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Employee Privacy, Speech and Blogs

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[Note: Supporting materials for this session include reprints of articles as noted below.]

I. Introduction and Overview. In 1931, George Bernard Shaw is said to have remarked about the United States:

> *An American has no sense of privacy. He does not know what it means. There is no such thing in this country.*[1]

Yet, the "Right to Privacy" as a formal legal concept is not novel. It predates Mr. Shaw's assessment, as privacy entered the popular American vocabulary when Attorneys Samuel Warren and Louis Brandeis authored an article for the HARVARD LAW REVIEW in 1890 entitled *The Right to Privacy*, which urged creation of privacy as a right to be protected by law.[2] After invasion of privacy gained acceptance in tort law,[3] notions of individual privacy found protection through court decisions,[4] express constitutional provisions in some states, and legislation, though such protections often applied in limited contexts.[5]

Privacy as a primary legal concept has not developed uniformly or universally, nor has it proceeded without controversy. By and large, though, privacy is now an accepted part of American jurisprudence. Indeed, many jurisdictions have extended individual privacy beyond residential environments so that it extends to workplaces in both the public and private sectors. Accordingly, a number of rules, created by both court decision and legislative enactment, have since sought to establish a definable line between legitimate employer interests and employee privacy.[6]

The public employment arena, though, must be examined from the additional perspective that the employer is deemed to be an arm of the state. Therefore, public employees are accorded

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[1] BARTLETT'S FAMILIAR QUOTATIONS 571 (16th Ed. 1992).
[2] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See also Lane, THE NAKED EMPLOYEE, American Management Association (2003) at 9.
[3] The Restatement of Torts contains four categories of invasion of privacy: (1) intrusion upon seclusion, (2) appropriation of identity, (3) disclosure of private facts, and (4) publicity that places another in a false light. McNulty, *Who is Watching Your Keystrokes?* II J. HIGH TECH. L 101 (2002) at 125.
[4] Though no provision of the Federal Constitution expressly protects individual privacy, the United States Supreme Court has long accorded privacy the status of Constitutional protection.
[5] The bedroom, for example. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[6] According to McNulty's article (cited at note 3), as of 2002, twenty-five states have statutes or provisions within their state constitutions protecting the right to privacy.

additional protections based on the Bill of Rights to the United States Constitution. Of course, these first ten amendments seek to protect individuals from an over-intrusive government, and those protections apply to state and local governments by virtue of the Fourteenth Amendment. Public entities as employers do not lose their status as governmental entities. Hence, public employees have been found to have additional protections beyond the rights of workplace privacy that may exist for both public and private employees. Among these rights are those of freedom of speech, religion, and assembly afforded by the First Amendment, and protections from unreasonable searches and searches and self-incrimination established under the Fourth and Fifth Amendments. Several state constitutions provide similar protections from governmental intrusion, but the materials for this session generally focus on federal constitutional concerns.

Constitutional protections constitute a floor – a minimal level of protection. Statutes such as the federal anti-discrimination laws[7] restrict employer actions to control the workplace. State legislatures have enacted similar laws and some have broader reach than federal laws.[8] In addition, states have enacted whistleblower protection laws that may protect employees from adverse consequences for speaking out on matters of public concern where (as discussed in the section of these materials on employee free speech) constitutional protections may not exist.[9]

The topics addressed in this session are (1) privacy in the public employment workplace, (2) public employee free speech, and (3) blogging by public employees. The latter two of these topics are addressed in copies of articles I have authored for the New Hampshire Public Risk Management Exchange journal of public risk management entitled AWARENESS IN ACTION. Copies of these articles are included in the handouts for this session along with a copy of an article that I wrote for the International Municipal Lawyers Association's MUNICIPAL LAWYER magazine on monitoring employees in the public workplace.

II. Updates and Issues of Current Concern.

A. Workplace Privacy. As discussed in the introduction and overview, governmental employees enjoy some additional privacy protections beyond those established by common law and express constitutional or statutorily established rights of privacy. The modern day formulation of a governmental employer's ability to search an employee's workplace depends to a large extent on the employee's "reasonable expectations" of privacy. Perhaps foremost in consideration of such an expectation is the existence of search-authorizing regulations, while two other major factors are the particular area searched[10] and the nature of the governmental workplace.[11]

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[7] Examples include the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. Federal law also regulates lie detector tests for employees, but that law does not apply to local government employees. Although religion and creed are two of the criteria protected under federal law, those issues are addressed only tangentially in these materials.

[8] New Hampshire's human rights law, for example, does not limit age protection to those over 40 as does federal law and includes sexual preference as a protected classification.

[9] Those interested in further reading on Whistleblower protection may wish to read *Whistleblowing in the Public Sector Workplace: From Snitch to Saint?* written for the International Municipal Lawyers Association (IMLA) magazine, MUNICIPAL LAWYER, vol. 47, No. 3, May/June 2003. An adaptation of that article appears in AWARENESS IN ACTION: THE JOURNAL OF NEW HAMPSHIRE PUBLIC RISK MANAGMENT, vol. #3, 2006.

[10] A search of an employee cubicle accessible by others is deemed less intrusive than one that looks into an employee's purse, coat, or even a desk drawer.

[11] *Warrantless Search by Government Employers of Employee's Workplace Locker, Desk and the Like, as a Violation of Fourth Amendment Privacy Rights – Federal Cases*, 91 ALR Fed 226.

The primary federal case on workplace privacy and searches is *O'Connor v. Ortega*,[12] 480 U.S. 709 (1987), after which standards regarding a governmental employer's workplace search are generally governed by two considerations:

- The employee's reasonable expectation of privacy; and
- Whether the search was reasonable under the circumstances.

These standards apply to searches conducted for both non-investigatory purposes and investigation of employee misconduct.

With regard to workplace searches, relevant factors in determining the validity of a search include:

- Abandonment of privacy protection, though decisions narrowly construe an employee's actions as forsaking privacy protection (such as tossing items in trash);
- Property rights – generally, the deciding factor relates not to any property or possessory interest in property but, rather, is decided on expectation of privacy factors;
- Existence, absence and clarity of search-authorizing policies or regulations;
- Purpose of the search – criminal or civil in nature; and
- Special factors, including nature of the workplace (e.g., medical, law enforcement).

Several state court rulings on this subject may be seen as being more restrictive of employee rights than federal court rulings, as they inquire also as to whether the privacy right being asserted is one that society, as a whole, is prepared to recognize as reasonable.[13] As a general rule, employees will bear the burden of demonstrating a reasonable expectation of privacy, but governmental employers may enhance their status considerably through adoption and implementation of policies realistically defining limited privacy expectations in the workplace.

Workplace systems and areas where policy adoption can assist in limiting employee claims of privacy expectations include: computer systems, telephone systems, limited personal areas, work-related use of employee personal systems such as a home computer, and generation and retention of employment-related business records.

Workplace monitoring also may be viewed as a term or condition of employment. As such, and depending on jurisdictional laws, employer actions, such as installing video cameras, may be subject to collective bargaining.[14]

Employee surveillance in a collective bargaining context raises additional concerns. Management surveillance of employees may be further circumscribed when it is related to union activities, such as organizing campaigns. In those states that recognize collective bargaining for public employees, many have laws that make it an unfair labor practice or otherwise illegal for an employer to interfere with the right of public employees to unionize. Such statutes often contain language similar to the provisions of the National Labor Relations Act as they apply to the private sector. Section 8(a)(1) of the NLRA states that "[i]t shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . ." 29 U.S.C. § 158(a)(1).

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[12] The employee, a psychiatrist, was found to have had a reasonable expectation of privacy in his office, desk, and file cabinet, as those were not shared spaces, had been exclusively his for 17 years, contained personal items, and no personnel policies had been adopted regarding workplace privacy.

[13] *Employee Expectations of Privacy in the Workplace*, 18 ALR 6th 1.

[14] E.g., *Brewers and Maltsters, Local Union No. 6 v. NLRB and Anheuser-Busch, Inc.*, 414 F.3d 36 (2005).

According to the National Labor Relations Board, Section 8(a)(1) makes observation of union activity unlawful, "if the observation goes beyond casual and becomes unduly intrusive."[15] However, "management officials may observe public union activity, particularly where such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless officials do something out of the ordinary."[16]

"The test for determining whether an employer engages in unlawful surveillance or whether it creates the impression of surveillance is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act."[17]

The NLRB refined the objective test for surveillance by announcing that, "[i]ndicia of coerciveness include the (1) duration of the observation, (2) the employer's distance from its employees while observing them, and (3) whether the employer engaged in other coercive behavior during its observation."[18]

In summary, it is well to remember that privacy concerns arising from the evolving concepts of individual privacy (including workplace privacy) and protections from unreasonable searches in a public workplace setting overlap with those arising under free speech (and freedoms of assembly and religion). Recent developments in public employee speech and blogging are addressed in the next two segments of this paper.

B. Employee Free Speech. In 2006, the U.S. Supreme Court decision in *Garcetti v. Ceballos*[19] was greeted in some sectors with great alarm, while others yawned in disinterest. Those in the former category saw the decision as yet another conservative roadblock to asserting individual freedom claims in federal courts. Those in the latter category viewed the decision as merely being consistent with the *Pickering-Connick* test (named for opinions issued in 1968 and 1983[20]) that has governed public employee expression for some forty years. The full effects of *Garcetti* will become evident with the benefit of analysis of ensuing court decisions, particularly those issued by the federal circuit courts of appeal. Accordingly, this supplement looks at some recent decisions involving public employee speech.

First, though, a very brief review of public employee free speech rights is in order, with the understanding that a fuller discussion of the issues is presented in the article *Public Employees and Constitutional Free Speech: Maybe a Little Less Free* included in the handouts for this session.

From a federal perspective, public employee free speech rights truly emerged with the *Pickering-Connick*, which held that public employees had First Amendment protections for speaking out as citizens on matters of public concern, subject to an employer's interest, as an

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[15] *Kenworth Truck Co., Inc.*, 327 N.L.R.B. 497, 501 (1999); *see also Cal. Acrylic Indus. v. NLRB*, 150 F.3d 1095, 1099-1100 (9th Cir. 1998) (noting unlawful surveillance tends to create fear of reprisal and chill the exercise of organizing rights).
[16] *Metal Industries, Inc.*, 251 N.L.R.B. 1523 (1980).
[17] *The Broadway*, 267 N.L.R.B. 385, 400 (1983).
[18] *Aladdin Gaming, LLC,* 345 N.L.R.B. No. 41 at 2, 178 L.R.R.M. (BNA) 1288 (2005). Cited in *Local Joint Executive Board of Las Vegas; Culinary Workers Union Local #226, and Bartenders Union Local 165, AFL-CIO v. National Labor Relations Board*, __ F. 3rd ___ (9th Cir. January 28, 2008).
[19] 547 U.S. __, 129 S.Ct. 1951 (2006).
[20] *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

employer, in promoting the efficiency of the public services performed through its employees. In *Garcetti*, the U.S. Supreme Court said that speech made by public employees as part of their official duties is not made as citizens speaking under the First Amendment. In other words, such speech does not prevent managerial discipline based on employee expression that is made pursuant to their official responsibilities.

Given the widespread availability of whistleblower protection laws, any narrowing of employee free speech protection by *Garcetti* may have little practical impact. Of course, not all such laws may be applicable in all instances of employee speech made in the course of duty. Yet, the potential for protection afforded by those laws should not be underestimated.

When whistleblower laws do not protect "official speech," if that speech has the effect desired by the speaker, it may run afoul of the adverse effect on workplace efficiency prong of the traditional *Pickering-Connick* test. A key concept for public employers is to focus on policies and actions – not on the exercise of speech – but instead on counterproductive effects in the workplace. An effective policy on official speech does not focus on words alone, but also should encourage employees to address concerns internally.

Thus, successfully addressing the issue of employee speech is not merely a matter of "muzzling" dissent, which might suppress official speech, but easily can lead to dissension, dissatisfaction, and morale issues. Effective procedures to allow employees to address concerns in a meaningful manner should accompany efforts to address employee speech restrictions.

Against that background, here are some short summaries of only a sampling of the post-*Garcetti* decisions that have been issued in the last year or so.

Blackman v. NYC Transit Authority, 491 F.3d 95 (2nd Cir. 2007). Blackman, a NYC Transit Authority employee, challenged, as a violation of his First Amendment right of free speech, his dismissal for commenting that he thought two Transit Authority supervisors who had recently been murdered "deserved what they got" for getting another transit authority employee fired.

Blackman had worked for the Authority for 15 years and was an outspoken union advocate on numerous issues, including health and safety matters. In December 2003, Blackman raised concerns over safety of hydraulic jacks used by car inspectors and was dissatisfied with his supervisor's (Perez) response. An argument ensued with escalating comment and Blackman was told to leave the workplace and that someone else would do the inspection. Blackman refused to leave, urging Perez to call the cops and stating, "I wish that some day I'll read in the newspaper that something bad has happened to you and also to your kids." Perez again told him to leave and Blackman replied he was not leaving, as he had a Transit Authority pass "and a .38 and I'll call my brother." Not sure if he really meant this as a threat, Perez just walked away. Blackman was not fired for this incident, but a disciplinary action notice recommending a 30-day suspension was filed, which then was grieved. While the grievance was pending, a disgruntled Authority employee who had been fired shot and killed two former supervisors. It was while employees were discussing this incident that Blackman said "I hate to say this, but those two guys deserve what they got for getting the (murderer) fired." When a co-employee asked what Blackman would do if he lost his livelihood, Blackman repeated his earlier comment, adding that "those two scumbags deserved what they got for getting the (employee) fired." Another disciplinary notice was filed recommending discharge. An independent arbitrator ruled that the Authority had cause for discipline, and ruled that termination for the comments would not violate his First

Amendment rights. Blackman then filed legal action and the trial court granted the Authority's motion for summary judgment, finding that the comment was not protected speech.

The Circuit Court said a two-step analysis was required. (1) Is speech protected? (2) If so, is the employee's interest in free speech outweighed by government interest in efficiency of public services? In what likely was an attempt to avoid an appeal, the Court assumed, for the sake of argument only, that the speech here was protected, since Blackman was a vocal union spokesman and the root cause of at least some of his concern lay in safety issues. Instead, the court emphasized the second issue – the effect of the speech, and noted that an employer's ability to respond to speech is related, in part, to how much the employee's speech truly relates to a public concern. While the Court did assume for the purposes of the appeal that Blackman's speech could have touched upon a public concern, at most, the comment only minimally touched on that concern and the government's burden in demonstrating a need to control the speech was at the lowest level. Here, the court ruled that the interest in disciplining Blackman (even including termination) was substantial, citing:

- The comments, in light of the earlier threat to Perez, indicated that Blackman had a violent disposition;
- The comments were disruptive within the workplace.

Although the case was decided in June of last year, it did not use *Garcetti*'s official speech context in deciding the case.

Lindsey v. City of Orrick, MO, 491 F.3d. 892, (8th Cir. 2007). Lindsey was employed as the city's Public Works Director. Though he owned land in the city, he was not a resident. The city sent him to training that included a session on the state's open meetings law, after which he became convinced that the City Council was violating the law (improperly entering non-public sessions and passing ordinances without public discussion). Lindsey raised these concerns at four different public meetings. After one of these meetings, Lindsey was told by the city attorney that the procedures complied with the law and by one of the council members that other councilors were angry because of his statements and "the best thing you could do is shut up."

A month later, he made similar accusations at another council meeting, after which Taylor (the mayor, who was Lindsey's direct supervisor and was named as a co-defendant in the case) told him the open meeting law was none of his business and to think about his actions before he "embarrassed the City." Several months later, at another council meeting, Lindsey read from the law and urged the council not to violate it by going into closed session. Then, several months later, he spoke again on the issue at a council meeting. Finally, some months later, he identified 15 "violations" of the law.

Mayor Taylor responded that the council considered the matter closed and Lindsey's concerns were not placed on the council agenda. However, during the meeting, at the mayor's suggestion, the council entered closed session to discuss personnel matters. A year or so later, Lindsey again spoke with the mayor saying he had audio- and video-taped meetings and was going to meet with an assistant attorney general. Less than a month later, Lindsey was fired, after being presented with two handwritten critiques of his work. Lindsey asserted none of the concerns had been noted previously. One of the critiques asserted that Lindsey has "attacked the council" and had said the council was not "handling city business or ordinances properly."

Lindsey responded with a §1983 lawsuit alleging violation of his First Amendment right of free speech. The city and Mayor Taylor, as defendants, moved for summary judgment. The trial court denied the motion, finding that the speech was protected speech and that the mayor was

not protected by "qualified immunity," as a person in her position would know or should have known that firing him for the speech was illegal. The city and mayor appealed.

The circuit court said that *Garcetti* had "clarified" public employee First Amendment protection to apply only when an employee speaks as "a citizen addressing matters of public concern." First, the medium or location in which speech is made may not be the sole controlling factor. The defense argued that the speech was not citizen speech because it was made at a council meeting which Lindsey attended as part of his job. But, his attendance in that capacity was to report on water, sewer, and street matters. Though he had attended training, which included a session on the "sunshine law," there was nothing to indicate he was sent to the training to learn about the law or that his job included ensuring compliance with the law.

Next, the defense argued that the comments were not on a matter of public concern, since they addressed the council's procedures for adopting ordinances governing retirement and other municipal employee benefits. Therefore, it was argued, they were self-serving and could not constitute protected speech. The court responded that criticism, "no matter how obnoxious or offensive, of government officials and their policies clearly addresses matters of public concern." While Lindsey did comment on some ordinances involving benefits, that was not the thrust of his complaints. The comments to the mayor about contacting the attorney general's office were not unprotected threats (like the Blackman case). The mayor also claimed that his comments were not made as a citizen because he was not a city resident. Residency, though, is not a technical requirement to asserting constitutional rights. The constitutional protection is triggered by Lindsey's United States citizenship.

The focus then shifted to the effect on employment, with the court noting that the employer must introduce at least some evidence of such an adverse impact. Mere allegations of adverse effect on morale or a department's reputation will not suffice. In effect, the claim was that an employee's attack on elected officials has a direct and adverse effect and strains in the relationship become apparent. Though his speech to the council was characterized as confrontational and disruptive, actual disruption of city functions must be shown.

Tennessee Secondary School Athletic Association v. Brentwood Academy, ___ U.S. ___ (June 21, 2007). While this case does not address employee statements as a basis for discipline, it is worth noting, as the principal issue is whether enforcement of a rule prohibiting high school coaches from recruiting middle school athletes violates the First Amendment. The Association is a not-for-profit organization created to regulate interscholastic sports in its membership, including some 290 public and 55 private high schools. Brentwood's coach invited some eighth grade boys to attend spring football practice, with a goal that they would attend the Academy. The Association strongly sanctioned Brentwood which, after filing appeals, brought an action asserting that enforcement of the rule violated the First Amendment. (The case had been up to the U. S. Supreme Court earlier, which found that the Association was a "state actor" and, thus, its actions could implicate First Amendment concerns. The 2007 appeal resulted from lower court decisions in Brentwood's favor after the case had been sent back for further proceedings.)

Brentwood had free speech rights to disseminate truthful information about itself and to persuade prospective students and parents that its excellence in sports was a reason to attend. Yet, like public employee speech rights, those rights are not absolute. The rule was asserted to further the purposes of preventing child exploitation, ensuring that athletic interests were secondary to academics, and promoting competition. The court first found that the rule did not prohibit Brentwood from disseminating truthful information about it and its sports programs, but Brentwood's solicitation differed in nature from such communications.

More importantly for present purposes, the concerns of a voluntary organization (including one with state ties so as to implicate First Amendment concerns) in enforcing its rules may, like a government employer's interest in running an efficient workplace, outweigh speech concerns. The court cautioned that a quasi-public organization's ability to condition membership on relinquishment of any and all constitutional rights (just like public employees when speaking on matters of public concern) may face restrictions on speech only when necessary for efficient and effective operations (citing the *Garcetti* ruling).

Lee v. York County School Division, et als., 484 F.3d 687 (4th Cir. 2007). Lee, who taught high school in York County, initiated this suit, maintaining that the School Board violated his rights under the First Amendment's Free Speech Clause by removing materials he had posted on the bulletin boards in his classroom. The trial court concluded that his postings were curricular in nature and thus did not constitute speech on a matter of public concern. In substance, Lee maintained on appeal that he possessed a First Amendment right to post his materials on the classroom bulletin boards.

When Zanca, the principal of Lee's school, first viewed the postings, he saw that some prominently included religious terms such as "Bible" or "God." Although Zanca did not read any of the articles in their entirety, he exercised his discretion as Principal to remove five items because he saw them as overly religious and thus violative of the Establishment Clause of the First Amendment. Aside from his determination that the postings might be legally problematic, Zanca believed the items to be irrelevant to the Spanish curricular objectives that Lee was obliged to follow within his classroom.

Although the school had no formal policy on teacher postings in the classroom, an unwritten school board policy, practice, and custom allowed teachers to post materials related to curricular objectives, or to post materials of a general and personal nature that were consistent with the high school's educational mission. When asked why he had posted the items, Lee explained that he had posted each either because he liked it or because it was uplifting. He also explained that a teacher could post most anything in a classroom and make it relevant to the curriculum being taught. He said that schoolteachers often use creative materials to catch and retain the attention of students. He also said that they were, in his opinion, "positive and good for the kids" and due to his position as a teacher, he felt responsible for more than just his students' academic well-being, likening the postings to those of a picture of George Washington.

Lee filed suit under §1983 asserting a violation of his free speech rights. He then appealed the dismissal of his suit to the Circuit Court of Appeals which said, "it is important to first acknowledge that schoolteachers do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)." However, Lee's assertions that his postings constituted speech on matters of public concern failed to consider that courts have generally recognized that public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and that a school board's ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) which said "We thus recognize that the determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board rather than with the federal courts." The Fourth Circuit Court, however, then said that the *Garcetti* ruling explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching, so it applied the *Pickering-Connick* balancing test in the context of its precedent that included analysis of whether the speech was curricular speech, in which case it was not protected.

To make that determination, the court asked whether (1) the speech was school-sponsored bearing the imprimatur of the school, and (2) the speech is supervised by faculty members and designed to impart knowledge to the students. Finding that the postings met both these criteria, the court affirmed the dismissal of Lee's action.

Bessent v. Dyersburg State Community College (DSCC), (unpublished opinion, 6th Cir., April 2, 2007). In another academic setting, a former supervisor of DSCC's adult education program alleged that her First Amendment rights were violated when she was fired in retaliation for making statements regarding the internal operation of DSCC's adult literacy program. She had started an adult literary program through a privately funded nonprofit agency(DCLP). When some state funding became available, the program was run by DCLP through an agreement with DSCC. Some concerns arose over her handling of the program. Bessent voiced opposition to DSCC's planned takeover of the program because she believed that such a consolidation would lead to a funding shortfall, while at the same time increasing costs due to the requirement that it comply with Tennessee Board of Regents regulations. Despite her opposition to the merger, DSCC hired Bessent as a supervisor, the functional equivalent of the pre-merger position she held with DCLP. She continued to voice her opposition to the situation at numerous meetings asserting that the merger was responsible for funding shortfalls. Eventually, she was terminated and denied an internal appeal based on her status as a probationary employee.

The trial court granted the defendants' motion for summary judgment. Though several issues were involved in the appeal, the nature of her statements is discussed here. After reviewing the traditional balancing test, the Circuit Court cited *Garcetti* to the effect that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." It then reviewed the trial court record saying that her First Amendment retaliation claim fails because her statements opposing the merger were not entitled to constitutional protection since they were made pursuant to her official duties. At oral argument, Bessent's counsel conceded as much, admitting that "Ms. Bessent well had the obligation as the Executive Director of the corporation, of a non-profit corporation, to speak out on the functioning of that program." Later, the court asked counsel, "So this was part of her job?" Counsel responded, "Yeah – to make these suggestions, to make sure the program is functioning properly, to make sure most – more people are being reached." Again, the court enquired, "So your position, if I understand it, is that the statements for which she was fired were an integral part of her job," to which counsel stated "I think that, yes...." Therefore, Bessent's statements were made as part of her official duties and do not receive constitutional protection. Of course, it must be remembered that job titles and descriptions do not categorically determine if speech is made "officially," but this clear admission doomed her claim.

Snelling v. City of Claremont, __ N.H. __ (July 18, 2007). In this state supreme court ruling, the plaintiff city assessor claimed he was wrongfully terminated in violation of his First Amendment rights. After a couple of incidents involving local boards, unrelated to his position, he participated in a series of interviews with a local newspaper. In the resulting article, he was credited with "adding his voice" to those of others who claimed the city's tax system was unfair or otherwise flawed. In the article he also indicated that certain city council members were taking unfair, but legal, advantage of the city's tax abatement system. He also was referenced as commenting on some efforts made to correct the system and his role, or proposed role, in those changes.

After meeting with the city attorney, the city manager terminated the assessor, citing seven reasons, one of which concerned the comments in the newspaper article. The ensuing legal

action resulted in jury verdicts for the plaintiff. Two grounds upon which the city appealed were the assertions that (1) the assessor's First Amendment claim was barred by *Garcetti* and (2) the balancing test weighed against his claim.

In determining if the assessor was acting pursuant to employment duties, the court said job descriptions and listing of tasks as the sole analytical factor would allow employers to restrict employee rights by creating excessively broad descriptions. With that in mind, the court rejected each of the city's claims that he was acting officially.

First, as to the claim that he was so acting because the article mentioned his job as city assessor, the court noted it is the employee's official job duties that are relevant, not a third party's motivation in speaking with the employee. Thus, the newspaper reporter's view is irrelevant to the issue. As to the assertion that the assessor's duties encompassed speaking to the public and clarifying taxation, the court found only one function in the job description that might so indicate, and that was to "explain to property owners and others the procedures and techniques used by the assessor's office in revaluation, abatements, exemptions, and effect of new or proposed construction on assessed values." Thus, communication on assessor's office procedures and techniques would be within the official duties; comments on fairness of the tax system or identification of potential abuses are not. Lastly, the city asserted that the official nature of the comments was shown by the assessor's statement at trial that the article contributed to his role in communicating to the public an understanding of whether to file for abatements. However, the court said the article served no such purpose and that its effect is measured from the content. The court then proceeded to the standard *Pickering* balancing test and ruled in favor of the employee.

Morales and Kolatski v. Jones, Ray, and City of Milwaukee, 494 F.3d 590 (7th Cir. 2007). This case demonstrates some of the very real difficulties in categorizing speech as being official or unofficial. The plaintiffs were two police officers assigned to the vice squad. They alleged that their reassignment to street patrol duties constituted retaliation for exercising protected free speech. At the risk of oversimplification, the facts can be summarized as follows. The two officers were assigned to arrest an alleged drug dealer. After several attempts failed, they came to believe that the Chief and Deputy Chief (the latter being the sister of the alleged dealer) participated in harboring the dealer to prevent his arrest. The belief arose apparently on the basis of an erroneous statement by a restaurant owner that, while delivering food to the home of the Deputy Chief, the alleged dealer was seen in the company of both the Chief and the Deputy. That belief also was supported when another officer was ordered to delete the Deputy Chief's address on a report of the incident. They reported their belief to other officers and supervisors and Officer Morales spoke with an assistant district attorney. He also testified about these matters in a deposition in an unrelated matter. The defendants appealed jury verdicts against them asserting that the officers' speech was not protected under *Garcetti*.

In an extensive analysis of speech made pursuant to official duties, the Court made several notable comments, including:

- The crux of the inquiry was whether the officers' speech was made pursuant to official duties.
- Garcetti did not provide a definitive framework for determining the scope of an employee's duties because the parties there agreed that the speech was made officially.
- That inquiry is a practical one and should focus on the duties "an employee actually is expected to perform."

The officers claimed, first, that the speech was not made officially because they first learned about the allegations of the Chief's and Deputy's actions after the arrest was made.

However, official duties in this case included processing arrests and, thus, did not end with the arrest. Next, the officers asserted that the official nature of the incident ended when the Chief concluded his investigation into whether one of the officers disclosed confidential information to the restaurant owner. The Chief decided that the disclosure did not pose a threat to the investigation because the arrest already had occurred. This, the officers said, supported the claim that their official actions ended with the arrest. The court disagreed for the same reasons as set forth on the first issue and also said the Chief's investigation had no bearing on the nature of the statements. Lastly, they argued that the speech was not official because they were uncertain of what they should do regarding the restaurant owner's allegations. But, uncertainty or merely having discretion to act does not signify that action is unofficial or outside the scope of duties. Exercising discretion can be a part of one's official duties. The internal reports of conversations concerning the alleged actions of the Chief and Deputy, therefore, were official duties and were not protected.

Morales' comments made in the unrelated deposition, though, were a different matter.[21] He had testified that in his opinion Officer Kolatski was transferred because of the report of the allegations against the Chief and Deputy. Being deposed in a civil suit pursuant to a subpoena was clearly not one of the officer's job duties. The fact that he testified about speech made pursuant to official duties did not change the character of that testimony. At this point, the court acknowledged that it might seem odd for speech to be classified as official or not based on the identity of the listener.[22] Odd though it may be, the court said that is the requirement of *Garcetti* and, since the court could not determine whether the retaliation against Morales was for protected or unprotected speech, it returned the case to the lower court for a new trial on that issue alone.

The dissenting judge felt that the first issue should have been to identify clearly the speech that was the cause of retaliation, but he agreed that comments other than those made to the assistant district attorney and at the deposition were made officially. The discussion with the assistant D.A. involved several considerations in addition to the issue of Morales' discretion. Some of it entailed a discussion of his findings regarding the arrest and submission of reports (e.g., work product) that would not be protected; but when he was speaking as a witness about the possibility of public corruption, he spoke in the same fashion as might any citizen who witnessed suspicious conduct by a government official. Therefore, that aspect of his discussion constituted protected speech. As to the deposition testimony, the dissent had little trouble finding that the speech was protected, as there was no obligation to testify as part of Morales' duties. The dissent also disagreed with the decision to send the matter back for retrial. He said the jury could reasonably have found that the demotion's timing indicated it resulted from protected speech during the deposition and not from unprotected speech made several months previously.

Brammer-Hoelter, et als. v. Twin Peaks Charter Academy, et als., 492 F.3d 1192 (10th Cir. 2007). This decision addressed First Amendment rights of charter school teachers who began meeting off-campus and after hours in residences, restaurants and at least one church to discuss concerns about the operation, management and mission of the school. The academy's principal issued an order that banned discussion of Academy matters outside of work and later told the teachers she would prefer that they not even associate with each other outside of work. Sometime later, the participants began receiving unfavorable performance reviews, contrary to

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[21] The case in which the deposition was taken involved a different officer's assertion that he had been transferred in violation of First Amendment rights.

[22] The court noted that Justice Stevens' dissent in *Garcetti* said it "is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description" 126 S.Ct at 1963.

past evaluations. They also said the principal ignored them and treated them rudely, e.g., slamming doors in their presence. They eventually submitted resignation letters, but later tried to rescind them (apparently after the principal resigned).

A critical issue in the case was whether the trial court was correct in ruling that the discussions did not involve matters of public concern. The Circuit Court said that following *Garcetti*, a five-step test was now appropriate:

> 1. Is the employee speaking pursuant to official duties or as a citizen? If the speech is in the former category, no constitutional protection exists because the employer restriction simply reflects the exercise of employer control over what the employer itself has commissioned or created.
> 2. If the speech is not made pursuant to official duties, is the subject a matter of public concern? If not, the speech is unprotected.
> 3. If the employee speaks as a citizen on a matter of public concern, does the employee's interest in speaking on the issue outweigh the interests of the government as employer?
> 4. Assuming the employee's interest in speaking does outweigh the government's interest as the employer, the employee must then show the speech was a substantial or motivating factor in a detrimental employment decision.
> 5. If that factor is shown, the employer may then show it would have taken the same action against the employee even in the absence of the protected speech.

Summary. As noted at the beginning of this section, the effects of *Garcetti* are still "in process." At this point, though, it should be reasonably evident that governmental employers might still wish to seek to defend employment decisions arising from employee statements by demonstrating adverse effects on governmental operations, not on trying to characterize statements as being made within the employee's official duties. Additionally employers should not neglect the other limitations on employee speech including:

- Justification for action based on the non-speech related performance of the employee; and
- Exceptions for political, confidential and policy-making positions.

C. Public Employee Blogging. Aside from instances in which employee blogging may be protected as free speech, by workplace privacy considerations, or under whistleblower protection laws, it does not appear that court decisions or state legislatures, at least as yet, have carved out defined, specific rules that specifically address blogging. What can be said definitively, though, is that blogging is, in fact, a means of communication. It is growing and will continue to grow. Targets of comment will not be limited to Hollywood starlets or national events. Local government – and local government officials – will continue to find themselves at the heart of much blogging. In this context, it is worthwhile recalling the timely adage that "all politics is local."[23]

Several reported cases have dealt with the disclosure of the identity of bloggers. While anonymous speech is protected under the First Amendment, some opinions indicate a concern with elevating blogging to too-high a protected status. For example, a grand jury's ability to compel disclosure was found permissible, as extending the "reporter privilege" to the "easily created blog or the ill-defined pamphleteer" could defeat legitimate investigative roles of grand juries.[24] Yet, blogging by public employees clearly must be recognized as having the potential to be a protected exercise of free speech.

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[23] Variously attributed to former U.S. House Speaker Thomas P. "Tip" O'Neill, Jr.
[24] *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2005).

Thus, public employers must face at least two concerns with regard to blogging (1) identifying the blogger and (2) the ability to discipline or discharge an employee for blogging. Of course, in those states where public employees are not at-will employees, some discernible reason for disciplining or discharging an employee for blogging would have to exist.[25]

One grand appeal of blogging appears to be the ability to engage in anonymous chat or even chatting under a pseudonym. Thus, employers may wish to conduct a "search" to identify bloggers whose comments are deemed cause for action. When blogs are made using an employer's computer system, a properly drafted and communicated computer use policy should be sufficient to overcome most, if not all, challenges based on an expectation of privacy. To support a claim that a governmental warrantless search (including one by a public employer) of electronic communications violates the Fourth Amendment, the individual must have both subjective and objective expectations of privacy in the place searched or in the items seized.[26] As noted previously, some courts also hold that society, as a whole, must be prepared to recognize that privacy expectation as being reasonable.

The "rub" to effective utilization of computer use policies may arise when employers permit some personal use of the system. Employers are likely little concerned with the occasional email from home asking a worker to make dinner reservations or pick up some groceries on the way home. Employers may not be overly concerned when an employee reads on-line editions of newspapers – so long as not too much time is "wasted" in such activities. But, when an employee sends a letter to an editor, or an email, or creates a blog that is critical of the employer, a supervisor, or co-worker (or even a vendor), then the employer may become concerned. At this point, the employer's decision to act is "content-based," and that may raise the stakes.

Though results are mixed, several courts have held that no reasonable expectation of privacy can exist in chat room communications. In part, this reasoning is a logical result stemming from two realities: by and large, a sender does not know who else is in the chat room and, once sent, the sender no longer can control the destinations or recipients to whom the communication may be forwarded.

While constitutional protections regarding searches may be limited,[27] federal statutes may affect various issues regarding communications involving the Internet, including, for example, those dealing with stored electronic communications and transactional records access.[28] Both disclosure of communications and subscriber information may be implicated. Federal laws also regulate interception of electronic communications[29] and fraud and related activity in connection with computer usage.[30] The normal prudent advice that governmental employers should consult with legal counsel regarding adoption of personnel policies is prudent advice in this context, as well.

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[25] One might, for example, posit a *Garcetti* or *Pickering* scenario in which an employee blogged about an internal workplace issue or even a public matter within the course of duty or in a manner that adversely affected the public workplace so that free speech protection did not exist. But, the question would then arise as to whether "cause" existed for discipline or termination.

[26] *Expectation of Privacy in Internet Communications,* 92 ALR5th 15.

[27] *Expectation of Privacy in Internet Communications*, 92 ALR 5th 15.

[28] 18 U.S.C. §2701, et seq.

[29] 18 U.S.C. §2510, et seq.

[30] 18 U.S.C. §1030.

The ability to identify an anonymous public employee blogger who is not using the employer's computer system may be subject to a more rigorous test and may be governed by the individual's relationship with the email provider or by the terms and use of the website involved in the communication. While the promises of privacy by a commercial enterprise do not guarantee a constitutional expectation of privacy, they will be factors, along with actual practice and the nature of the communication, in determining the ability of a governmental employer to obtain access to information about this type of blogging. A policy that alerts employees to the possibility that some "private" blogging may be subject to review may assist an employer in attempting to control adverse effects.[31]

Though policies may assist employers, they are not necessarily a requirement to demonstrate that emails are not private. A Pennsylvania court held that an employer could use what it deemed improper email comments made over its system even though it had made assurances that all email communications would be confidential and privileged and such communications would not be intercepted and used as grounds for termination. A former at-will employee brought a wrongful termination suit after being fired for inappropriate and unprofessional email comments. The court stated that the employee could not possibly have had a reasonable expectation of privacy in the communications since they were voluntarily made to the employee's supervisor. Thus, they may have been used by the employer but they were not intercepted. Once communicated over the system to the supervisor over an email system used by all employees, any privacy expectation was abandoned.[32]

Outside of the context of employment, chat room communications have been found not to be accompanied by an expectation of privacy.[33] It should be noted, however, that these and other similar cases reported in the ALR annotation cited at note 26 involved allegations of criminal pedophile activity. Yet, the very nature of chat rooms would seem to suggest that users should not expect their comments to be deemed private. After all, is not the purpose of a chat room to make statements and offer opinions to other individuals or the public generally? Website comments are similarly viewed, particularly if access to the website is not strictly controlled.[34]

As supportive as some of the foregoing cases may be for employer freedom to access blogging sites and use the content in disciplinary matters, blogging is an exercise in communication. First Amendment protections will apply in the same manner as other forms of expression.

The Tenth Circuit *Brammer-Hoelter v. Twin Peaks Academy* case discussed in the Free Speech section above did not deal with blogging, but instead addressed First Amendment rights of charter school teachers who began meeting off-campus and after hours in residences, restaurants and a church to discuss concerns about the operation, management and mission of the school. But the nature of those off-work-site communications can be compared to blogging, so it would seem appropriate to apply a similar five-step test in looking at public employee blogging.

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[31] See, e.g., the sample policy set forth in the appendix to these materials. The appendix also contains a sample policy dealing with computer use and email in general.
[32] *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996).
[33] *U.S. v. Charbonneau*, 979 F. Supp. 1177 (S.D. Ohio 1997).
[34] *J.S. ex rel. H.S. v. Bethlehem Area School District*, 757 A.2d 412 (Pa. Commw. Ct. 2000) upholding school district's suspension of student whose personal website, created at home and on student's own time, made derogatory comments about a teacher and principal that were deemed threatening and harassing.

Even in states where public employment remains "at-will," courts have created and expanded protections for employees under "quasi-contract" or public policy exceptions.[35] As with employee free speech and privacy issues, a substantial element of an employer's ability to control blogging may be affected by employee expectations which are established though properly adopted and communicated personnel policies. That approach may have a more limited applicability to public policy exceptions to at-will employment where some lawyers have crafted arguments asserting that employer blogging and similar restrictions "encroach on employees' personal autonomy."[36] Thus, employees have challenged, albeit with limited success, restrictions on personal relationships and non-workplace behavior.[37]

Reported cases in Wisconsin and New Jersey ruled against employees who were terminated after news accounts reported, respectively, their outside, non-work-related racial bias and sales of neo-Nazi paraphernalia. It is not too hard to see how a court could find that these activities were not protected under public policy exceptions to the at-will doctrine. The Idaho Supreme court upheld termination of an employee who criticized a proposal by his employer and a civic group to manage a local national forest. These cases do not appear to have involved public employers, so First Amendment concerns may not have been considered; but they do represent what seems to be the current narrow application of the public policy exception.[38]

Laws like New Hampshire's regarding off-duty use of tobacco products have been expanded in some states to include other lawful off-duty activity including alcohol use. New York, California, and North Dakota protect workers from adverse or discriminatory employment actions arising from lawful off-duty conduct. These laws may limit protection where off-duty conduct may be seen as being in direct conflict with the essential business needs of the employer.[39]

Another case that does not deal directly with blogging can serve to guide employer responses to blogging, since its subject (political support) often is associated with blogging. The case[40] arose when a county tax commissioner dismissed an office clerk after winning reelection. The clerk had allowed an opponent of the commissioner to post a campaign sign on her property. The termination was claimed to be part of an effort "to clean house" and the specific reason for her termination was a "cold environment." As the clerk was not covered by an internal appeal process, she brought an action alleging the firing violated her First Amendment right of association. The defendants sought to dismiss the action claiming that the clerk was subject to the patronage exception under which political appointees may be terminated without regard to First Amendment protections[41] so as to further the legitimate governmental end of assuring

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[35] For example, a college professor's letter of engagement, even though referring to handbook status as an at-will employee, was held to have limited a college's otherwise free hand to terminate, *Dillman v. New Hampshire College*, 150 N.H. 431 (2003); and a grocery store manager who refused to make unescorted late-night deposits of large amounts of cash was protected by public policy exception to at-will status, *Cloutier v. Great Atlantic & Pacific Tea Co.*, 121 N.H. 915 (1981). See generally, Gely and Bierman, *Social Isolation and American Workers: Employee Blogging and Labor Reform*, 20 HARV. J. OF LAW & TECHNOLOGY 287 (2007) at 315.

[36] *Ibid*. at 316.

[37] The New Hampshire Legislature has barred employers from requiring as a condition of employment that employees abstain from using tobacco products, RSA 275:37-a.

[38] Gely and Bierman, *supra, n. 30* at 319.

[39] N.D. Cent. Code §14-02.4.03, as cited *Ibid*. at 321.

[40] *Epps v. Watson, et al.*, (11th Cir., July 18, 2007).

[41] Traditionally referred to as the *Elrod-Branti* exception (based on cases so named in 1976 and 1980), this doctrine permits termination based on speech and actions when the employee is a policy-maker or

implementation of policies of a new administration, policies presumably sanctioned by the electorate. The court found the exception did not apply because the discharged employee was not deputized, did not need to work in close cooperation with the elected official, and loyalty to the official was not needed to perform the clerical duties her job entailed.

Translating the guidance from that case into the blogging arena where political comment is often the basis for participation, one can see that termination or discipline with adverse employment consequences for mere participation in public comment would be inappropriate unless the employer can:

- Identify an exception such as that set forth for political, confidential employees;
- Determine that the blogging occurs within the context of official duties; or
- If it constitutes protected speech, find adverse consequences under the *Pickering* balancing test.

With respect to the sample blogging policy in the appendix, it is wise to note that any such policy should be adopted in coordination with e-mail and computer use policies and any other policies or practices regarding statements made by, or conduct of, employees. Generally, though, a blogging policy might cover:

(a) blogging that involves the use of the employer's electronic computer system;
(b) blogging conducted on company time or premises regardless of the system used;
(c) blogging by an employee in the course of performing duties as an employee; and
(d) "private" blogging that may expose the employer to liability or undue criticism or that may adversely affect the workplace so as to constitute a potential for disruption or impair efficiency. This latter criterion is derived from traditional public employee jurisprudence applying standard *Pickering-Connick* analysis, as described in the free-speech section of this paper.

III. Conclusion and Guidance. Without benefit of a crystal ball, the immediate and longer-term future of employee privacy, free speech and blogging rights cannot be predicted with great accuracy. Many critics of the status quo, like Frederick S. Lane (author of THE NAKED EMPLOYEE cited in note 2) assert that increasing technological capability increases threats to employee workplace privacy. Citing statistics such as the increase of computer email, Internet, and blogging use – in and out of the workplace – and the relative ease of anonymous communication, others will point to the need to control productivity and prevent liability and adverse effects arising from unfettered criticism of management, co-workers, governmental entities, and even individuals and entities outside of government.

It can be predicted with reasonable accuracy that some of the time-worn traditions in the workplace will be shaken to some degree. Both employer and employee nerves will be rattled. And things will likely roll right along, at least until Congress or State Legislatures seek to enter the public workplace or until the federal Circuit Courts of Appeal have issued enough conflicting decisions to warrant U.S. Supreme Court intervention.

For now, employer policies and practices seeking to advise employees on expectations with regard to privacy, speech and blogging will remain the most effective way to control the workplace by ensuring that employees are aware of proper and improper conduct in and out of the workplace and to ensure that supervisors and management remain active in monitoring activities for compliance with those policies.

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confidential employee, or when the it can be shown that party affiliation is an appropriate requirement for the effective performance of the office involved.

Appendix: Sample Policies

[Note: These policies are provided as examples of those which might be adopted to attempt to establish guidance for employees. The samples are not intended as legal advice and readers are urged to contact legal counsel for guidance in particular situations.]

A. Sample Computer Use and Email Policy

[Note: This sample policy is based on one that was included in an article, *E-Government in New Hampshire*, printed in Issue #1, 2005, of Primex[3]'s AWARENESS IN ACTION, THE JOURNAL OF NEW HAMPSHIRE PUBLIC RISK MANAGEMENT.]

I. Introduction/Purpose Statements.

1. This policy governs access to and disclosure of electronic data composed, stored, sent or received by employees using the (Governmental Entity's) computer system. This policy is designed to protect the safety and security of the Entity's computer systems, including e-mail and Internet use.

2. This policy is deemed to be a part of the Entity's personnel policies and will be enforced in accordance with the procedures stated in the personnel policies. Any violation of this policy will be deemed to be a violation of the personnel policies. Entity reserves the right to change this policy at any time.

3. All uses that are not otherwise permitted under this policy are prohibited.

II. Ownership and Control.

1. The computer hardware system, software and e-mail system ("the system") are owned by Entity. All messages or data composed, stored, sent or received using the system are and remain the property of Entity. Employee usage of the system is a revocable privilege provided for the purpose of facilitating performance of the employee's work. It is not the private property of any employee. An employee's home computer, laptop or other equipment will be deemed to be part of the Entity's system to the extent that it uses the Entity's software or e-mail system or is used for the performance of work for the Entity. Reasonable effort will be made to preserve an employee's privacy expectations with regard to such personal hardware, but it cannot be guaranteed.

2. The computer system, including Internet access and the e-mail system, is to be used for business purposes only. Personal business is not authorized and shall not be conducted on the system, except with prior authorization. [Note: If any personal use is permitted, this paragraph should be amended to describe the allowed personal use.]

3. The e-mail system may not be used to solicit or proselytize for non-job-related purposes, including, but not limited to, use for commercial ventures, religious or political causes, or outside organizations.

4. The transmission of any discriminatory, harassing or offensive material in any form, including electronic media, is prohibited. Material considered to be offensive and prohibited includes any message which contains sexual implications, racial slurs, gender-specific comments or any other comment that offensively addresses someone's age, gender, sexual orientation, religious or political belief, national origin, disability or other characteristic which is protected from discrimination by state or federal law.

5. The e-mail system shall not be used to send (upload) or receive (download) copyrighted materials, trade secrets, proprietary information or similar materials without proper authorization.

6. Entity reserves, and may exercise without prior notice, the right to read, review, audit, intercept, access or disclose any and all information on an employee's computer system or messages created, received or sent over the e-mail system for any purpose, even if coded or protected by password or other security device. Employees should not have any expectation of personal privacy with regard to their usage of the system. By using the Entity's computer system, software, e-mail system and Internet access, the employee is deemed to have consented to this provision. Any employee who uses the system for any permitted personal communication shall advise the person with whom the employee is communicating of this monitoring policy and shall obtain that person's consent to the monitoring. Any employee who does not consent to this provision shall not be permitted such usage.

7. The confidentiality of any message or data should not be assumed. Even when a message is erased, it is still possible to retrieve and read that message. The use of passwords for security does not guarantee confidentiality, or that Entity will not retrieve it. All passwords must be disclosed to the computer systems administrator.

8. Users must understand that any communications created, sent or retrieved using Entity's e-mail may be read by individuals other than the intended recipient.

9. Notwithstanding Entity's right to retrieve and monitor any e-mail messages, such messages should be treated as confidential by other employees and accessed only by the intended recipient. Employees are not authorized to retrieve or read any e-mail that is not sent to them. Any exception to this policy must receive prior approval by the designated supervisor.

10. Entity has the authority to terminate or limit access to any program or hardware at any time.

11. Personal disks or data sources cannot be used on the system unless pre-approved by the computer systems administrator.

III. Confidentiality and Privacy.

1. Preservation of confidential and non-disclosure of private records is essential to the proper functioning of Entity.

2. All communications which are confidential shall not be disclosed intentionally, negligently or inadvertently. Confidential materials shall be handled and filed in accordance with the Entity's departmental directives.

3. Although employees have no expectation of privacy with regard to Entity's control of and access to the system, all employees shall treat other employees' workstations, computer files, e-mail and data as personal and private to that other employee, except as required and appropriate for shared tasks or when appropriate to the employment context.

Additional or Alternate Policy Language Examples.

Control/Ownership/Access. The computer systems are provided for Entity's governmental purposes only. Employees may not use the systems for:

a) Personal use;

b) Any offensive or unlawful purpose including, but not limited to, destruction or damage to equipment, software or data belonging to the Entity or others; disruption or unauthorized use of accounts, access codes or identification numbers; use of computer resources to send or store messages and/or materials with the intent to defraud, harass, defame or threaten others; use of computer resources in ways which intentionally or unintentionally impede the computing activities of others (such activities include but are not limited to: disrupting another's use of computer resources, such as game playing; sending an excessive number of messages or e-mails; making or printing excessive copies of documents, files or programs; or introducing computer viruses of any type onto the computer resources); use of computer resources that violates copyright, trademark or license agreements; use of computer resources to violate another's privacy (including, but not limited to, accessing another user's account, identification number, password, electronic file, data or e-mail; impersonation of any person or any communication under a false or unauthorized name); transmission of any unsolicited advertising, promotional materials or other forms of solicitation, including such activities as placing hypertext links to non-entity related web sites other than those requested or directly related to the functions of the Entity; using computer resources for commercial purposes or personal financial gain; inappropriate mass mailing ("spamming"); tampering with any software protections or restrictions placed on computer applications or files; attempting to circumvent local or network system security measures; altering or attempting to alter system software or hardware configurations on either network systems or local computing devices; installing unauthorized software programs on entity-owned computing devices or network systems and/or using such programs; ignoring or disobeying policies and procedures established for specific network systems; and using computer resources to access adult-oriented sites that contain descriptions or depictions of a pornographic or offensive nature or that permit access to gambling facilities over the Internet.

Monitoring Usage. Entity reserves the right to monitor, access, change, delete, review or retrieve any information stored or transmitted on the system, including information which may have been deleted but still exists on the system.

Improper Usage. Any use of the system that violates the Entity's sexual harassment, anti-discrimination or other policies pertaining to respect for individuals and workplace conduct constitutes a violation of this policy.

Reporting Violations. Users are expected to report policy violations that they observe. Such reports should be made to a designated employee for investigation.

Acknowledgement of Receipt and Requirement to Comply.
I acknowledge that I have read this policy, understand its provisions and agree to be bound by these provisions. I understand that all computer systems, telephonic and electronic communications systems and all information transmitted by, received from or stored in these systems is the property of Entity and that I have no expectation of privacy in connection with the use of the Entity's hardware, software, Internet access and e-mail. I also acknowledge that I have been given an adequate opportunity to consult with an attorney before signing this agreement and that I have received a copy of this agreement as signed by me.

B. Sample Employee Blogging Policies

[Note: This sample policy was included in an article, *Blogging in the Public Sector Workplace: Employee Right of Employee Blight?* printed in Issue #4, 2006 of Primex[3]'s AWARENESS IN ACTION, THE JOURNAL OF NEW HAMPSHIRE PUBLIC RISK MANAGEMENT.]

I. Purpose and Intent. Employer acknowledges that the public and employees may benefit from reasoned debate on matters of public interest. This policy, like the e-mail and computer use policy, does not seek to censor public debate. However, Employer is justifiably concerned with the potential negative aspects of comment that may lead to liability, inefficiency, or adverse impact upon the workplace. This policy advises employees as to the nature of appropriate and inappropriate blogging that may affect the public, Employer, or other employees. This policy must be read in conjunction with other applicable policies and requirements. Employees who are uncertain about the scope or applicability of this policy may contact [insert positions or name of individual(s)] for guidance.

II. Scope. This policy applies to "blogging" in a broad sense including comments made to or by a public employee whether made by e-mail, contribution to a weblog, or posting on a website (public or personal). This policy also applies to blogging statements made officially or unofficially in a public capacity and to blogging statements made privately.

III. General Guidance.

1. Unless specifically and expressly authorized by an individual position description or by [department head/administrator/other designee], an employee:

(a) May not use Employer's computer system (including workstations, lap tops, or any portion of the system, software, or e-mail system) for blogging purposes. This prohibition applies to all blogging of any format or kind, and includes blogging by use of an employee's personal computer using Employer's system whether remotely or in the workplace.

(b) May not blog during the workday or while on Employer's premises.

(c) May not blog in any manner or at any time in a manner that identifies the individual as an employee of Employer to create an appearance, whether intended or not, that the employee is speaking as a representative of, agent for, or in any way on behalf of Employer, or that casts Employer and public employees in an improper, unjustified negative light.

(d) May not use the municipal website to engage in blogging.

2. An employee must understand that blogging of any kind transmits information electronically and that the content may be viewed by anyone at any time. Therefore, employees cannot have any expectation of privacy in any blog, and Employer may read, review, monitor, or copy blogs. Employee further acknowledges that Employer may take all necessary steps to ascertain the identity of individual employees who engage in blogging, except for blogging that expressly constitutes non-work-related blogging under this policy.

3. Blogging by employees, whether it is authorized work-related blogging or non-work-related blogging, should follow these general guidelines.

(a) Blogs may not be used for personal or sexual harassment, unfounded accusations, or to create or contribute to a hostile work environment.

(b) Blogs may not disclose confidential or personal information about others.

(c) Unless authorized, blogs may not display images of Employer's property, logo, seal, or premises or information of or about other employees.

(d) Bloggers must be wary of commentary about individuals and reputations.

(e) Unless prohibited by other policy provisions, blogs may mention facts regarding incidents or events involving Employer if (i) that information has been reported to Employer and (ii) the incident or event has first been reported through established media and the information is not confidential or false.

(f) Bloggers must avoid any activity or conduct that unjustly reflects adversely upon Employer and other employees, including but not limited to, pornography or illegal acts.

(g) Blogs may not be used for admission of, or comment upon, individual or Employer liability regarding any work-related matter. Employees shall use internal reporting mechanisms as set forth in [reference other policies that provide a means of reporting issues or filing complaints]. [Note: Be wary of whistleblower laws].

(h) Bloggers should ensure that opinions they express or relay are not capable of being seen as opinions of Employer or its officials or employees unless expressly authorized.

(i) Bloggers should not assume that anonymous blogging, or blogging conducted under a pseudonym, protects their identity from disclosure.

IV. Guidance for Non-Work-Related Blogging. Subject to the general guidelines and other policy provisions, individual bloggers acting on their own behalf, without identifying themselves as employees or in any way indicating their status as such, may make non-work-related blog comments, without prior review or approval by employer, provided that such activity does not constitute defamation or misrepresent or distort facts in such manner that it may cause negative effects for Employer, officials, or employees. Non-work-related blogging, as described in this paragraph by an employee of Employer who is identified as such, shall conform to paragraph V.

V. Guidance for Non-Work-Related Blogging When Blogger is Identified as Public Employee.

1. When an employee engages in personal, non-work-related blogging, but the employee is identified as an employee of Employer, Employer has an interest in protecting itself, the public, and other employees from potentially adverse effects of blogging.

2. Accordingly, employee agrees that any such blogging shall clearly indicate that the content, opinions, and statements are solely those of the employee and do not necessarily represent the views of Employer, other employees, or the public.

3. Such blogging may constitute a basis for discipline, including termination, if it:

(a) Contains defamatory or false content;

(b) Creates or adds to an unreasonable adverse effect on the workplace;

(c) Is represented or appears to be made as part of the official duties of the employee unless the official duties of the employee include the authority to engage in blogging in the manner in which the blogging occurred; or

(d) Otherwise exposes Employer to liability or adversely affects public officials, employees, the public, or the governmental entity without due cause.

VI. Guidance for "Unofficial" Work-Related Blogging.

1. The rights of public employees in some instances to make statements that constitute legitimate public comment on matters of public concern may be protected to an extent by constitutional guarantees of free speech, association, and religion. Those rights, however, are not unlimited and are subject to control depending on the employee's position and duties and the effect of the statements.

2. An employee may not state, imply, or suggest that blogging is authorized by or represents Employer unless that is actually the case and the employee expressly has been authorized to make such statements.

VII. Guidance for Official Blogging. Blogging on behalf of Employer or as a representative or agent of Employer may be conducted only with specific written authorization of [identify individual]. The general guidelines and standards for official blogging require that the blog be specifically authorized, honest and candid, and confined to the authorized statement or topic, and conducted in the manner authorized.