth as a novel form of communication.

IV. THE INFLUENCE OF EMPLOYMENT LAW IN THE BLOGOSPHERE AND ITS EFFECT ON THE RIGHTS OF BLOGGERS

Employment at-will is a widely accepted doctrine governing private employment in the United States.¹²⁶ There are three general exceptions to the doctrine, one of which should be expanded to account for the protections given to anonymous Internet communications and for the public interest in blogging as a modern communication device. Before exploring this argument, this Comment examines the employment at-will doctrine.

A. *The At-Will Employment Doctrine*

In all but one state, the employment at-will doctrine governs private employees.¹²⁷ In the absence of a clause precisely defining the length of employment, the at-will doctrine presumptively applies.¹²⁸ At-will employees may quit their jobs at any time, for

the President and Chief Executive Officer of Sun Microsystems frequently blogs to discuss company culture, business operations, and technological developments).

124. Taylor, *supra* note 5 (observing the popularity of blogs authored by political candidates and the positive financial and political return earned by those blogs).

125. See Zubowicz, *supra* note 16, at 28 (“[I]ndividuals have been prolific publishers of news, commentary, and editorial content online without distributing that content through traditional media outlets. . . . Those who want unfiltered access to information can rely on blogs, as opposed to more traditional sources of news.”).

126. See, e.g., Paoletta v. Browning-Ferris, Inc., 158 F.3d 183, 189 (3d Cir. 1998) (“The employment-at-will doctrine ‘has a long history in Delaware and the United States.’” (quoting E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 440 (Del. 1996))).

127. See Pham, *supra* note 63, at 211 (“All states except for Montana retain the ‘at-will’ presumption of employment.”).

128. Deborah L. Markowitz, *The Demise of At-Will Employment and the Public Employee Conundrum*, 27 URB. LAW. 305, 307–08 (1995) (defining the employment at-will doctrine and chronicling its creation and acceptance in American practice).

any reason.¹²⁹ Likewise, an employer can fire his at-will employees at any time, with or without cause.¹³⁰ In fact, employers are even free to exercise poor judgment in their termination decisions as long as such decisions do not exceed established legal boundaries.¹³¹ Thus, at-will employment offers the majority of American private workers “little legal protection” from private employers’ actions.¹³² To compound the problem, the First Amendment¹³³ does not protect the free speech rights of private employees in the workplace.¹³⁴ Rather, the amendment’s scope extends only to “governmental actors, such as public employers.”¹³⁵ Although the employment at-will doctrine is harsh in application, the exceptions to the doctrine provide some relief to private employees, as the following section highlights.

B. Exceptions to the At-Will Employment Doctrine

Two categories of exceptions to the at-will employment doctrine afford private employees some protection: statutorily created exceptions and common law exceptions.

1. *Statutorily Created Exceptions: Title VII of the Civil Rights Act of 1964 and the National Labor Relations Act.* The first statutory exception to the at-will presumption arises from Title VII of the Civil Rights Act of 1964.¹³⁶ This federal statute prohibits employment discrimination based on “race, color, religion, sex, or national origin.”¹³⁷ For example, Title VII would

129. See, e.g., *Corcoran v. Chi. Park Dist.*, 875 F.2d 609, 612 (7th Cir. 1989) (explaining the scope of the employment at-will doctrine).

130. See *Smith v. Calgon Carbon Corp.*, 917 F.2d 1338, 1341 (3d Cir. 1990) (“[I]t is an established general principle that in an employment relationship, an employer ‘may discharge an employee with or without cause, at pleasure, unless restrained by some contract.’” (quoting *Henry v. Pittsburgh & Lake Erie R.R. Co.*, 21 A. 157, 157 (Pa. 1891))); Karen McMahon, Note, *Contracts—The Employment At Will Doctrine: Can Oral Assurances of Job Security Overcome the At-Will Presumption?*, 23 WM. MITCHELL L. REV. 465, 466, 470–71 (describing this employer freedom and its rationale and introducing the limitations of the at-will presumption).

131. Jonathan A. Segal, *Can You Fire an Employee for Blogging?*, EMP. L. STRATEGIST, Aug. 2005, at 1 (declaring that an at-will employee may be discharged “at any time, for any reason, no reason, a good reason or a bad reason, just not an illegal reason” (emphasis added)).

132. Gely & Bierman, *supra* note 79, at 1091.

133. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

134. See *Hudson*, *supra* note 70, at 134 (explaining that private employees are not protected because “there is no trigger of state action”).

135. See *id.* (recommending that private employees seek protection from contractual or state statutory remedies as an alternative to First Amendment protection).

136. 42 U.S.C. § 2000e (2000); see also Gely & Bierman, *supra* note 79, at 1091.

137. 42 U.S.C. § 2000e (2000).

prevent an employer from “systematically fir[ing] only female employee bloggers and not male bloggers.”¹³⁸ However, only blogging activities falling within these narrow statutory categories would be unlawful.¹³⁹

Another federal statute allotting increased protection to at-will employees is the National Labor Relations Act (NLRA).¹⁴⁰ The NLRA prohibits employer interference with “concerted activities for . . . mutual aid and protection.”¹⁴¹ The NLRA should encompass blogging activities that discuss compensation and other terms of employment.¹⁴²

2. *Judicially Created Exceptions.* In addition to the statutorily created exceptions to the at-will presumption, courts have established three common law exceptions to the doctrine: (1) good faith and fair dealing; (2) implied contractual obligations; and (3) public policy.¹⁴³

a. *Good Faith and Fair Dealing.* The first common law exception to the at-will presumption is good faith and fair dealing.¹⁴⁴ An employer has a nonwaivable duty to act in good faith and deal fairly with at-will employees.¹⁴⁵ This exception prevents employers from causing, in bad faith, injury to at-will employees and requires that both employers and employees “respect the rights of the other to receive the benefits of the contract.”¹⁴⁶ In practice, however, this exception has been applied

138. Gely & Bierman, *supra* note 79, at 1091.

139. *Cf. id.* at 1091–92 (explaining that claims brought under Title VII for blatant discrimination are rarely seen today because employers use more “subtle” forms of discrimination (citing Jonathan C. Ziegert & Paul J. Hanges, *Employment & Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553 (2005))).

140. 29 U.S.C. §§ 151–169 (2000).

141. 29 U.S.C. § 157 (2000).

142. *See* Gordon & Franklin, *supra* note 53 (implying that the NLRA prohibits an employer’s ability to completely ban all blogs because employers cannot restrict employee blogs that discuss “compensation, benefits, and other terms and conditions of employment”).

143. Gutman, *supra* note 36, at 156–57; *see, e.g.*, *LaScola v. U.S. Sprint Commc’ns*, 946 F.2d 559, 563–64 (7th Cir. 1991) (listing the three judicially established exceptions to the employment at-will doctrine).

144. Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment-At-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583, 1590–93 (1994) (indicating that imposition of this exception prevents employers from exercising “bad faith” or “bad cause”).

145. *Id.* (“Under this approach, the court imposes a nondisclaimable duty on the employer to exercise good faith and to deal fairly with all employees, including employees at will.”).

146. *See* J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 360 (1995) (defining

only by a minority of jurisdictions and only in rare circumstances, thereby making it the weakest exception.¹⁴⁷

b. Implied Contractual Obligations. The second common law exception to the at-will presumption is based on implied contractual obligations.¹⁴⁸ These obligations are implied by law based on company documents, statements, policies, or other representations made to the employee.¹⁴⁹ This exception has the effect of removing the at-will presumption because employee manuals and handbooks grant protection to employees and establish the boundaries within which employers may act.¹⁵⁰

c. Public Policy. The final, and “strongest,” common law exception is the public policy exception.¹⁵¹ Here, “an employer may be liable for wrongful discharge when the motivation for discharge contravenes public policy.”¹⁵² The rationale for this exception is grounded in the belief that employers should not be able to leverage employment against the rights belonging to at-will employees.¹⁵³ Other justifications include preventing harm to

good faith and fair dealing and instructing that “a breach of the covenant results when the promisor, by his bad faith conduct, jeopardizes or destroys a promisee’s opportunity to reap the expected benefit of the bargain”).

147. See Gutman, *supra* note 36, at 160 (reporting that the good faith and fair dealing exception is applied “only in cases where an employer has attempted to avoid paying wages or other benefits or has discharged a long-time employee without cause” (emphasis omitted)); McMahon, *supra* note 130, at 475 (noting that only a minority of courts find an implied covenant of good faith in employment contracts).

148. See Pham, *supra* note 63, at 211 (stating that the implied contractual obligation exception is premised on an individual’s right to contract for oneself and can arise where the employer “foster[s] an expectation of job security” (quoting Cynthia L. Estlund, *How Wrong are Employees about Their Rights, and Why Does it Matter?*, 77 N.Y.U. L. REV. 6, 19 (2002))).

149. McDonald v. Union Camp Corp., 898 F.2d 1155, 1163 (6th Cir. 1990) (citing Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980)) (“[E]mployers’ handbooks, policy statements and oral representations can create binding contractual obligations limiting the employers’ right to discharge an employee at will.”). “Under the implied-contract exception, representations made by employers regarding job security, disciplinary procedures, and other employee privileges have been frequently treated by state courts as enforceable provisions, even in the absence of an express employment contract.” Gely & Bierman, *supra* note 79, at 1092.

150. See Markowitz, *supra* note 128, at 317 & nn.85–86 (providing examples of inferred bases of contractual obligations).

151. Gutman, *supra* note 36, at 161 (discussing the public policy exception).

152. Paolini v. Albertson’s Inc., 418 F.3d 1023, 1026 (9th Cir. 2005) (internal quotation marks omitted). “Under this exception, an employer will be held liable for discharging an employee in a manner or for a reason that is contrary to public policy.” Richard L. Alfred & Ben T. Clements, *The Public Policy Exception to the At-Will Employment Rule*, 78 MASS. L. REV. 88, 88 (1993).

153. Gutman, *supra* note 36, at 161 (clarifying the justifications of the public policy exception to at-will employment).

third parties, “protect[ing] activities intent on supporting American society[,] and avoid[ing] making it self-sacrificial to engage in such activities.”¹⁵⁴ The scope of this exception depends on what constitutes “public policy.”¹⁵⁵ The public policy exception applies to four situations: (1) whistleblowing; (2) refusal to commit an illegal act; (3) performance of a statutory obligation; and (4) exercise of a statutory right or privilege.¹⁵⁶

i. Whistleblowing. Within the context of the public policy exception, employers may not discharge employees for whistleblowing.¹⁵⁷ Whistleblowing is the activity of disclosing illegal and improper activities of co-workers and supervisors.¹⁵⁸ The protection of these “vigilant employees” is supported by the sound public policy of encouraging employees not to overlook illegal acts in the workplace and to report any violations to higher authority.¹⁵⁹ Many state and federal statutes reinforce this concept, because “enforcing the law is clearly within the public interest.”¹⁶⁰

ii. Refusal to Engage in Illegal Conduct. The public policy exception applies in those circumstances when an at-will employee refuses to engage in illegal conduct.¹⁶¹ At-will

154. *Id.*

155. McMahon, *supra* note 130, at 472 (claiming that the precise “definition of ‘public policy’ varies”).

156. See Pennington, *supra* note 144, at 1593–1622 (examining the parameters of the situations in which the public policy exception applies).

157. See *White v. Gen. Motors Corp.*, 908 F.2d 669, 671 (10th Cir. 1990) (noting that, despite the employment at-will doctrine, an employer may not terminate an at-will employee in retaliation for whistleblowing); Robben, *supra* note 15, at 45–47 (cautioning employers to consider whether their dismissal of a blogging activity could constitute retaliatory discharge).

158. Pennington, *supra* note 144, at 1604 (recognizing that the whistleblowing exception may also fall under the exception for refusal to commit illegal acts).

159. See *Belline v. K-Mart Corp.*, 940 F.2d 184, 190 (7th Cir. 1991) (“[P]ublic policy protects vigilant employees who alert their employers to apparently criminal activity in the workplace.”); Pennington, *supra* note 144, at 1604 (instructing that employees must have protection from retaliatory discharge in order to encourage whistleblowing).

160. Gutman, *supra* note 36, at 161–62. *But see* Pennington, *supra* note 144, at 1604–05 (noting that whistleblower protection laws receive criticism due to inconsistent application).

161. See *Pease v. Pakhoed Corp.*, 980 F.2d 995, 1000 (5th Cir. 1993) (narrowing the employment at-will doctrine with the public policy exception of refusing to commit an illegal act); Kim, *supra* note 2, at 722 (opining that the rationale of preventing harm to third parties is easily applicable in the situation where an at-will employee refuses to engage in unlawful activities). “When an employer that is engaging, or is about to engage, in an illegal activity seeks to coerce its employees into participating in that activity or condoning it by silence, the public’s interest in exposing unlawful activities overrides the doctrine of employment at-will.” *Clark v. Modern Group Ltd.*, 9 F.3d 321, 331 (3d Cir. 1993).

employees need protection from socially and economically powerful employers.¹⁶² In addition, employees who refuse to engage in unlawful acts serve the greater public good and do not aid the advancement of a few at the expense of society.¹⁶³ Hence, protecting such employees is “patently just and perfectly logical.”¹⁶⁴ The justification for providing this protection is similar to that offered in the whistleblowing context: the employee is deserving of protection for doing what the public good requires, despite the risk of retaliatory actions by the employer.¹⁶⁵

iii. Performance of a Statutory Obligation. The third context in which the public policy exception applies is the dismissal of an employee performing a statutory obligation.¹⁶⁶ An example of such an obligation is participating in jury duty.¹⁶⁷ Allowing for dismissal would generate fear of jury service, thereby stifling civic participation and shrinking the potential jury pool to only self-employed or unemployed citizens.¹⁶⁸ Consequently, any adverse effects of termination decisions would be displaced onto the jury system.¹⁶⁹

iv. Exercise of a Statutory Right or Privilege. Finally, the public policy exception prohibits terminating an employee based on conduct that is protected by a statutory right or privilege.¹⁷⁰ The most visible application of this exception is in the context of an employee exercising his right to file a worker’s compensation

162. See Pennington, *supra* note 144, at 1596 (declaring that employers retain “significant power” and control over their at-will employees).

163. *Id.* (instructing that those deserving of the greatest amount of protection are employees who are able to thwart an employer’s transgression against “laws that clearly benefit the public at large”).

164. *Id.*

165. *Id.* at 1597 (noting that a civil cause of action exists against an employer for alleged retaliatory discharge).

166. See Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 120–22 (Pa. Super. Ct. 1978) (circumscribing an employer’s right to discharge an at-will employee with the public policy exception of serving jury duty); Kim, *supra* note 2, at 722–23 (observing that, although dismissal for performing a statutory obligation such as jury duty does not pose an actual risk to third parties, society’s value of political participation merits protection).

167. See Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (holding an employer liable for discharging an employee for fulfilling her civic obligation of jury duty).

168. See Pennington, *supra* note 144, at 1603 (implying that the public interest will be abridged if employees are forced to choose between civic participation and their current employment).

169. *Id.* (commenting that the constitutionally guaranteed right to a jury of one’s peers would be infringed if at-will employees refrain from jury participation).

170. See, e.g., Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (“[W]hen an employee is discharged solely for exercising a statutorily conferred right[,] an exception to the general rule [of at-will employment] must be recognized.”).

claim.¹⁷¹ The rationale underlying this additional protection is based on the notion that an employee should not be inhibited from exercising a right to which he is fairly entitled under state workers compensation laws.¹⁷² Furthermore, public interest favors ensuring that injured workers are adequately cared for—the very purpose of workers compensation laws.¹⁷³

Privately employed bloggers partake in blogging activities at the risk of termination because the employment at-will doctrine and its exceptions provide only minimal protection.¹⁷⁴ However, in order to prevent the dismissal of blogging employees, the public policy exception should be expanded to incorporate society's interest in the unfettered growth of the blogosphere, as the next section illustrates.

V. EXTENDING THE PUBLIC POLICY EXCEPTION OF AT-WILL EMPLOYMENT TO PROTECT BLOGGING EMPLOYEES

To preserve the unique forum for debate, the laboratory for literary development, and the strategic business tool that the blogosphere provides, the standard applied to this modern communication device must not be limited to the traditional contexts of the employment at-will doctrine.¹⁷⁵ The public policy exception should expand to encompass the advantages that blogging provides to society.¹⁷⁶ Furthermore, creating a niche within the public policy exception for the blogosphere would advance the legislative policy of “promot[ing] the continued development of the Internet and other interactive computer

171. See, e.g., *id.* at 426 (noting plaintiff's complaint that she was fired without reason after filing for compensation benefits for the loss of function of her arm resulting from an injury at the workplace).

172. Pennington, *supra* note 144, at 1599 (stating that the majority of cases to which the exercise of a statutory right or privilege exception is applied to the employment at-will doctrine involve discharge of an employee for filing a worker's compensation claim).

173. See, e.g., *Shick v. Shirey*, 716 A.2d 1231, 1237–38 (Pa. 1998) (noting that worker compensation laws are intended to shift the economic burden from an employee to an employer and that retaliatory discharge would stifle this public policy).

174. See, e.g., *Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc.*, 160 F.3d 1048, 1049 (5th Cir. 1998) (“Under well-established Texas law, the employer may, absent a specific agreement to the contrary, terminate an employee for good cause, bad cause, or no cause at all.”).

175. See 47 U.S.C. § 230(a)(5) (2000) (codifying the congressional finding that “[i]ncreasingly Americans are relying on [the Internet] . . . for a variety of political, educational, cultural, and entertainment services”).

176. See *infra* Part V.D (propounding that the standard for judging employee bloggers must adapt to this contemporary communication device in order to realize its cultural and political advantages).

services and other interactive media.”¹⁷⁷ To accomplish this goal and to ensure the growth of the blogosphere as a contemporary communication tool, an evolving legal standard must apply to privately employed bloggers.

A. *Evolving Standards with which to Judge Contemporary Forms of Communication*

Legal standards with which to judge new forms of communication must evolve.¹⁷⁸ The evolution of judicial standards must “be responsive to the specific technology because dissemination and substantive content are not the same for all media.”¹⁷⁹ Traditional employment at-will principles have not been responsive to employee blogging and have not accommodated the features of Internet speech.¹⁸⁰ Therefore, the public policy exception to the at-will employment doctrine should be modified to include Internet speech by means of employee blogging.¹⁸¹ There is a pressing need to avoid private restrictions on blogging and to encourage the free flow of ideas and novel debate that blogging currently embodies.¹⁸² Otherwise, “[a]llowing

177. 47 U.S.C. § 230(b)(1) (2000).

178. See Gutman, *supra* note 36, at 170 (“Change must be accommodated in the law as it develops in the world.”).

179. Lee, *supra* note 9, at 67. “The doctrine of differentiation among media is important for legal issues surrounding the Internet because such technological differences are incorporated into First Amendment analysis, thus allowing a court to use its knowledge of the Internet to determine whether regulations unconstitutionally inhibit operation of the Internet.” *Id.*

180. *Id.* at 67–68 (commenting that the *Reno v. ACLU* Court was cognizant of the fact that low barriers of entry to the Internet are one of its key features and that, in finding the Communications Decency Act of 1996 (CDA) unconstitutionally broad, the Court preserved this characteristic); see also *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 594–95 (2002) (Kennedy, J., concurring) (“[E]ach mode of expression has its own unique characteristics, and each ‘must be assessed for First Amendment purposes by standards suited to it.’” (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975))).

181. See Gutman, *supra* note 36, at 170–72 (urging that protecting Internet speech with the shield of the public policy exception is a viable option because of the public’s interest in preserving the free exchange of ideas and debate that blogging encompasses). To reiterate, this Comment argues that only Internet speech conducted by employees who blog on their own time and on their personal computers should be protected by the public policy exception. Indeed, privately employed individuals who blog while at work and on company computers may be rightfully terminated on the grounds of decreased productivity, or—with an appropriate company policy—on the grounds of misuse of company property. See Karen E. Klein, *When an Employee Blogs About Work*, BUSINESSWEEK.COM., Feb. 8, 2007, http://www.businessweek.com/smallbiz/content/feb2007/sb20070207_078291.htm?chan=technology_technology+index+page_internet (counseling employers to establish policies to deal with employees who blog at work or use company resources).

182. See Lee, *supra* note 9, at 81–82 (cautioning that increasingly stringent regulation of Internet speech could compromise “[t]he freedom and autonomy that the

private entities [such as private employers] to undermine blogging and other new speech technologies may be seen as democratically destructive” because it would harm the First Amendment notion of a marketplace of ideas.¹⁸³

The general trend among the states has been away from a strict application of the at-will employment doctrine, and modern courts increasingly utilize exceptions to the doctrine.¹⁸⁴ Although certain blogging activities do not deserve protection,¹⁸⁵ generally speaking, blogging should find its niche within the public policy exception.¹⁸⁶ Blogging could be protected through three traditional categories of the public policy exception: (1) whistleblowing; (2) refusal to engage in illegal conduct; and (3) the exercise of a statutory right.¹⁸⁷ Further, in the event that the traditional exceptions fail to protect at-will bloggers, the public policy exception should be expanded in order to avoid inhibiting the blogosphere’s growth.¹⁸⁸

B. Application of the Traditional Categories of the Public Policy Exception to Protect Bloggers

Private employees who post material that is only tangentially related to their employment on their personal blogs, during their personal time, and with their personal equipment, should be shielded from employer retaliation by the traditional categories of the public policy exception to the at-will

current Internet user enjoys”).

183. See Gutman, *supra* note 36, at 169–70.

184. See Markowitz, *supra* note 128, at 305 (highlighting the movement away from “the unfettered right of the employer to terminate employees that has historically characterized the at-will relationship”).

185. See, e.g., Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc., No. 0425, 2006 WL 37020, at *10 (Pa. Com. Pl. Jan. 4, 2006) (explaining why certain speech does not deserve protection). Indeed,

[D]efamatory and libelous speech enjoys no Constitutional protection, as “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from this is clearly outweighed by the social interest in order and morality.”

Id. (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

186. See Gutman, *supra* note 36, at 169–70 (reasoning that, as a new form of public discourse, Internet speech—and more particularly, blogging—demands protection); Kim, *supra* note 1, at 724–25 (advocating an expansion of the public policy exception to cover employee privacy).

187. See *infra* Part V.B, D (applying the public policy exception to blogging employees and arguing for a broadening of this exception to allow for blogging’s growth).

188. See Kochan, *supra* note 105, at 100 (“One of the most modern developments and revolutions in the dissemination of information, news and opinion is the [I]nternet weblog . . .”).

employment doctrine.¹⁸⁹ Of the traditional contexts in which the exception is applied, bloggers should assert that retaliatory dismissal occurred in response to their use of a personal blog to communicate whistleblowing, their refusal to engage in illegal activities, or their exercise of a statutory right.

1. *Whistleblowing and Refusal to Engage in Illegal Activities Exceptions.* When an employee utilizes his personal blog to communicate information about corporate fraud or misbehavior, his actions can be construed as whistleblowing.¹⁹⁰ As a result, the blogger should be protected from retaliatory discharge.¹⁹¹ Moreover, a blogger can be protected even if he or she blogs anonymously.¹⁹² A similar situation may arise if an employee blogs about his reluctance to participate in an unlawful act at the direction of his supervisor. In addition, the justifications applicable to whistleblowing readily apply in this second context.¹⁹³ Thus, bloggers may find protection from retaliatory dismissal under either the whistleblowing or the refusal to engage in illegal activities exceptions.¹⁹⁴

2. *Exercise of a Statutory Right Exception.* Bloggers may also seek protection from retaliatory discharge by claiming that

189. See Gutman, *supra* note 36, at 172 (“[I]nternet speech is an important concern and one that may comport with the public policy exception—that [I]nternet speech is of such value to the public that restrictions on it by employers might be inappropriate.”); Nathan Fennessy, Comment, *Bringing Bloggers into the Journalistic Fold*, 55 CATH. U. L. REV. 1059, 1061 (2006) (noting that as Americans seek the Internet and blogs as their news source, “the law should extend the protections granted to the established media to the ‘journalists’ of the new media”); Stafford, *supra* note 6 (“It’s the arena of personal-time, personal-computer blogging that’s creating the shakiest ground for both employers and employees.”).

190. See Gordon & Franklin, *supra* note 53 (discussing the procedure a blogger should follow in order to succeed on a whistleblowing claim).

191. See ESSENTIAL FACTS: EMPLOYMENT, *supra* note 58 (cautioning that dismissal for blogging about alleged unlawful company behavior could violate whistleblowing laws and bring unfavorable publicity to the company).

192. See Konrad S. Lee, *Hiding from the Boss Online: The Anti-Employer Blogger’s Legal Quest for Anonymity*, 23 SANTA CLARA COMPUTER & HIGH TECH L.J. 135, 156 (2006) (suggesting that “one of the protections that may be extended to the blogger whistleblower is the preservation of anonymity status through application of whistleblower statutes”).

193. See *supra* notes 157–165 and accompanying text (commenting that the refusing to engage in illegal activities and whistleblowing exceptions encompass important public interests worthy of protection from retaliatory discharge).

194. See Gutman, *supra* note 36, at 164 (observing that the whistleblowing exception may provide protection to bloggers from retaliatory dismissal); see generally Debra Drew Cyranoski, Comment, *The Model Employment Termination Act: A Welcome Solution to the Problem of Disparity Among State Laws*, 37 VILL. L. REV. 1527, 1544–45 (1992) (illustrating that protection from dismissal would be given, for example, to those employees who refuse to violate consumer credit and protection laws and state food labeling laws).

blogging is an exercise of their First Amendment right to freedom of speech and, therefore, falls within the public policy exception to the at-will employment doctrine.¹⁹⁵ This argument may be complicated by the fact that the First Amendment does not necessarily protect private employees; rather, its protections are intended to monitor the activities of state and public employers.¹⁹⁶ As a result, a blogging private employee likely has a greater hurdle to clear when asserting this exception than a public employee. However, if a court considers the policies underlying the First Amendment protection afforded to anonymous Internet speech in conjunction with the public interest in fostering blogging, even a private employee may find reprieve within this exception—a privately employed blogger could assert that his blog is supported, not only by the constitutional right to free speech, but by the strong public interest in the development of blogging as a modern communication device. Thus, at-will employees should be able to find protection in an expanded public policy exception that considers the rights allocated to anonymous Internet speech in combination with the public interest in cultivating modern communication devices. Before elaborating on the rights guaranteed to anonymous Internet speech, this Comment explains how the remaining two common law exceptions provide only a modest amount of protection to privately employed bloggers.

C. *The Inadequacies of the Good Faith and Fair Dealing Exception and Implied Contractual Obligation Exception in Protecting Bloggers*

The remaining two common law exceptions to the employment at-will doctrine offer only “weak” protection to bloggers.¹⁹⁷ The common law exception of good faith and fair dealing has a limited scope and minimal applicability.¹⁹⁸ To avoid liability, an employer must simply treat the dismissed employee fairly by providing the “promised benefits.”¹⁹⁹ This exception has

195. U.S. CONST. amend. I.

196. See *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451, 461–62 (1951) (emphasizing that the First Amendment does not restrict private persons).

197. Gutman, *supra* note 36, at 159–60 (“[T]he exceptions for good faith and fair dealing and for implied contractual obligations are weak bases to use in attacking a blogger’s discharge.”).

198. See Teresa A. Cheek, *The Employment-At-Will Doctrine in Delaware: A Survey*, 6 DEL. L. REV. 311, 324–29 (2003) (observing the “very limited” adoption of the good faith and fair dealing exception in case law).

199. Markowitz, *supra* note 128, at 312–13 (revealing that the good faith exception will not impose a requirement on an employer to articulate a good faith reason for an at-

only been applied when an employer refuses to distribute compensation²⁰⁰ or dismisses a long-time employee without reason.²⁰¹ Employers can terminate an employee for reasons “other than good cause” and easily escape the application of this exception, as long as they mask their true retaliatory purpose and superficially follow through on their promises.²⁰² Unless the employer possesses a blatantly clear ulterior motive, an employee will find great difficulty in persuading the courts to utilize this exception in a blogging setting.²⁰³ Consequently, blogging employees are not likely to be protected by this exception.

Additionally, the common law implied contractual obligation exception will likely provide little relief to bloggers.²⁰⁴ Absent sufficient indication, in employee handbooks or discussions during contract negotiations, of the employer’s prior acceptance of blogging, the blogger’s claim of unlawful discharge would probably not succeed.²⁰⁵ Only in the event that an employer is aware of an employee’s blog prior to hiring the individual and takes no steps to limit the activity, might an employee prevail in his wrongful discharge claim.²⁰⁶ Therefore, like the good faith and fair dealing exception, the contractual obligation exception does not represent the most formidable defense against termination

will employee’s dismissal).

200. See, e.g., *Devlin v. WSI Corp.*, 833 F. Supp. 69, 77–78 (D. Mass. 1993) (finding that a discharged employee may properly assert a claim based on bad faith if his dismissal was effectuated with the intent “to deprive him of benefits earned but not received”).

201. See, e.g., *Cleary v. Am. Airlines, Inc.*, 168 Cal. Rptr. 722, 729 (Ct. App. 1980) (holding that termination of a worker who had been employed at the company for eighteen years and without cause offends good faith and fair dealing covenants in employment contracts); see also *Foley v. Interactive Data Corp.*, 765 P.2d 373, 401 n.42 (Cal. 1988) (“*Cleary* and its progeny accordingly are disapproved to the extent that they permit a cause of action seeking tort remedies for breach of the implied covenant.” (citation omitted)).

202. See *Gutman*, *supra* note 36, at 160 (describing how an employer can escape a wrongful discharge claim by “com[ing] up with *any* valid termination decision” (emphasis added)).

203. *Id.* (“It is fairly clear that as a blogger, an employee cannot successfully claim this exception, except possibly in a situation where a long-term employee’s new blog is used as a stand-in or makeweight for the employer’s obvious and impermissible ulterior motives.”).

204. See *Gely & Bierman*, *supra* note 79, at 1092–93 (rejecting the implied contractual obligation exception as a viable source of protection for bloggers because employer guidelines on the issue may not be established).

205. *Id.*

206. See *Gutman*, *supra* note 36, at 160 (arguing that employees who create blogs after being hired would not be protected because the employer never had the opportunity during the hiring phase to fashion a pre-employment agreement governing blogging activities).

by at-will employers.²⁰⁷ However, as the following sections will illustrate, an expansion of the public policy exception, which accounts for anonymous Internet speech rights and the growing interest in blogging as a communication device, will provide adequate protection to privately employed bloggers.

D. Expanding the Public Policy Exception to Account for Rights Accorded to Anonymous Communications Conducted over the Internet

Despite the limitations on a private employee's freedom of speech, private employees must be afforded wider protection within the public policy exception due to the unique nature of the blogosphere. Blogging occurs solely in one medium—over the Internet.²⁰⁸ In addition, many bloggers employ pseudonyms in place of their real names.²⁰⁹ The First Amendment protects both communications conducted anonymously and over the Internet from infringement.²¹⁰ Abridgement of these two areas, when applied to blogging employees, could cripple the blogosphere.²¹¹ The following section illustrates the courts' practice of protecting communications that are conducted anonymously and through the Internet.

1. A History of Anonymous Internet Speech Protection. Anonymous communication is deeply rooted in the American tradition, beginning with the Federalist Papers.²¹²

“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.” The [I]nternet is simply a similar modern distribution system. Some bloggers expose themselves yet many operate by pseudonyms and a shield of anonymity. Either way, they are information providers²¹³

207. See, e.g., *McDermott v. Nat'l Shipping Co. of Saudi Arabia*, No. 00-2358, 18 Fed. App'x. 120, 121 (4th Cir. Sept. 7, 2001) (demonstrating that a claim for breach of an employment contract is difficult to establish by an at-will employee).

208. See Flanagan, *supra* note 10, at 396 (defining a blog as a “website” and as the joining of the words “web” and “log”).

209. See *supra* notes 40–42 and accompanying text (discussing the common feature of blogging under an assumed name and providing examples of such).

210. See Lee, *supra* note 54, ¶ 25–26 (2006) (summarizing Supreme Court interpretations of freedom of speech in the anonymous authorship and Internet settings).

211. See Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 188 (suggesting that the costs of regulation should be evaluated in light of the benefits of the amateur journalism created by blogging).

212. See Kochan, *supra* note 105, at 100–01 (recognizing The Federalist Papers as one of “the most revered and sustaining successes in ‘pamphleteering’ in America”).

213. *Id.* at 101 (quoting *Talley v. California*, 362 U.S. 60, 64 (1960)).

As a result, it should not come as a surprise that the Supreme Court awarded protection to anonymous speech under the First Amendment in *McIntyre v. Ohio Elections Commission*.²¹⁴ This landmark decision noted that, while anonymous speech may be abused, it “exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.”²¹⁵

Soon thereafter, the Supreme Court extended freedom of speech privileges to Internet communications in *Reno v. ACLU*.²¹⁶ The Court once again referenced the pamphleteer image in describing the vastness of the Internet.²¹⁷ The Court concluded that “compelled identification [of anonymous authors] can have a chill[ing effect] on freedom of speech and expression” and that “the vast democratic forum of the [I]nternet’ would be stifled if users were unable to preserve their anonymity online.”²¹⁸ Lastly, while acknowledging the vital interest of protecting minors, the Court stressed that it could not promote that purpose at the expense of freedom of speech.²¹⁹ In light of the established protection of anonymous speech, including anonymous Internet speech, blogging should not cower to stringent application of the employment at-will doctrine.²²⁰

214. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–43 (1995). The case decided whether an Ohio statute prohibiting distribution of anonymous campaign materials infringed upon free speech rights. *Id.* at 336. The Court found the statute unconstitutional because it impaired the plaintiff’s ability to distribute material opposing a school tax levy. *Id.* at 346–49.

215. *Id.* at 357.

216. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868–70 (1997). This case involved the Communications Decency Act, which prohibited the transmission of harmful and inappropriate material over the Internet to minors. *Id.* at 858–61. The Court found that the statute was overly broad and violated the First Amendment because it precluded access to a large amount of material that adults have a right to view. *Id.* at 874–77.

217. *See id.* at 870 (“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”).

218. *Id.* at 868; *see also* Lee, *supra* note 54, ¶ 26–27.

219. *Reno*, 521 U.S. at 877 (indicating that the statute’s limitless terms, “patently offensive” and “indecent,” would have the unintentional side effect of excluding nonpornographic information with educational value from adults who possess the right to access to such material).

220. *See* Hudson, *supra* note 70, at 129, 132–33 (noting several judges and authors who have advocated protection of Internet anonymity); *see also* *Reno*, 521 U.S. at 854–55 (justifying a lower level of scrutiny for Internet communications than traditional media, such as radio and television, because “the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial”).

2. *The Contrasting Standards of Anonymous Internet Speech and Employment-At-Will.* Applied in a blogging context, the rights afforded to anonymous speech conflict with employment-at-will. Because privately employed at-will workers may be fired with or without cause at anytime, many bloggers run the risk of being terminated as a result of their anonymous blogging activities.²²¹ In contrast, as *McIntyre* and *Reno* illustrate, nondefamatory and anonymous Internet speech is protected in order to promote freedom of speech.²²² In the struggle between employment at-will and the freedom of speech, the employment at-will doctrine seems to unjustly tip the scales in favor of the employer.²²³ This commonly leaves the blogger with a choice: remove the personal blog altogether, or continue the blog at the risk of unemployment.²²⁴ Such unbalanced application of these two battling doctrines resembles a pendulum that continually swings back in the employer's favor, leading to inequitable results.

At-will employees who disseminate nonlibelous information through blogging should not be terminated simply because their employers disagree with what they post in their blogs.²²⁵ As recognized in *Reno v. ACLU*, the important American ideals embodied in the freedom of speech must be protected even if other genuine concerns, such as avoiding harm to minors, exist and infringe upon freedom of speech interests.²²⁶ Similarly, the right to maintain an Internet blog should triumph over other interests, such as those of at-will employers, if the employer's actions infringe upon the employee's first amendment rights.²²⁷

Congressional policy recognizes that "[t]he Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and a myriad of avenues for

221. See, e.g., Stafford, *supra* note 6 (inferring that if an employer discovers an at-will employee's blog and dislikes what is written, the employee may be fired).

222. See *supra* notes 212–20220 and accompanying text (reproducing the rationale in extending speech freedoms to the Internet).

223. See *supra* Part II.C (recounting several incidents where the employment at-will doctrine has triumphed over the freedom of speech rights of bloggers, ultimately resulting in the at-will blogger's termination).

224. See, e.g., *supra* text accompanying notes 97–101 (chronicling the events of Mark Pilgrim's termination).

225. See Laurie Arendt, *Personal Expression Online Versus Job Security*, CORP. REP. WIS., Aug. 2006, at 10 (recognizing that attempts to terminate an employee based on embarrassing but lawful material on an employee's blog may lead to potential legal problems).

226. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874–77 (1997) (striking down the CDA for its sweeping language covering Internet transmissions).

227. See Ribstein, *supra* note 211, at 188 (addressing "the risk that regulation will reduce the benefits of individuals' unfiltered participation in public debate").

intellectual activity.”²²⁸ Allowing employers to abridge employee blogging directly contradicts this congressional intent.²²⁹ Additionally, adapting the public policy exception to accommodate Internet speech interests would comply with the Supreme Court’s recognition that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”²³⁰

Furthermore, if “our society accords greater weight to the value of free speech than to the dangers of its misuse,” then we should not allow the at-will employment doctrine to trump constitutional guarantees of free speech.²³¹ The fear of potential harm from misuse of blogging does not justify broadly sweeping restrictions on its use by the privately employed population.²³² The benefits of blogging as a forum for debate and a mechanism for novel thinking outweigh the costs perceived by overly cautious employers.²³³ Therefore, this imbalance must be corrected by broadening the public policy exception to protect the tradition of anonymous communication.²³⁴ In this manner, private employees will no longer fear job loss for engaging in a legal, off-duty activity, thereby thwarting any reduction of the blogosphere.²³⁵ Moreover, society would be able to achieve the benefits of blogging as an environment for debate, as a literary device, and as a strategic business tool.²³⁶ In addition to protecting the important societal interest inherent in anonymous

228. 47 U.S.C. § 230(a)(3) (2000).

229. See *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 605 (2002) (Stevens, J., dissenting) (noting that “[t]he Internet presents a unique forum for communication” and that abridging the freedom of Internet speech will necessarily inhibit its development).

230. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969).

231. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

232. See Ribstein, *supra* note 211, at 188 (cautioning against “the cost of over deterring speech by bloggers” when considering “any benefits of regulation” on employee blogging).

233. See *id.* (“Regulation may sharply reduce amateur journalism’s comparative advantage over professional journalism in allowing the expression of diverse views and the dissemination of specialized information.”).

234. See Gutman, *supra* note 36, at 186 (predicting that Internet law will shift the current standards of employment law). “Each new medium, as it was introduced, changed the balance of power in the constitutional equation involving the First Amendment. Every advance in mass communication has enhanced the immediate and widespread dissemination of information . . .” *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 753 (E.D. Mich. 1999).

235. See Ribstein, *supra* note 211, at 195–212 (listing the numerous benefits of blogging and arguing that regulation could have an improper deterrent effect on the activity and stifle its advancement).

236. See *supra* notes 104–25 and accompanying text (discussing the advantages of blogging meriting a shift in the public policy exception toward increased protection for bloggers).

Internet speech rights, the next section asserts that blogging should fall within the public policy exception because uninhibited growth of the blogosphere garners public interest in furthering novel methods of communication.

E. Establishing a New Niche within the Public Policy Exception that Embraces the Growth of the Blogosphere

In addition to freedom of expression, the public policy exception should also accommodate the fact that promoting the growth of blogging is strong public policy.²³⁷ The growth of the blogosphere is in the public interest for several reasons. To begin, blogging is a phenomenon that is an increasingly and extensively used international communication device.²³⁸ As other countries seize upon this opportunity to strengthen the advancement of their intellectual community, poor policy choices may cause America to fall behind. If more employers institute policies banning their employees from blogging, they will remove much of the privately employed population from this activity altogether.²³⁹ In essence, the remaining population of bloggers will shrink to a far smaller number, leading to a curtailment in the use of this communication tool.²⁴⁰ The employers that fear the potential harms of employee blogging effectively impute their concerns onto society and reduce the expanse of the blogosphere.²⁴¹

The provision of information is fundamental for the growth and sustenance of any society, and blogging represents the ideal manner in which this may be accomplished.²⁴² If America desires to remain politically progressive, blogging represents a vital opportunity to encourage freethinking and, thus, is of paramount public interest.

237. See 47 U.S.C. § 230(a) (2000) (listing congressional findings and policies favoring the expansion of technologies such as blogging, which increase “political discourse, . . . cultural development, and . . . intellectual activity”).

238. See Robben, *supra* note 15, at 43 (observing the rapid expansion of the blogosphere).

239. See Laura DiBiase, *Are Your Clients Smear-Savvy?*, 18 AM. BANKR. INST. J. 22, 22–23 (1999), available at 18-9 ABIJ 22 (Lexis) (warning employees against maintaining a blog because employers are watching and retain the right to terminate their employment).

240. See Beal, *supra* note 29 (“[A]dvocates and impartial observers alike call blogging a mushrooming new arm of the media.”).

241. See *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 612 (2002) (Stevens, J., dissenting) (stating that the community who finds certain material offensive “not only rids itself, but the entire Internet of the offending speech”).

242. See Kochan, *supra* note 105, at 100 (“The blogosphere is truly a transformation and a popular revolution in the provision of information. Information flow is a highly valuable concept”); Lee, *supra* note 9, at 87 (“The Internet has great potential as a new frontier in public discourse.”).

However, if companies follow the critics arguing for the abridgment of blogging, then this innovative communication tool will be cut down to the detriment of society.²⁴³

From a social policy point of view, because blogging functions as a tool for remaining connected with one another, the public should embrace this new technology—instead of fearing it.²⁴⁴ Fostering the proliferation of the blogosphere promotes significant public policy because the blogosphere “serves as an elimination of isolation and facilitator of association.”²⁴⁵ In the vast landscape of the Internet, blogging retains a personal characteristic by its very nature.²⁴⁶ Many blogs are about the personal thoughts and concerns of the author.²⁴⁷ Hence, blogging can bring people together in a manner that no traditional form of communication can achieve.²⁴⁸ At the very least, technology has been evolving towards the delivery of products that run faster or provide a service instantaneously to meet the demanding needs of consumers.²⁴⁹ Likewise, the immediate connectivity and publishing capabilities of blogging make it a desirable mode of communication.²⁵⁰ Thus, the political and social advantages of blogging to society warrant protection from the employment at-will doctrine. This protection can be achieved by concluding that blogging falls within the public policy exception to the at-will employment doctrine.

VI. CONCLUSION

The blogosphere possesses the potential to become a powerful communication device in the modern era.²⁵¹ However, employers discourage the privately employed population from participating in blogging by terminating at-will employees who

243. See Ribstein, *supra* note 211, at 211–12 (disagreeing with critics who call for regulation because it will lead to the “inhibition of efficient technological evolution”).

244. See Kochan, *supra* note 105, at 103 (noting that blogging provides a venue to forge new relationships and to “unit[e] people around common causes”).

245. *Id.* at 101.

246. See Tara Bahrapour, *On the Web, ‘Dear Diary’ Becomes ‘Dear World,’* WASH. POST, Jan. 2, 2007, at B2 (equating a blog to an online diary).

247. See *id.* (reproducing the personal entries made by many bloggers).

248. See Kochan, *supra* note 105, at 101 (“The blogosphere brings strangers and friends alike together for discussion and reflection.”).

249. See Alf Hermida, *Las Vegas Hosts Digital Nirvana*, BBC NEWS, Jan. 3, 2006, <http://news.bbc.co.uk/1/hi/technology/4577142.stm> (describing the latest gadgets of 2006 at the Consumer Electronics Show as providing consumers with convenience and fast technology).

250. See Lee, *supra* note 9, at 79 (“First Amendment protection of the Internet is certainly vital to maintaining the current diversity of online discussion.”).

251. See Klosek, *supra* note 121 (observing that “[b]logging has quickly emerged as a powerful tool of the modern enterprise”).

blog.²⁵² Removing the privately employed population from blogging “threatens to torch a large segment of the Internet community.”²⁵³ In the race to impede at-will employees from blogging, employers overlook the advantages that blogging provides to society.²⁵⁴

The dominance of the at-will employment doctrine contradicts the American tradition of protecting anonymous Internet speech.²⁵⁵ Additionally, the legal standards applicable to blogging must evolve to accommodate its distinctive attributes because “[t]he Internet is a unique and wholly new medium of worldwide human communication.”²⁵⁶

Protection lies within the public policy exception to employment at-will, in both the traditional contexts of the exception, such as whistleblowing, refusal to engage in illegal activities, and exercise of a statutory right,²⁵⁷ and in the expanded version that accommodates Internet speech rights.²⁵⁸ Uninhibited growth of the blogosphere is of paramount importance to political and social interests; thus, blogging should acquire a new niche within the public policy exception’s borders.²⁵⁹ In this manner, expansion of the public policy exception will harmonize the inconsistency that exists between the employment at-will doctrine and speech interests and will thwart the decline of the blogosphere.

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252. See Claire Murphy, *Blogging*, PERSONNEL TODAY, Mar. 21, 2006, at 26 (crediting the United States with beginning the trend of firing employees for blogging).

253. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 882 (1997).

254. See *supra* notes 105–25 and accompanying text (listing three advantages of blogging as a forum for debate, a platform for refining literary devices, and a channel to connect with customers, promote company strategy, or spread news about forthcoming products).

255. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (“Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent.”).

256. *Reno*, 521 U.S. at 850 (internal quotations omitted).

257. See *supra* Part V.B (elaborating further on the traditional contexts of the public policy exception and how they apply to protect at-will employees from termination).

258. See *supra* Part V.D (arguing that the public policy exception should include free speech interests as recognized by the Supreme Court).

259. See *supra* Part V.E (defining some of the political and social interests, such as the need for the United States to strengthen its intellectual community, to remain politically progressive, and to facilitate association among its citizens).