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Michael Z. Green

Texas A&M University School of Law, [mzgreen@law.tamu.edu](mailto:mzgreen@law.tamu.edu)

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### Recommended Citation

Michael Z. Green, *A 2001 Employment Law Odyssey: The Invasion of Privacy Tort Takes Flight in the Florida Workplace*, 3 Fla. Coastal L.J. 1 (2001).

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# A 2001 EMPLOYMENT LAW ODYSSEY: THE INVASION OF PRIVACY TORT TAKES FLIGHT IN THE FLORIDA WORKPLACE

By Michael Z. Green\*

As employers gain access to increasingly sophisticated technology, new legal issues seem destined to suffuse the workplace.<sup>1</sup>

## I. INTRODUCTION

In Stanley Kubrick's 1968 movie, *2001: Space Odyssey*,<sup>2</sup> he forecasted that computers<sup>3</sup> may take over humankind. This brilliant work of science fiction represented to America some of the earliest fears of what horrors might occur from advancements in computer technology. As the end of the actual 2001 year approaches, major growth in technology, especially through the Internet, has also created new fears for humankind about the diminishing level of individual privacy.<sup>4</sup> When exploring the level of privacy protections for individual employees who already have limited bargaining power and must deal with the harsh results that can occur from the employment at will doctrine,<sup>5</sup> those fears are magnified even further.

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\* Associate Professor of Law, Florida Coastal School of Law; B.S. University of Southern California; J.D., *cum laude*, & M.S. Indus. Rel., Loyola University of Chicago; LL.M., University of Wisconsin. I would like to thank Kelly DeGance who provided numerous hours of research assistance that made this Article possible.

<sup>1</sup> Vega-Rodriguez v. P.R. Tel. Co., 110 F.3d 174, 176 (1st Cir. 1997).

<sup>2</sup> 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer 1968).

<sup>3</sup> In the Kubrick science fiction movie, the particular computer was named HAL. HAL was designed to operate a spaceship but HAL became obsessed with its power, turned on the crew and had to be disconnected. *Id.*

<sup>4</sup> See generally Rod Dixon, *With Nowhere To Hide, Workers Are Scrambling For Privacy in the Digital Age*, 4 J. TECH. L. & POLY 1 (1999) (providing detailed analysis of the growing technological advancement and the lack of protection for employees' privacy); see also David Beckman & David Hirsch, *Security or Snooping? Monitoring Staff E-mail is Easy Now, But Privacy May Suffer*, A.B.A. J. at 72-73 (Apr. 2001) (recognizing the need for employer monitoring but suggesting a balance so that employee privacy is still protected).

<sup>5</sup> The principle of employment at will is defined as the ability by the employer or the employee to terminate the employment relationship for good reason, bad reason or no reason at all. See MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 1.27, at 76 (West Hornbook Series 2d ed. 1999). This at will employment concept is believed to have gained credence in the United States based upon a treatise written by Horace Wood. See Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 554 (1990) (discussing HORACE WOOD, MASTER AND SERVANT (1877) and the cases relied therein to validate the rule of at will employment in the United States).

Computer use has exploded over the last twenty years.<sup>6</sup> Even more rapid growth of technology throughout the 1990s has culminated with the dynamic and exponentially increasing use of the Internet.<sup>7</sup> This technology spurt has led the way to many more business opportunities. With those increasing opportunities more problems have arisen, especially with protecting privacy on a domestic and an international scale after the European Union Directive. The European Union Directive created a profound impact on multinational employers, especially those in the U.S., by requiring guarantees that all private information gathered by companies doing business in countries that are members of the European Union be protected.<sup>8</sup>

It is surprising that the European Union has taken the lead on protecting privacy rather than the United States. American workers spend more time working

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<sup>6</sup> See *Newberger v. State*, 641 So. 2d 419, 422 (Fla. Dist. Ct. App. 1994) (noting the “explosion of computer use since 1978,” finding that Florida statutes, unlike Missouri statutes, do not prohibit invasion of privacy by use of a computer and suggesting that the Florida legislature may want to contemplate statutory protections to address the “probable continuing growth in the number of computer” misuses).

<sup>7</sup> See John Schwartz, *Tracks in Cyberspace: Government Is Wary of Tackling Online Privacy*, N.Y. TIMES, Sept. 6, 2001, at C1 (describing the tremendous problems with the Internet and its ability to collect a lot of private information about people cheaply and the limited legal authority to regulate privacy efforts in the United States if and when self-regulation fails); see also Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1265 (1993) (identifying an “immense new array of sophisticated technology is available to the employer . . . to engage in surveillance, monitoring, and testing of employees” and this technology “makes secret supervision possible”); A. Michael Froomkin, *The Death of Privacy*, 52 STAN. L. REV. 1461, 1465 (2000) (noting the “pace at which privacy-destroying technologies are being devised and deployed is accelerating”); see Benjamin F. Overton & Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and The Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 27-31 (1997) (discussing the growth of technology due to the Internet and other factors and how that growth affects privacy).

<sup>8</sup> See William A. Wines & Michael P. Fronmueller, *American Workers Increase Efforts to Establish A Legal Right to Privacy As Civility Declines in U.S. Society: Some Observations on the Effort and Its Social Context*, 78 NEB. L. REV. 606, 625-28 (1999) (comparing U.S. privacy laws with developments in other western countries and the European Union); see also John T. Bentivoglio & Sarah Harden, *U.S. Companies Must Decide Whether To Enter US-EU Safe Harbor For Data Privacy*, Vol. 18, No. 3, THE COMPUTER & INTERNET LAW., at 1-4 (Mar., 2001) (discussing the European Union’s Directive which “prohibits the transfer of personal data to countries outside the E[uropean] U[nion] that do not have ‘adequate’ protections for personal privacy” and noting how the United States has adopted a Safe Harbor Agreement to bridge the gap between the strong privacy protections required by the European Union Directive versus the less exacting protection of privacy in the United States); see Overton & Giddings, *supra* note 7, at 50 (discussing the European Union Directive and how “international efforts have been more successful” at regulating privacy than efforts in the United States).

than workers in any other country.<sup>9</sup> Therefore, the opportunity for U.S. workers to have their privacy invaded in the workplace has reached pervasive levels. In a 1994 study of the opinions of human resource managers and employees about employee privacy, both groups tended to agree that “off-the-job lifestyles of workers and job applicants should be off limits to employers.”<sup>10</sup> Likewise, the same groups essentially agreed that employers should not question whether an employee smokes off the job, has AIDS, or has become overweight; nor should employers use drug testing or any form of testing to determine an employee’s genetic predisposition to develop certain diseases or health problems.<sup>11</sup>

Although human resource managers and employees may agree about keeping such issues private, the executives who run companies may not agree. A recent American Management Association study shows that a majority of U.S. companies electronically monitor their employees at work.<sup>12</sup> In 2000, nearly seventy-five percent of employers indicated that they record and review their employees’ telephone calls, e-mail, Internet connections and computer files.<sup>13</sup> This represents a drastic increase of more than double the percentage of the same type of monitoring identified by employers in 1997 of only thirty-five percent.<sup>14</sup> With tremendous technological gains and some genuine concerns about protecting themselves from liability, massive efforts by employers to gather a significant amount of private data on their employees have become an accepted practice in the workplace.

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<sup>9</sup> Steve Greenhouse, *In U.S., Workers Toil Even Longer*, CHI. TRIB., Sept. 1, 2001, at 1 (finding from a survey that Americans work 100 hours more per year than the next closest country, Japan, and that the total of 1978 hours on average from the year 2000 was nearly a full week’s increase of 36 hours more than the total hours from a similar 1990 survey).

<sup>10</sup> *Survey Finds Employees, HR Managers Agree On Many Employee Privacy Issues*, Daily Lab. Rep. (BNA) No. 159, at D-5 (Aug. 19, 1994) (describing survey conducted by Louis Harris and Associates, Inc. where a national cross-section of 1,000 workers and 300 senior human resources executives were interviewed).

<sup>11</sup> *Id.*

<sup>12</sup> *See Employment Policies: Employers Watching Computer Use For Legal Liability, AMA Survey Finds*, Daily Lab. Rep. (BNA) No. 153, at A-5 (Aug. 9, 2001) (discussing how companies have been far more vigilant at conducting electronic monitoring of their employees because of concerns about reducing legal liability). The summary of this study is also available at <<http://www.amanet.org/research.summ.htm>>.

<sup>13</sup> *See Employment Policies: Survey Finds Electronic Surveillance of Employees’ Communications Rising*, Daily Lab. Rep. (BNA) No. 85, at A-3 (May 2, 2000).

<sup>14</sup> *Id.*

Nevertheless, as the end of 2001 approaches, Florida appears to be on the cusp of developing and expanding the tort of invasion of privacy<sup>15</sup> to protect individual privacy in the workplace. That common law tort provides a major protector from various forms of employment-related invasions of privacy. Even a few short years ago, you may have never even thought about some of the following claims as viable tort actions in Florida, but this Article asserts that thinking may start to change very soon:

1. An employee seeks recovery against an employer for disclosing, without the employee's approval, certain private facts about the employee to other employees including age or marital status (recently divorced)<sup>16</sup> or that the employee is diabetic<sup>17</sup> or HIV positive.<sup>18</sup>
2. An employee seeks recovery against an employer for being secretly videotaped in the workplace.<sup>19</sup>

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<sup>15</sup> Many have traced the development of this legal protection from invasion of privacy to the landmark article by Messrs. Warren and Brandeis. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Dean William Prosser also agreed that the Warren & Brandeis article played a significant role in the development of privacy protection under the common law. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389-90 (1960) (describing the impact of the Warren & Brandeis article).

<sup>16</sup> *See* THEODORA R. LEE, *Employee Privacy: Handling Wrongful Termination Claims 2001: What Plaintiffs and Defendants Have to Know*, 651 PRAC. LAW. INST./LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 477, 494 (Mar.-Apr. 2001) (noting possible invasion of privacy claims against employers for "telling others that the employee . . . had recently been divorced"). *Cf.* *Galdauckas v. Interstate Hotels Corp.*, 901 F. Supp. 454 (D. Mass. 1995) (finding no claim of invasion of privacy where a supervisor revealed an employee's age as a prank because the employee had no reasonable expectation in keeping the status of his age private).

<sup>17</sup> *But see* *Cash v. Smith*, 231 F.3d 1301 (11th Cir. 2000) (finding claim of invasion of privacy based on disclosure of employee's diabetes to others was not valid under Alabama law because employee had openly discussed this same information with a number of employees).

<sup>18</sup> *See* *Ozer v. Borquez*, 940 P.2d 371 (Colo. 1997) (involving a case where an associate's claim of invasion of privacy was based on a law firm partner's disclosure to other employees that the associate was homosexual, that his domestic partner had been diagnosed with AIDS and that he needed to get tested to determine if he was HIV positive and the employees who heard this information were not privileged with the need to know about this information to perform their jobs); *see also* LEE, *supra* note 16, at 494 (noting a possible invasion of privacy claim against employers for "telling others that the employee was suffering from AIDS").

<sup>19</sup> *See* Stephen Van Drake, *Two Ocwen Financial Workers Sue Over Hidden Camera in Bathroom* (Feb. 24, 2000) (describing invasion of privacy lawsuit filed in Palm Beach, Florida by two female employees who alleged that a co-worker installed a hidden video camera in the ladies' restroom at the company's headquarters and, despite complaints to management, nothing was done and pictures of the women's intimate parts started to appear on pornographic sites on the Internet), [http://www.dailybusinessreview.com/news.html?news\\_id=14857](http://www.dailybusinessreview.com/news.html?news_id=14857) (on file with the Florida Coastal Law

3. An employee seeks recovery for being put under surveillance by an employer while off duty to discover any embarrassing information that might get the employee fired.<sup>20</sup>
4. An employee seeks recovery against an employer for a physical search of the employee related to an alleged theft.<sup>21</sup>
5. An employee seeks recovery for being terminated because of off-duty activity (i.e., operating a pornographic website or participating in private sexual activity of an unusual nature) or relationships with others (i.e., other employees (non-fraternization/anti-nepotism policies), employees of competitors and homosexual relationships).<sup>22</sup>

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Journal); see also Neal T. Buehe, *Things to Come in Minnesota: Ways in Which the Privacy Tort Has Affected Employment Law in Other States*, 23 HAMLINE L. REV. 38, 51 (1999) (describing alleged claims of invasion of privacy based upon videotaping employees in the bathroom as a prank); *Purelli v. State Farm Fire & Casualty Co.*, 698 So. 2d 618 (Fla. Dist. Ct. App. 1997) (discussing an invasion of privacy claim where a female employee discovered that her employer, a chiropractor, had taken inappropriate videos of her when she had visited him as a patient but focusing on whether the chiropractor's insurance policy covered the claim); David Elder, *Rhode Island Privacy Law: An Overview and Some Important Recent Decisions*, 31 SUFFOLK U. L. REV. 837, 841 (1998) (describing invasion of privacy claims based on "surreptitious viewing of plaintiff by someone of the opposite sex without prior notice") (citing, *Stockett v. Tolin*, 791 F.Supp. 1536, 1555-56 (S.D. Fla. 1992) (finding invasion of privacy where male employee entered female employees' bathroom).

<sup>20</sup> See *State Worker Wins Settlement from Spying Insurer* (June 20, 2000) (describing \$2.55 million settlement of lawsuit alleging invasion of privacy filed in the United States District Court for the Northern District of Florida where the plaintiff, a state employee, who ran the Joint Underwriting Authority (JUA) alleged that after losing a major contract with JUA and believing that the plaintiff was biased against it, an insurance company had hired a private investigator who followed plaintiff to "a local gay bar, tapped his telephone and checked his banking and credit information" to see if something embarrassing about his personal life could be discovered to get him fired), <http://www.floridabiz.com/expcfm/display.cfm?id=4393> (on file with the Florida Coastal Law Journal).

<sup>21</sup> See Stephen Van Drake, *Home Cleaner Sues Boca Couple, Says Boss' Wife Strip-Searches Her* (Jan. 6, 2000) (describing a court complaint alleging invasion of privacy based on the claim that an employer noticed his wallet with \$300 in it was missing so he accused two cleaning women of stealing it, retained them until a police officer arrived, who patted down one of the women and the employer's wife demanded that the officer strip search the women while she allegedly strip-searched one of the women and the money was later found where it had fallen, behind the employer's bedroom vanity), <http://www.floridabiz.com/expcfm/display.cfm?id=2535> (on file with the Florida Coastal Law Journal).

<sup>22</sup> See Wendy L. Stasell, *How Far is Boss's Reach?* A.B.A. J. 32 (Dec. 2000) (describing claims by a Florida employee who asserted that he was harassed by co-workers and his employer did nothing but

6. An employee seeks recovery for being “secretly” tested for genetic make-up as part of an overall procedure to determine which employees are likely to develop illnesses or conditions that would cause them to need time off from work.<sup>23</sup>

Although it is not absolutely clear that all of these claims will become successful under the invasion of privacy tort theory in Florida, commentators have lamented over the lack of federal law in place to safeguard employees from such

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say that he “opened the door” to the treatment by co-employees when he decided to operate a pornographic website with his wife out of his home); see *Faccina v. Mutual Benefits Corp.*, 735 So. 2d 499 (Fla. Dist. Ct. App. 1999) (describing invasion of privacy claim by male model against parties for publishing a picture that implied plaintiff was a homosexual male with AIDS but brought pursuant to statute FLA. STAT. ch. 540.08 not tort law). *But see Patton v. J.C. Penney Co.*, 719 P.2d 854 (Or. 1986) (finding no cause of action for plaintiff employee who was fired for having a social relationship with a co-worker); see *Bellamy v. Mason’s Stores*, 508 F.2d 504 (4th Cir. 1974) (finding termination decision based upon well-publicized membership of employee in the Ku Klux Klan did not create any liability for employer).

<sup>23</sup> See Daryl Van Duch, *EEOC Deals With Railroad Augurs Hard Line On Workers’ Gene Data*, MIAMI DAILY BUS. REV., May 31, 2001, at A12 (describing case of *Norman Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260 (9th Cir. 1998) where the court found that employees’ claims of invasion of privacy could go to trial when those claims were based on secret testing of employees during pre-employment examination for their propensity to develop carpal tunnel syndrome and also for sickle cell trait and pregnancy), available at <http://www.floridabiz.com/expcfm/display.cfm?id=8031> (on file with the Florida Coastal Law Journal). The University of California eventually settled the *Norman Bloodsaw* suit by paying out \$2.2 million for alleged violations of 9,000 employees’ rights. See *Privacy Rights: University of California Settles Lawsuit Alleging Testing of Workers Without Consent*, Daily Lab. Rep. (BNA) No. 152, at A-9 (Aug. 7, 2000). Congress has been debating possible legislation to limit genetic testing. See Fawn H. Johnson, *Discrimination: Sen. Kennedy To Address Genetic Bias Bill’s Overlap of ADA, Privacy Regulations*, Daily Lab. Rep. (BNA) No. 143, at A-1 (July 26, 2001); Fawn H. Johnson, *Discrimination: Jeffords Examining Need For Legislation on Genetic Discrimination, Coalitions Forming*, Daily Lab. Rep. (BNA) No. 48, at C-1 (Mar. 12, 2001). The Equal Employment Opportunity Commission (EEOC) has taken the position that genetic testing constitutes discrimination under the Americans With Disabilities Act and recently filed suit against Burlington Northern for its use of genetic testing to determine the potential for developing carpal tunnel syndrome. See Nancy Montwieler, *Discrimination: Railroad Agrees To End Genetic Testing, After Disability Discrimination Suit Filed By EEOC*, Daily Lab. Rep. (BNA) No. 30, at AA-1 (Feb. 13, 2001) (discussing *EEOC v. Burlington Northern Santa Fe Railroad Co.*, N.D. Iowa, No. C01-4013, filed 2/9/01 where the company required employees who submitted claims for carpal tunnel syndrome to submit samples of blood for testing to determine if those employees had a general propensity to develop the carpal tunnel condition). A recent article provides a general discussion about expanding tort rights for genetic testing. See generally June Mary Z. Makdisi, *Genetic Privacy: New Intrusion A New Tort?* 34 CREIGHTON L. REV. 965 (2001) (describing general privacy concerns and tort developments related to genetic testing).

abuses.<sup>24</sup> Thus, state tort law may provide the only legitimate option to address these issues.

Part II of this Article provides a general overview of the development of invasion of privacy as a tort-based exception to at will employment over the last twenty years, including initial sparks of broad development with little development thereafter. Part III of this Article examines the growth and development of privacy law in Florida. Part IV of this Article describes how the invasion of privacy tort is about to take flight in the Florida workplace. Finally, the Article concludes that the growing use of technology to gather data in the workplace has vaulted ahead without much concern about employee privacy issues. But recent concerns about the unlimited power of the technology juggernaut have led to enough development of this tort over the last decade so that Florida is now ready to take advantage of its protection in the workplace and apply it to many privacy situations that exceed the technological concerns.

## II. DEVELOPING PRIVACY EXCEPTIONS TO AT WILL EMPLOYMENT OVER THE LAST TWENTY YEARS

Over the last twenty years, the doctrine of employment at will has eroded significantly due to the expansion of certain exceptions under contract and tort

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<sup>24</sup> Dixon, *supra* note 4, at 9 (lamenting that “[t]here are no laws prohibiting employers from using digital surveillance to monitor employees in the modern workplace.”)(footnotes omitted); see *Privacy Rights: Employers Urged To Be Cautious About Employees’ Privacy Concerns*, Daily Lab. Rep. (BNA) No. 209, at A-9 (Oct. 29, 1999) (discussing comments of Lewis Maltby and Michael Tedesco and their concerns about electronic surveillance of employee computer-related communications and drug testing as a guise to “discipline unpopular employees” and the lack of “federal law to safeguard employees from such abuses”); see also *Employee Rights Professor Calls On Clinton To Regulate Workplace Privacy*, Daily Lab. Rep. (BNA) No. 78, at D-17 (Apr. 23, 1996) (describing comments of Professor David F. Linowes about his study of eighty-four Fortune 500 companies and his findings regarding company practices for drug testing, AIDS testing, polygraph use, and the use of arrest, conviction, and security records, among other practices, that need federal privacy regulation to check abuses and misuses by employers of employees’ private information).



law.<sup>25</sup> Invasion of privacy constitutes one of those tort-based<sup>26</sup> exceptions to the employment at will doctrine.

### A. Historical Origins

The tort of invasion of privacy has developed from the common law. Privacy rights probably originated in Judge Thomas Cooley's 1880 treatise expressing the power of the "right to be let alone."<sup>27</sup> Samuel Warren and Louis Brandeis expanded that concept in their landmark 1890 law review article, *The Right To Privacy*.<sup>28</sup> The next real major expansion of this tort occurred when Dean William Prosser addressed it in his landmark 1960 law review article, *Privacy*.<sup>29</sup> According to Dean Prosser, "[w]hat has emerged from the [common law] decisions is . . . not one [invasion of privacy] tort, but a complex of four."<sup>30</sup> Those four types of invasion of privacy torts are: 1) Intrusion upon a person's seclusion or solitude, or into the person's private affairs; 2) Public disclosure of embarrassing private facts about the person; 3) Publicity which places the person in a false light in the public eye; and 4) Appropriation by a person for that person's advantage of the name or

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<sup>25</sup> Examples of those contractual-based exceptions include wrongful discharge based upon contractual promises in handbooks, implied in fact promises, implied in law promises, and promissory estoppel claims. See ROTHSTEIN ET AL., *supra* note 5, §§ 8.1-8.5, at 672-90 (describing same). Also, examples of tort-based exceptions include retaliatory discharge based upon violation of public policy or whistle blowing, intentional infliction of emotional distress, defamation, and intentional interference with contractual relations. *Id.* at §§ 4.6-4.8, at 396-405 & §§ 8.9-8.15, at 698-716 (describing same).

<sup>26</sup> I recognize that privacy law consists of much more than tort law. See Ken Gormley, *One Hundred Years of Privacy*, 1992 WISC. L. REV. 1335, 1434 (providing support for the claim that privacy law cannot be easily defined because it consists of five "species" or interrelated areas: 1) tort-based privacy; 2) Fourth Amendment privacy; 3) First Amendment privacy; 4) Fourteenth Amendment privacy; and 5) state constitutional privacy); see also RICHARD TURKINGTON & ANITA ALLEN, *PRIVACY LAW, CASES AND MATERIALS*, at 1-2 (noting how some have "mistakenly viewed privacy law as a branch of the common law of torts" and asserting that privacy law can constitute a "broad range of areas of law and legal theories, including torts, constitutional law, contracts and estates, as well as numerous statutes and agency regulations at the state and federal level that provide some legal protection for privacy"). A right to privacy exists under the United States Constitution. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). Likewise, the Florida Constitution, Article V, Section 23, grants an even broader right to privacy in Florida. See *Rasmussen v. S. Fla. Blood Servs.*, 500 So. 2d 533 (Fla. 1987). However, for purposes of this Article, the analysis shall focus on a review of privacy claims in the workplace based upon common law tort theory.

<sup>27</sup> See *Stall v. State*, 570 So. 2d 257, 265 (Fla. 1990) (citing THOMAS COOLEY, *THE LAW OF TORTS* 29 (1st ed. 1880)).

<sup>28</sup> Warren & Brandeis, *supra* note 15.

<sup>29</sup> Prosser, *supra* note 15, at 389-90.

<sup>30</sup> *Id.* at 389.

likeness of another person.<sup>31</sup> Dean Prosser's analysis of the invasion of privacy tort was incorporated into section 652 of the Restatement (Second) of Torts<sup>32</sup> which identifies these four different types of invasion of privacy torts in their shortened form as: intrusion upon seclusion (section 652B); appropriation of name or likeness (section 652C); publicity given to private life (section 652D); and publicity placing a person in a false light (section 652E).<sup>33</sup>

### B. *Development of the Employment Tort of Invasion of Privacy*

All of the privacy torts may arise in employment matters. Although every state has "now recognized some [general] form of common law protection for privacy,"<sup>34</sup> the invasion of privacy tort has not been applied to the workplace setting that much.<sup>35</sup> The two most often applied claims for invasion of privacy in the workplace are public disclosure of private facts (652B) and intrusion upon seclusion (652D) with public disclosure of private facts being "the tort most often asserted by employees in invasion of privacy actions."<sup>36</sup> Therefore, despite recognizing that an employment-related claim based on appropriation of an employee's name or likeness(652C) or on publicity placing an employee in a false light (652E) may occur in limited circumstances, this Article shall focus only on the two claims that are

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<sup>31</sup> *Id.*; see also *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1252 (Fla. 1996) (describing the four types of invasion of privacy torts in Florida).

<sup>32</sup> RESTATEMENT OF TORTS (SECOND) § 652 (1977) [hereinafter RESTATEMENT].

<sup>33</sup> RESTATEMENT, *supra* note 32, §§ 652 B-E; see *TURKINGTON & ALLEN*, *supra* note 26, at 60; see also *Forsberg v. Housing Auth. of Miami Beach*, 455 So. 2d 373, 376 (Fla. 1984) (Overton, J., concurring) (finding that the four types of wrongful conduct that can all be remedied with resort to an invasion of privacy action are: (1) appropriation--the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion--physically or electronically intruding into one's private quarters; (3) public disclosure of private facts--the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye--publication of facts which place a person in a false light even though the facts themselves may not be defamatory). By being a private right, the action is limited to actions by living individuals. See RESTATEMENT, *supra* note 32, § 652I ("Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded."). "Comment a" to RESTATEMENT section 652I states that the action is a personal right, peculiar to the individual whose privacy is invaded, and that the cause of action cannot be maintained by members of the individual's family unless their own privacy is invaded along with his. *Id.* (Comment a). Furthermore, "Comment b" indicates that in the absence of statute, the action for invasion of privacy cannot be maintained after the death of the individual whose privacy is invaded. *Id.* (Comment b).

<sup>34</sup> *TURKINGTON & ALLEN*, *supra* note 26, at 24.

<sup>35</sup> See *Terry Morehead Dworkin, It's My Life - Leave Me Alone: Off-The-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 72 (1997) (noting that although "this right has been recognized for nearly a century in tort law, it has only recently started to play an important role in employment law").

<sup>36</sup> *ROTHSTEIN ET AL.*, *supra* note 5, at 325.

most likely to occur in a workplace setting, public disclosure of private facts and intrusion upon seclusion.

A number of public disclosure of private facts and intrusion upon seclusion claims have succeeded when based upon drug, AIDS and other forms of testing or the use of electronic devices in the workplace.<sup>37</sup> Meanwhile, other employment-related claims of invasion of privacy have moved along at a snail's pace, especially claims based on off-duty conduct or relationships.<sup>38</sup> Even in instances where employees have attempted to establish such invasion of privacy claims, employers have successfully raised two key defenses to such claims: consent by the employee or a qualified privilege.<sup>39</sup>

### *C. Initially Great Expectations But Not Much Thereafter*

Although it was not decided as a common law invasion of privacy case, the landmark California decision of *Rulon-Miller v. IBM*<sup>40</sup> in 1984, suggested the growth of the invasion of privacy tort in the workplace more than 15 years ago. In that case, the plaintiff, Rulon-Miller, was asked by management to stop dating a former IBM employee, Blum, after Blum started working for a competitor.<sup>41</sup> The company asserted that their continued relationship posed a conflict of interest.<sup>42</sup> After first telling Rulon-Miller that she would be given a few days to consider the choice

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<sup>37</sup> Dworkin, *supra* note 35, at 72; *see also* Erika L. Greenfield, Note, *Maintaining Employees' Privacy of HIV and AIDS Information in the Workplace*, 15 HOFSTRA LAB. & EMPLOY. L. J. 277, 288-96 (1997) (describing development of invasion of privacy claims for intrusion upon seclusion and public disclosure of private facts based upon unauthorized inquiries and disclosure of an employee's HIV/AIDS related information).

<sup>38</sup> Dworkin, *supra* note 35, at 72-73.

<sup>39</sup> *See* Helen M. Richards, *Is Employee Privacy An Oxymoron?*, 15 DEL. LAW. 20, 22 (Summer 1997). An example of the qualified privilege defense was used recently in a Utah case where a female employee was raped in an employee lounge and surveillance tapes of the sexual assault were shown to 10 people. The plaintiff did not have a claim for invasion of privacy because the 10 people were all individuals who had a legitimate need to view the tape as part of the investigation of the assault so it was not disclosed to the public or any person who did not have a legitimate reason to view it. *See* Owen v. Snowbird Corp., 16 P.3d 555 (Utah 2000); *see also* Wilson v. Procter & Gamble, No. C-970778, 1998 WL 769718, at \*1; 14 Indiv. Empl. Rights Cases (BNA) 932 (Ohio Ct. App. 1998) (affirming summary judgment for the company where a warehouse worker, James Wilson, failed to show that a Procter & Gamble supervisor violated his privacy by telling co-workers that an investigation into his alleged inappropriate behavior showed he had done nothing wrong and where Wilson failed to show that the supervisor acted with actual malice or reckless disregard as to the truth of the statement which was made to employees for the qualified privilege of dispelling rumors).

<sup>40</sup> 208 Cal. Rptr. 524 (1984).

<sup>41</sup> *Id.* at 528-30.

<sup>42</sup> *Id.*

between ending her employment with IBM or ending her dating relationship with Blum, her supervisor told Rulon-Miller that he had made up her mind for her and terminated her.<sup>43</sup>

Rulon-Miller prevailed by relying upon the employer's policy that seemed to value an employee's right to privacy and promised not to delve into an employee's personal affairs.<sup>44</sup> Nevertheless, tort claims based on this type of activity have not really expanded. The *Rulon-Miller* case has been limited to the unique IBM policy that was in place guaranteeing to the employee that the employer would not seek to interfere with private and personal affairs.

In a 1990 landmark decision in Illinois, *Miller v. Motorola*,<sup>45</sup> invasion of privacy by public disclosure of private facts occurred when the employer disclosed to many co-workers that the plaintiff had a mastectomy. The disclosure of this information to her co-workers and the resulting tort liability for invasion of privacy seemed to suggest that this employment tort had arrived.

In a 1990 article, its two authors proclaimed that privacy would be the "workplace issue of the 1990s."<sup>46</sup> Few decisions of the late 1980s and early 1990s resulted from the spring of hope that cases like *Rulon-Miller v. IBM* and *Miller v. Motorola* generated. Despite these early cases and proclamations and the overall acceptance of this tort, in general, its application to the workplace has been one of limited circumstances, especially in Florida. Contemporaneous with the recent growth in the use of technology, attempts to establish invasion of privacy claims in the workplace have started to flourish.

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> 560 N.E.2d 900 (Ill. App. Ct. 1990) (finding that employer's disclosure that employee had a mastectomy stated a claim for invasion of privacy based upon public disclosure of private facts).

<sup>46</sup> David F. Linowes & Ray C. Spencer, *Privacy: The Workplace Issue of the '90s*, 23 J. MAR. L. REV. 591, 591 (1990). One of the key privacy concerns at that time was the increasing use of drug testing in the workplace. *Id.* at 599-603; see also Philip J. Griego, *Do Mandatory Drug Tests Invade An Employee's Privacy?*, 4 SANTA CLARA COMPUTER & HIGH TECH. L.J. 165 (1988).

### III. THE DEVELOPMENT OF PRIVACY PROTECTIONS IN FLORIDA

#### A. State Constitutional Right To Privacy

Florida's constitutional right to privacy limits governmental employers from invading the right of privacy of its employees.<sup>47</sup> Florida's constitution specifically provides a constitutional right of privacy broader in scope than the protection provided in the United States Constitution.<sup>48</sup> However, that right does not apply to situations involving private employers.<sup>49</sup> In contrast, other jurisdictions have found

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<sup>47</sup> Cf. *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995) (recognizing an employee's right of privacy with respect to parenting and rearing children that should not be trampled upon by a governmental employer but not extending that to smoking). There are nine other state constitutions that specify a protection for the right of privacy, including Alaska, Arizona, California, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington. See Major B. Harding et al., *Right To Be Let Alone?— Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides for a State Right to Privacy, Resulted in Greater Privacy Protection for Florida Citizens?* 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y, 945, 951 (2000) (noting only Alaska, California, Florida, Hawaii and Montana as states with explicit clauses in their constitutions protecting privacy separately from search and seizure provisions).

<sup>48</sup> The origins and the development of Florida's constitutional right to privacy were explained by the Florida Supreme Court in *Stall v. State*, 570 So. 2d 257, 265-66 (Fla. 1990). It is not clear that even public employees involved with governmental intrusions have that strong of a right of privacy in Florida. See *Kurtz*, 653 So. 2d at 1028 (recognizing a fundamental right to privacy for such things as being married and being parents but finding no right to privacy in smoking for public employees); see Renee M. Szobnya, Note, *City of North Miami v. Kurtz: Is Sacrificing Employee Privacy Rights The Cost of Health Care Reform?*, 27 U. TOL. L. REV. 545, 567 (1996) (criticizing the *Kurtz* decision and expressly finding that the decision "is cause for concern by current employees and job applicants"). Cf. HARDING ET AL., *supra* note 47, at 1009 (arguing that the Florida state constitutional right to privacy has provided greater protections for Florida citizens from governmental intrusions upon an individual's right to privacy). Some citizens even believe that the state constitutional right to privacy has been too expansive. See Daniel Gordon, *Upside Down Intentions: Weakening The State Constitutional Right To Privacy, A Florida Story of Intrigue and A Lack of Historical Integrity*, 71 TEMPLE L. REV. 579, 606 (1998) (describing efforts to limit the scope of Florida's constitutional right to privacy because of concerns about behavioral privacy, i.e., abortion and sex between minors, and other socially destructive issues rather than looking at the overall failure of the provision to address concerns about informational privacy, i.e., disclosure of personal information to outsiders).

<sup>49</sup> See Overton & Giddings, *supra* note 7, at 35 (noting that there has been some confusion by those who believe the Florida constitutional provision applies to all intrusions but asserting that the "language makes it clear that there must be state action before the provision's protections are available"). The actual provision provides:

ARTICLE I, SECTION 23. Right of Privacy – Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise

that the state constitutional right to privacy can serve as a source of public policy protection for employees even in the private sector.<sup>50</sup>

### B. Key Statutory Protections of Privacy

Although several Florida statutes list concerns about privacy in a number of areas, most of those statutory provisions do not create any substantive protections.<sup>51</sup> A few statutes do cover privacy areas affecting employees including: prohibiting employment discrimination against employees for having AIDS or being HIV positive or for even requiring employees be tested for the HIV virus;<sup>52</sup> prohibiting genetic testing;<sup>53</sup> and prohibiting employers from coercing employees

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provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

FLA. CONST. art. I, § 23 (emphasis added). In *Resha v. Tucker*, 670 So. 2d 56, 58 (Fla. 1996), the Supreme Court of Florida found that the invasion of privacy claim under the Florida constitution "only applies to governmental action." *Id.*; see also *Kurtz*, 653 So. 2d at 1027 (noting that the "privacy provision applies only to government action, and the right provided under that provision is circumscribed and limited by the circumstances in which it is asserted"); *Sparks v. Jay's A.C. & Refrigeration, Inc.*, 971 F. Supp. 1433, 1441 (M.D. Fla. 1997) (granting the defendant's motion to dismiss plaintiff's invasion of privacy claim under Article I, section 23 because that provision applies only to governmental intrusion). Other states have also found that their state constitutional right to privacy only applies to governmental actors. See, e.g., *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989) (finding that Alaska's constitutional right of privacy does not extend to actions by private employers).

<sup>50</sup> See *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11 (N.J. 1992); see also *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (applying Pennsylvania state constitutional right to privacy and First Amendment cases in a private employment setting).

<sup>51</sup> See *Overton & Giddings*, *supra* note 7, at 46 (stating that the "term 'privacy' is referenced in at least seventy-two Florida statutory provisions" and that "most of the references to privacy are non-substantive, referring simply to protecting the type of personal privacy involved").

<sup>52</sup> See FLA. STAT. ch. 760.50 (2000) (protects employees from discrimination on the basis of having AIDS or being HIV positive and prohibits employers from testing for same unless the absence of the HIV virus is a bona fide occupational qualification for the job); *Y Person v. X Corp.*, 606 So. 2d 1219 (Fla. Dist. Ct. App. 1992) (granting petition to quash an order involving an employer's request for an HIV test of an employee who allegedly threatened to kiss or bite other employees because he knew he was dying of AIDS and as dementia was starting). Florida's Supreme Court has already recognized the important privacy rights of employees not to have information that they have AIDS disclosed to other employees. See *Rasmussen v. S. Fla. Blood Servs., Inc.*, 500 So. 2d 533, 537 & n.8 (Fla. 1987) (describing how "AIDS is the modern day equivalent of leprosy" and the major privacy concerns involved if information about an individual having AIDS or even being associated with someone having AIDS is disclosed to other employees or friends).

<sup>53</sup> FLA. STAT. ch. 760.40 (2000) (banning DNA analysis and biological testing without informed consent when done for the purpose of determining genetic make-up unless part of a criminal prosecution or a paternity suit). In the dissent from the Florida Supreme Court decision in *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995), Justice Kogan raised the concern about genetic

regarding their private political activities.<sup>54</sup> Also, the right to privacy regarding marriage constitutes a major statutory exception as a number of states have adopted laws against marital discrimination by employers. However, the restriction on marital discrimination in Florida consists of a narrow limitation based solely upon the status of being married or not and does not include actions based upon the identity or actions of a spouse.<sup>55</sup>

### C. *The Invasion of Privacy Tort in Florida*

Florida does recognize the common law tort of invasion of privacy.<sup>56</sup> The Florida Supreme Court first recognized the tort of invasion of privacy in the 1944 decision of *Cason v. Baskin*,<sup>57</sup> a recognition that was reconfirmed in a later decision involving the same parties.<sup>58</sup> According to the court in *Cason*, the right of privacy consists of the "the right to be let alone, the right to live in a community without being held up to public gaze if you don't want to be held up to the public gaze."<sup>59</sup> In recognizing the tort, the *Cason* court expressly defined an invasion of the right of privacy as: "The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern,

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testing of employees as a potential invasion of privacy under the state constitution. See *Kurtz*, 653 So. 2d at 1029 (Kogan, J., dissenting) (discussing potential harm from allowing invasion of privacy and extension of the *Kurtz* decision to genetic testing). The Florida statute appears to allay those concerns. FLA. STAT. ch. 760.40 (2000).

<sup>54</sup> FLA. STAT. ch. 104.081 (2000) (making it a third degree felony for any employer of one or more persons making threats or coercing employees to vote for one candidate or for any measure submitted to vote or for voting or not voting in any government election).

<sup>55</sup> See *Donato v. AT&T Corp.*, 767 So. 2d 1146 (Fla. 2000) (answering question certified to the Florida Supreme Court by the United States Court of Appeals for the Eleventh Circuit and finding that marital status discrimination under the Florida Civil Rights Act is limited to actions based on the status of being single, married, separated or divorced and not based on the identity or actions of an individual's spouse).

<sup>56</sup> See *Agency for Health Care Admn. v. Associated Indus. of Florida, Inc.*, 678 So. 2d 1239, 1252 (Fla. 1996) (recognizing four separate categories constituting invasion of privacy); *Stoddard v. Wohlfahrt*, 573 So. 2d 1060 (Fla. Dist. Ct. App. 1991); *Loft v. Fuller*, 408 So. 2d 619, 622 (Fla. Dist. Ct. App. 1981); *Chase Manhattan Inv. Servs., Inc. v. Miranda*, 658 So. 2d 181, 182 (Fla. Dist. Ct. App. 1995). See generally *Cape Publications, Inc. v. Hitcher*, 549 So. 2d 1374 (Fla. 1989) (invasion of privacy claim established in a suit against a newspaper); *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1945) (invasion of privacy claims established by plaintiff against author for use of name in publication of a book); *Forsberg v. Housing Auth. of City of Miami Beach*, 455 So. 2d 373, 376 (Fla. 1984) (Overton, J., concurring); see also *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996) (interpreting Florida law); *Guin v. City of Riviera Beach*, 388 So. 2d 604, 606 (Fla. Dist. Ct. App. 1980).

<sup>57</sup> 20 So. 2d 243 (Fla. 1945).

<sup>58</sup> See *Cason v. Baskin*, 30 So. 2d 635 (Fla. 1947).

<sup>59</sup> *Cason*, 20 So. 2d at 248.

or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."<sup>60</sup> The Florida courts have made it clear that the invasion of privacy tort applies to both claims for intrusion upon seclusion<sup>61</sup> and claims of public disclosure of private facts.<sup>62</sup>

#### IV. EXPANDING THE INVASION OF PRIVACY TORT IN FLORIDA TO EMPLOYMENT SITUATIONS

The law in Florida, and in most jurisdictions, is that if the period of employment is indefinite, either party may terminate the employment relationship at any time. Unless the employment contract specifically obligates both the employer and the employee for a definite term of employment, the employment is considered to be indefinite and terminable at the will of either party.<sup>63</sup> The Florida courts have not carved out a lot of exceptions to this doctrine. Accordingly, Florida cases discussing claims of invasion of privacy in the workplace may not be easily found.

The Florida legislature has also guarded the at will doctrine by establishing only a very few of the traditional tort or contract-based limitations by statute,

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<sup>60</sup> *Id.* at 249.

<sup>61</sup> Invasion of privacy claims in Florida do exist under the tort identified by the Supreme Court of Florida as "intrusion—physically or electronically intruding into one's private quarters." *See All State Ins. Co. v. Ginsberg*, 235 F.3d 1331, 1334 (11th Cir. 2000) (quoting *Agency for Health Care Admin. v. Assoc. Indus. of Fla., Inc.*, 678 So. 2d 1239, 1252 (Fla. 1996)). This is a right of privacy defined as "the right of an individual to be let alone." *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715, 717 (Fla. Dist. Ct. App. 1961). Intrusion upon seclusion requires a trespass or intrusion upon physical solitude as by invading one's home. *Florida Pub. Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976); *Guin v. City of Riviera Beach*, 388 So. 2d 604, 606 (Fla. Dist. Ct. App. 1980); *Thompson v. City of Jacksonville*, 130 So. 2d 105 (Fla. Dist. Ct. App. 1961); *Rawls v. Conde Nast Publ'ns, Inc.*, 446 F.2d 313, 317 (5th Cir. 1971) (construing Florida law).

<sup>62</sup> One Florida Appellate Court recently acknowledged the existence of an invasion of privacy claim for public disclosure of private facts. *See Doe v. Univision Television Group, Inc.*, 717 So. 2d 63 (Fla. Dist. Ct. App. 1998) (overturning summary judgment for the defendant, a television station, based on the existence of a claim that the defendant invaded the plaintiff's privacy when showing a story about her plastic surgery when it failed to keep her voice disguised and her face from being recognized). To establish a disclosure of private facts claim, a person must prove the publication of a personal matter to a third person. *Cason*, 20 So. 2d. at 249.

<sup>63</sup> *See DeMarco v. Publix Super Mkts., Inc.*, 360 So. 2d 134 (Fla. Dist. Ct. App. 1978); *Hope v. Nat'l Airlines*, 99 So. 2d 244 (Fla. Dist. Ct. App. 1957).



primarily for whistle blowing.<sup>64</sup> Accordingly, successful invasion of privacy claims in the workplace appear to be virtually non-existent in court decisions.<sup>65</sup>

### A. *Intrusion Upon Seclusion In The Workplace*

A form of intrusion upon seclusion may occur when an employee is shadowed or kept under surveillance.<sup>66</sup> Another classic example of intrusion upon seclusion in the employment setting occurred in *Liberti v. Walt Disney World*.<sup>67</sup> In that case, female children employees and performers at Disney World were being secretly videotaped in their dressing room by a “peeping Tom” employee.<sup>68</sup> That employee placed a hidden video camera in the children’s dressing room and created various peepholes to view female employees. His actions were part of an elaborate

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<sup>64</sup> FLA. STAT. ch. 112.3187-31895 (2000). This statute applies primarily to public employees. However, in 1991, the Florida legislature extended its coverage to private employers who employ ten or more persons. FLA. STAT. ch. 448.101-102 (2000); *see also* Forrester v. John H. Phipps Inc., 643 So. 2d 1109 (Fla. Dist. Ct. App. 1994) (finding a viable claim for refusing to sign or agree with a false statement as to an employer’s explanation for a reassignment of duties at a TV station where the plaintiff was employed).

<sup>65</sup> Despite numerous searches on LEXIS® and WESTLAW®, the author could not find a single case at the Florida appellate court level where an employee plaintiff had won an invasion of privacy tort claim against an employer for public disclosure of private facts and the appellate court analyzed the merits and sufficiency of the elements needed to prove it. While mentioning public disclosure of private facts, the few employment claims that have reached the appellate level have tended to involve intrusions upon seclusion like searches or surveillance, *see* Catania v. E. Airlines, Inc., 381 So. 2d 265 (Fla. Dist. Ct. App. 1980); Tucker v. Am. Employer’s Ins. Co., 171 So. 2d 437 (Fla. Dist. Ct. App. 1965), or where sexual harassment or assault has occurred and the plaintiff also seeks tort damages by including an invasion of privacy claim. *See* Guin v. City of Riviera Beach, 388 So. 2d 604 (Fla. Dist. Ct. App. 1980); Hennagan v. Dept. of Safety & Motor Vehicles, 467 So. 2d 748, 750 (Fla. Dist. Ct. App. 1985) (reversing summary judgment on a claim of invasion of privacy involving allegations of unwelcome touching and sexual assault); State Farm Fire & Cas. Co. v. Compupay, Inc., 654 So. 2d 944, 949 (Fla. Dist. Ct. App. 1995) (finding that invasion of privacy includes touching of plaintiff in an undesired or offensive manner); Ponton v. Scarfone, 468 So. 2d 1009 (Fla. Dist. Ct. App. 1985) (where an employer attempted to induce his female employee to join with him in a sexual liaison and the words attributable to the defendant fell short of the zone of conduct necessary to intrude upon the employee’s seclusion).

<sup>66</sup> *See* Tucker v. Am. Employers’ Ins. Co., 171 So. 2d 437 (Fla. Dist. Ct. App. 1965) (discussing the viability of an invasion of privacy common law cause of action based on a defendant’s surveillance of a plaintiff). In the *Tucker* opinion, the court adopted the reasoning in *Forster v. Manchester*, 189 A.2d 147 (Pa. 1963), and held that in order to state a cause of action under this theory, the surveillance of the plaintiff by the defendant must be shown to have been in a vicious and malicious manner not reasonably limited to a legitimate purpose. *Id.* (citing to *Pinkerton Nat’l Detective Agency, Inc. v. Stevens*, 132 S.E.2d 119 (Ga. 1963)).

<sup>67</sup> 912 F. Supp. 1494 (M.D. Fla. 1995).

<sup>68</sup> *Id.* at 1499.

peeping and videotaping scheme where he could watch the female employees undress from a hidden area. After an internal sting operation, where the employer caught him masturbating while viewing the women and terminated him, the female employees sued for invasion of privacy against the employer and claimed that it had failed to notify the female employees that they were being watched. Additionally, they claimed the employer let this invasion occur to further its undercover operation to catch the employee while he was monitoring the female employees.<sup>69</sup> The court denied the employer's motion for summary judgment based on the allegations that the employer knew about the employee who had videotaped the female employees and had failed to act.<sup>70</sup>

Another example involving a claim of invasion of privacy based upon intrusion upon seclusion was *McKenzie v. EAP Management Corp.*<sup>71</sup> In *McKenzie*, a black female employee, working at a Kentucky Fried Chicken restaurant, alleged that a supervisor had "performed a modified strip search" on her after believing that the plaintiff may have stolen a \$50 bill.<sup>72</sup> Specifically, plaintiff alleged that the female supervisor "reached into [her] pants pockets," reached "inside the pockets of a second pair of pants worn by Plaintiff" and then put "her finger under [the plaintiff's] breasts" and "inside her bra, to check for the missing \$ 50."<sup>73</sup> Nevertheless, like many invasion of privacy employment cases in Florida, the court in *McKenzie* did not discuss the merits of this invasion of privacy claim. Her state claims, including the invasion of privacy claim, were not addressed by the federal court after it found that plaintiff's federal claims of race and disability discrimination and retaliation had no merit.<sup>74</sup>

Some cases have required that the invasion of privacy tort cannot be charged against the employer due to acts of a co-worker. In *Resley v. Ritz-Carlton*

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<sup>69</sup> *Id.* at 1499-1500.

<sup>70</sup> *Id.* at 1507-08.

<sup>71</sup> 40 F. Supp. 2d 1369 (S.D. Fla. 1999).

<sup>72</sup> *Id.* at 1373.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1377-78. A similar refusal to review the merits of an invasion of privacy claim in the workplace because the federal discrimination claims were dismissed occurred in *Madray v. Publix Super Mkts.*, 30 F. Supp. 2d 1371, 1373-74 (S.D. Fla. 1998), *aff'd*, 208 F.3d 1290 (11th Cir. 2000) (describing a number of times when a male supervisor hugged, kissed and physically touched female employees). In yet another case, the merits were not discussed because Plaintiff alleged an invasion of privacy claim under the Florida constitution rather than tort law and the action was dismissed without prejudice allowing plaintiff to file the action again as a tort claim. *Spark's v. Jay's A.C. & Refrigeration*, 971 F. Supp. 1433, 1441-42 (M.D. Fla. 1997).

*Hotel, Co.*,<sup>75</sup> the court found that invasion of privacy claims may not be established against an employer for offensive touching. The reasoning of the court was that a co-worker's intentional acts fell outside the scope of employment to create respondeat superior liability for the employer.<sup>76</sup> Also, in *Benn v. Florida East Railway Co.*,<sup>77</sup> a Florida federal court found that "there is usually no intrusion upon seclusion when a plaintiff is in a public place, such as her workplace."<sup>78</sup> That same court also recognized that in Florida "there can be an intrusion upon seclusion in the workplace in certain instances, such as when an employee looks up a co-worker's skirt,"<sup>79</sup> or "when an employee enters the ladies' room and commits a battery upon a co-worker."<sup>80</sup> The court also noted that "mere noises which disturb a church congregation, or bad manners, harsh names and insulting gestures in public are not enough" to establish intrusion upon a person's privacy to create tort liability.<sup>81</sup> The question of whether those acts could be attributed to the employer under respondeat superior liability was not addressed. But, the employer would appear to be liable if it knew of the invasions and failed to act or stood by and watched the invasions occur at work.<sup>82</sup>

A number of the recent intrusion upon seclusion cases have involved sexual assault or harassment allegations as recovery for those claims in the workplace has increased. The United States Court of Appeals for the Eleventh Circuit recently certified four questions to the Supreme Court of Florida for clarification including

<sup>75</sup> 989 F. Supp. 1442 (M.D. Fla. 1997).

<sup>76</sup> *Id.* at 1448 (finding that invasion of privacy claim brought against an employer for offensive and sexually oriented touching of plaintiff by a co-worker did not establish liability for the employer because the employee's actions were outside the scope of employment and could not create respondeat superior liability).

<sup>77</sup> No. 97-4403-Civ., 1999 U.S. Dist. LEXIS 14314 (S.D. Fla. 1999).

<sup>78</sup> *Id.* at \*23. In *Benn*, the district court dismissed an invasion of privacy claim brought by a female employee against her employer. *Id.* She alleged that co-workers placed a dildo at her work station and conducted other pranks of a sexual nature. *Id.* at \*2-4. The court found that these allegations did not establish tort liability against her employer because the pranks were not within the co-workers' scope of employment. *Id.* at \*21-2. Furthermore, those pranks were deemed insufficient to establish liability against the individual co-workers because they did not involve touching or physical contact or establish that some special zone of privacy involving the private affairs of the plaintiff different from the public workplace had been intruded upon. *Id.* at \*21-23.

<sup>79</sup> *Id.* (citing *Vernon v. Med. Mgmt. Assoc. of Margate, Inc.*, 912 F. Supp. 1549, 1562 (S.D. Fla. 1996)).

<sup>80</sup> *Id.* (citing *Stockett v. Tolin*, 791 F. Supp. 1536 (S.D. Fla. 1992)).

<sup>81</sup> *Id.* at \*23 (citing PROSSER & KEATON, *THE LAW OF TORTS* 854-55 (5th ed. 1984)).

<sup>82</sup> See *Liberti*, 912 F. Supp. at 1499-500 (where employer failed to terminate employee involved in spying on female children and even scheduled a sting operation where they watched the employee spying on the female employees without stopping it from occurring or making the employees aware of the fact that they were watching the employee who was watching them getting dressed).

the issue of whether pleadings of unwelcome conduct including touching in a sexual manner and sexually offensive comments state a cause of action in Florida under the common law tort law claim of invasion of privacy.<sup>83</sup> Because the Florida Supreme Court has not clearly addressed what type of acts fall within the invasion of privacy tort, several approaches taken by Florida appellate courts suggest some information on the development of this particular form of the tort. For instance, in the First and Third Appellate Districts, those courts have expressly acknowledged that the tort of invasion of privacy includes a physical intrusion to the plaintiff's body.<sup>84</sup> Also, the Eleventh Circuit Court of Appeals interpreting Florida law has implied that unwanted sexual comments can constitute a basis for invasion of privacy.<sup>85</sup> In *Ginsberg*, the plaintiff argued that these opinions justify a broad reading of the invasion of privacy tort to include unwanted sexual overtures and comments.<sup>86</sup> The Defendant insurance company in *Ginsberg* argued that the tort as recognized by Florida is much more limited and relied on decisions of the Second and Fourth Appellate Districts.<sup>87</sup> Once the *Ginsberg* questions are answered by the Supreme Court of Florida, it may open the door to many more opportunities for expansion of the invasion of privacy tort in the Florida workplace.

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<sup>83</sup> *Allstate Ins. Co. v. Ginsberg*, 235 F.3d 1331 (11th Cir. 2000).

<sup>84</sup> *See Hennagan v. Dept. of Safety & Motor Vehicles*, 467 So. 2d 748, 750 (Fla. 1st Dist. Ct. App. 1985) (reversing summary judgment on a claim of invasion of privacy involving allegations of unwelcome touching and sexual assault); *State Farm Fire & Cas. Co. v. Compupay, Inc.*, 654 So. 2d 944, 949 (Fla. 3rd Dist. Ct. App. 1995) (finding that invasion of privacy includes touching of plaintiff in an undesired or offensive manner similar to sexual harassment claims even though the merits of the case were merely whether the claim was covered by insurance because the underlying invasion of privacy claim had been settled).

<sup>85</sup> *See Steele v. Offshore Shipbuilding Inc.*, 867 F.2d 1311, 1315 (11th Cir. 1989) (Florida action for invasion of privacy based on sexually related comments allowed to proceed when the comments were published to a large number of people).

<sup>86</sup> *Ginsberg*, 235 F.3d at 1333-35.

<sup>87</sup> *See Ponton v. Scarfone*, 468 So. 2d 1009, 1010 (Fla. 2nd Dist. Ct. App. 1985) (finding the employer's utterances designed to induce employee into a sexual relationship did not fall within the zone of conduct establishing an invasion of privacy); *Guin v. City of Riviera Beach*, 388 So. 2d 604, 606 (Fla. 4th Dist. Ct. App. 1980) (holding that the "tort of invasion of privacy is ordinarily considered to encompass four categories, one of which consists of 'intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home'"). The defendant's argument in *Ginsberg* was that these decisions along with the Florida Supreme Court's statement in *Agency for Health Care Administration* about this tort being a limited one, supports the position that the intrusion element of invasion of privacy is limited to intrusions of seclusion and does not include intrusions of the body. *Ginsberg*, 235 F.3d at 1333-35.

### B. Public Disclosure of Private Facts in the Workplace

With public disclosure of private facts, a major concern is the media's attempt to disclose private information about public figures or limited public figures.<sup>88</sup> The special "public figure" analysis for privacy questions applied to print and broadcast media is unnecessary for this tort in the employment setting.<sup>89</sup>

One example of the recent application of the invasion of privacy tort in an employment setting, without any real explanation of the scope of the tort, occurred in *School Board v. Greene*.<sup>90</sup> In *Greene*, the appellate court affirmed a jury verdict where the plaintiff, a teacher, successfully sued his employer, the defendant school board, for invasion of privacy when the school board disclosed derogatory information about the plaintiff after he decided to run for a position on the school board.<sup>91</sup> Nevertheless, the gist of the case involved whether it was appropriate to award more than \$ 100,000 against the school board because of sovereign immunity when the jury verdict of \$850,000 was based on two theories, negligence and invasion of privacy.<sup>92</sup> The court reversed the amount of the verdict and remanded it to the trial court with instructions for limiting recovery to \$100,000.<sup>93</sup>

In another employment case that mentions invasion of privacy but does not address the merits of the claim,<sup>94</sup> the court in *Pucci v. US Air*<sup>95</sup> reviewed a litany of

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<sup>88</sup> See Warren & Brandeis, *supra* note 15, at 195-96 (discussing the concern about the "press . . . overstepping . . . bounds of propriety and of decency"). This allowed a right of action against the media even if their statements were truthful. TURKINGTON & ALLEN, *supra* note 26, at 450.

<sup>89</sup> *Id.* at 466-70; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 324 (1974).

<sup>90</sup> 739 So. 2d 668 (Fla. Dist. Ct. App. 1999).

<sup>91</sup> *Id.* at 669.

<sup>92</sup> *Id.* at 670.

<sup>93</sup> *Id.*

<sup>94</sup> See *Chase Manhattan Inv. Serv. v. Miranda*, 658 So. 2d 181 (Fla. Dist. Ct. App. 1995) (describing an employee's claim of invasion of privacy but not getting to the merits and only addressing the case of whether the claim was subject to arbitration) (citing *Nazon v. Shearson Lehman Bros., Inc.*, 832 F. Supp. 540 (S.D. Fla. 1993) (compelling arbitration before the NASD of former employee's claims for invasion of privacy and intentional infliction of emotional distress, as well as state statutory claims under Florida's Human Rights Act, based on Form U-4)); *Bachus & Stratton, Inc. v. Mann*, 639 So. 2d 35, 36 (Fla. Dist. Ct. App. 1994) (same as to former account executive's state law claims of invasion of privacy, assault and battery, intentional infliction of emotional distress, defamation, conspiracy to defame and interference with business relationships based on Form U-4).

<sup>95</sup> 940 F. Supp. 305 (M.D. Fla. 1996) (denying defendant's motion to dismiss and finding sufficient pleading to establish a claim by former employee against former employer under Florida law for tortious invasion of privacy by alleging the necessary elements upon which relief could be granted as to specific category of public disclosure of private facts).

complaints by a female against her employer related to sexual harassment. The court analyzed an invasion of privacy claim with this meager analysis: "Count V, a claim for tortious invasion of privacy, alleges the necessary elements upon which relief may be granted as to the specific category of 'public disclosure of private facts.' The Court denies the Motion to Dismiss Count V."<sup>96</sup> This reflects the limited analysis courts have been willing to provide regarding the successful establishment of an invasion of privacy tort in the workplace for public disclosure of private facts.

## V. CONCLUSION

Over the last century the concept of a "right to privacy" has grown tremendously beyond its initial common law formation and has expanded to basic notions amongst most individuals that nobody, even an employer, should be allowed to pry into an individual's personal affairs or personal space. However, as technology advances at warp speed and employers race to keep up with that technology and their potential liability, protection for the individual employee's privacy rights has become an afterthought. With increasing use of the invasion of privacy tort in the Florida workplace, the concern for individual privacy rights of employees may move to the forefront. Regardless of the at will employment doctrine, the pervasive invasions of employees' privacy and the continuing erosion of their privacy rights requires some legal intervention. Although the invasion of privacy tort may not be a panacea for those with major concerns about employee privacy matters,<sup>97</sup> it does represent a growing and developing area where Florida employees will likely start to bring a broad number of claims against their employers. As the year 2001 comes to an end, the odyssey for employers concerned about expansion of invasion of privacy claims will be to develop sound policies that balance individual employee privacy issues with the ever-expanding technological and legal demands of a global economy.

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<sup>96</sup> *Id.* at 310.

<sup>97</sup> See Wines & Fronmueller, *supra* note 8, at 640-41 (lamenting that the "real cause of workplace problems with privacy is the underlying dominant rule of employment in the United States, employment at will," because all the employer has to do to prevent invasion of privacy liability is give "notice in advance that it intends to engage in the questionable practice which will be deemed as consent if the employee agrees and will subject the employee to at will dismissal if the employee does not agree"). Also, note that the defenses of consent, privilege and actions outside the scope of employment which prevent respondeat superior liability are all major obstacles to the expansion of this tort. But, it is another weapon to start to raise the awareness of the extreme deprivations of privacy by employers or co-workers that may now occur without a strong legal remedy.

