

MYSACE ISN'T YOUR SPACE

*Expanding the Fair Credit Reporting Act to Ensure Accountability and Fairness in Employer Searches of Online Social Networking Services**Donald Carrington Davis*

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EXECUTIVE SUMMARY

The advent and popularity of online social networking has changed the way Americans socialize. Employers have begun to tap into these online communities as a simple and inexpensive way to perform background checks on candidates. However, a number of problems arise and may arise when employers base adverse employment decisions on the results of these online searches. Three basic problems or issues accompany searches of online profiles for employment decisions: inaccurate, irrelevant, or false information leads to unfair employment decisions; lack of accountability and disclosure tempts employers to make illegal employment decisions; and employer searches of an employee's online social life violate an employee's privacy when his off-duty conduct does not negatively impact her employer.

Because searches of online social networking services such as MySpace and The Facebook only stand to become more prevalent and popular among employers, the law must expand to ensure users of these websites adequate protection from unfair, illegal or arbitrary employment decisions. Employers also stand to gain from such an expansion of legal protections because they will be accountable to make good employment decisions. The original purposes of the FCRA allow for and demand its expansion to cover the potential problems caused when employers go searching for a candidate or employee's online social networking profiles. This solution effectively strikes an agreeable balance

between an employer's right to know its candidates and employees and an employee's right to privacy and fair employment decision making.

I. INTRODUCTION AND BACKGROUND

Online social networking services, which include such popular online communities as MySpace¹, The Facebook², and Friendster³ have begun to dominate and define the social realities of many people, especially teenagers and young adults. MySpace allows its members to create profiles with personal information, communicate with others in their online network, and enjoy a variety of other membership benefits, including listening to music made available by many musical artists who maintain profiles on MySpace. MySpace expresses its purpose to host private social communities through its service.⁴ The Facebook began as a social networking website for college students, but has since expanded to provide networks for high school students, professionals, and alumni, and now allows almost anyone to create a profile. Numerous other social networking websites focus on establishing networks for everything from activism to professional affinity and provide users with avenues and outlets to express themselves freely, meet other people, and keep in touch with the people they know.⁵

¹ Myspace Home Page, <http://www.myspace.com> (last visited Dec. 12, 2006).

² Facebook Home Page, <http://www.facebook.com> (last visited Dec. 12, 2006).

³ Friendster Home Page, <http://www.friendster.com> (last visited Dec. 12, 2006).

⁴ "Create a private community on MySpace and you can share photos, journals and interests with your growing network of mutual friends!" MySpace, *About Us*, <http://www.myspace.com/Modules/Common/Pages/AboutUs.aspx> (last visited Dec. 18, 2006).

⁵ One popular online encyclopedia estimates that over 200 social networking websites exist. See Wikipedia, *Social Network*, http://en.wikipeda.org/wiki/Social_Network (last visited Nov. 26, 2006).

With over one hundred million accounts worldwide⁶ and fifty-six million unique users in the United States,⁷ MySpace currently stands as the leader in online social networking, and continues to grow at a pace of approximately 230,000 new profiles a day⁸. This very popular site commands the loyalty of nearly eighty percent of visitors to online social networks.⁹ The Facebook currently holds first place in the online world as both a college-based social network¹⁰ and for the uploading and storage of photographs.¹¹

While many over the age of thirty have begun rushing to become part of the online social networking world, the largest and most significant group of online social network users comes from the generation commonly known as Generation Y, young adults now in their late teens to twenties¹². Unlike the much older adults who have shaped, written, and interpreted the privacy laws applicable today, these young adults grew up in an age of vast technological expansion that has fostered a world of instantaneous communication and with it the need for new modes of thinking in the area

⁶ MySpace's 100 millionth account was created August 9, 2006. See Seeking Alpha, *Rupert Murdoch Comments on Fox Interactive's Growth* (Aug. 9, 2006), at <http://internet.seekingalpha.com/article/15237>.

⁷ Associated Press, *Youths No Longer Predominant at MySpace* (Oct. 5, 2006), available at <http://abcnews.go.com/Technology/wireStory?id=2534413>. Number of accounts does not accurately reflect how many individuals use social networking services, as some users create more than one account.

⁸ CNN, *MySpace Cowboys* (Aug. 24, 2006), available at http://money.cnn.com/magazines/fortune/fortune_archive/2006/09/04/8384727/index.htm.

⁹ Reuters, *MySpace gains top ranking of US Web sites* (July 11, 2006), available at http://www.usatoday.com/tech/news/2006-07-11-myspace-tops_x.htm.

¹⁰ Washington Post, *In Online Social Club, Sharing Is the Point Until It Goes Too Far* (Sep. 7, 2006), available at http://www.washingtonpost.com/wp-dyn/content/article/2006/09/06/AR2006090601805.html?nav=rss_education.

¹¹ Facebook, *Inside Facebook Engineering*, http://www.facebook.com/jobs_engineering.php (last visited Dec. 15, 2006).

¹² Associated Press, *supra* note 7.

of privacy. As these young adults have recently begun to enter and continue to enter the workforce, they face a realm of unfamiliar thinking about the meaning of digital privacy.

Surveys differ on how many employers include some form of internet search of candidates in their applicant screening process, but all agree that it has become an increasingly popular trend among employers.¹³ One survey found that sixty-three percent of employers that search social networking profiles online have rejected candidates based on information found in those profiles.¹⁴ Many employers consider searching a candidate's MySpace or Facebook profile an inexpensive and convenient peek into the candidate's life and character.¹⁵ Up until recently, when news articles and blog entries began to appear on this topic and career placement professionals began to warn students of the risks of posting information about themselves in their social networking websites, online social networking users remained generally unaware of the fact that many employers were rejecting them because of something the employer found on their MySpace profile.¹⁶

¹³ Alan Finder, *For Some, Online Persona Undermines a Résumé*, N.Y. TIMES, June 11, 2006, available at <http://www.nytimes.com/2006/06/11/us/11recruit.html>.

¹⁴ Press Release, Career Builder.com, One-in-Four Hiring Managers Have Used Internet Search Engines to Screen Job Candidates; One-in-Ten Have Used Social Networking Sites, CareerBuilder.com Survey Finds (Oct. 26, 2006), available at http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr331&sd=10%2f26%2f2006&ed=12%2f31%2f2006&siteid=cbpr331&sc_cmp1=cb_pr331_ (on file with author).

¹⁵ See Alison Doyle, *MySpace, Facebook, and More, About: Job Searching*, available at <http://jobsearch.about.com/b/a/217342.htm> (last visited Dec. 15, 2006) ("Employers have been known to peruse MySpace and Facebook, along with blogs and websites of prospective employees.").

¹⁶ One recent college graduate reported that once he had a satirical essay removed that he published on a social networking site for students, he began to receive invitations to interview and has since received several job offers. Finder, *supra* note 13.

Modern young adults demonstrate a willingness to post information about themselves on these websites because of the way they think about privacy in today's world. Americans know that a wealth of information that exists about them floats around in the electronic world--outside the realm of the physical control--yet Americans do not consent to sharing that information with parties that have no proper or relevant use for it. Congress has enacted laws to help ensure that only appropriate individuals and entities may access certain personal information that lies beyond this physical control and that information about individuals portrays them accurately and fairly. Specifically, Congress has communicated through the Fair Credit Reporting Act¹⁷ its intent to ensure that an individual's eligibility for employment is based on a consumer report free from inaccurate or irrelevant information.¹⁸

Members of Generation Y do not consider their online profiles the province of their employer much in the same way an older generation would think it improper and invasive for an employer to show up at an employee's private party unannounced. The existence of the internet has undoubtedly changed society and the way that it interacts. While members of this generation reasonably understand that many people may easily access information about them posted on the internet, they believe that what they do in their private social lives is none of their employer's business. As long as their activity

¹⁷ 15 U.S.C. §§ 1681 *et. seq.* (2000).

¹⁸ *See* *Rasor v. Retail Credit Co.*, 554 P.2d 1041, 1045 (Wash. 1976) ("The Fair Credit Reporting Act was adopted 'to protect an individual from inaccurate or arbitrary information about himself in a consumer report that is being used as a factor in determining the individual's eligibility for credit, insurance or employment.'" (quoting *Porter v. Talbot Perkins Children's Servs.*, 355 F. Supp. 174, 176 (S.D.N.Y. 1973))) "The general purpose of the FCRA is to protect the reputation of a consumer, for once false rumors are circulated there is not complete vindication." (quoting *Ackerley v. Credit Bureau of Sheridan, Inc.*, 385 F. Supp. 658, 659 (D. Wyo. 1974))).

does not violate the law, does not negatively impact business or job performance, and does not expose their employer to liability, it should certainly not become the basis for adverse employment decisions. While employers have the right to know who their applicants and employees are, they must keep in mind the important separation between the professional and private lives of their candidates and employees. Making assumptions about a person's professionalism based on information obtained out of context on a website designed solely for social purposes violates a basic tenet of conventional wisdom—you can't always believe what you see.¹⁹

Lawmakers and policymakers must begin to reconsider the traditional physical conceptions of privacy (i.e., thinking about privacy within physical boundaries such as a home or an automobile) in order to meet the demands of this new tech-savvy generation that has proven itself much more apt to share and communicate in the world wide web than its predecessors. In a world where maintaining absolute discretion in every aspect of one's life seems both impossible and impractical, Congress must begin to respond by adopting reasonable privacy-protecting measures. These measures should conform to the modern concept of an employee's expectation of privacy, an expectation that is as strong as ever, but now with metaphysical boundaries rather than purely physical ones.

The scope of this note is limited to private employers that are subject to relevant provisions of federal employment-related laws. It examines the problems that might arise

¹⁹ Employment lawyer George Lenard asserts that employers must not forget that the lessons of conventional wisdom that applied to earlier modes of communication, such as newspapers and television, also apply to the Internet. An old adage, "Not everything you see is true," easily evolves into "Not everything you see on the Internet is true." Applied to candidates for employment, "Not everything you see on MySpace is true or accurate." George Lenard, *George's Employment Blawg*, <http://www.employmentblawg.com/2006/more-on-using-facebook-et-al-in-recruiting-and-hiring/> (last visited Dec. 15, 2006).

when employers use online social networking profiles to make employment decisions and proposes a solution that balances an employee's reasonable expectation of privacy and an employer's rights. Part II examines the problems that accompany an employer's search of social networking profiles. Part III examines and analyzes the federal law in place that has been designed to protect employee privacy rights with regard to background checks and discusses the policy breathing life into this law. Finally, Part IV proposes an expansion of the Fair Credit Reporting Act that will balance the employee's expectation of privacy and rights as a consumer to know what information exists about her with an employer's right to know who its applicants and employees are. With a simple definitional expansion, the FCRA would easily extend its protections to those who have used, use, and will use online social networking as a part of their off-duty lives without unduly burdening employers.

II. SPECIAL PROBLEMS CREATED BY EMPLOYER SEARCHES OF ONLINE SOCIAL NETWORKING SERVICES

When employers use online social networking profiles to make decisions about hiring, retention, and promotion, they risk creating a number of problems for themselves and their candidates and employees. Currently, employers may search these online profiles without ever disclosing the search, the results of the search, or the reason for the attendant adverse decision to the candidate or employee. The doctrine of employment-at-will has guaranteed this unfair result despite many attempts to modify the doctrine to avoid and mitigate such results. Federal and state exceptions to the doctrine exist to protect employees from unfair and arbitrary decisions, and logically should extend to protect against unfair decisions based on an individual's online persona.

First, inaccurate and even completely fabricated information exists everywhere about individuals, which gave Congress reason to enact the Fair Credit Reporting Act. Decisions based on inaccurate information unfairly impact the reputation, credit-worthiness, and well-being of individual employees and should be made known to the individual to allow for prompt and timely correction. Second, undisclosed online searches of candidates and employees produce information that can tempt an ill-meaning employer to violate laws that it would find easy to violate without a system of information accountability in place. Third, employees' expectation of privacy in their personal, off-duty lives gives them respite from the always-scrutinizing eye of their employer. If privacy is to retain any value in a world where people can no longer hide their lives behind physical boundaries, the law must require employers to provide notification for, obtain authorization for, and disclose the results of online social networking searches of candidates and employees.

A. False, Inaccurate and Irrelevant Information Resulting in Unfair Adverse Employment Decisions

One of the most prominent and legitimate concerns of employee privacy advocates lies in the problem of inaccurate or false information, especially that which lies beyond the scope of the individual's control. Employers risk making poor employment decisions based on information that may paint an inaccurate or unfair portrait of the candidate or employee. Varying degrees of problems based on inaccuracy exist, from fake profiles created about a person²⁰ by another to inaccurate assumptions formed on

²⁰ Ryan Walker, a Chicago resident, realized he had fallen victim to "profile poaching" on MySpace when someone approached him at a local bar and asked if his name was 'Justin.' The profile poacher had taken Mr. Walker's photographs from his MySpace page and uploaded them to a fake MySpace profile. WLS-

information that may be true, but not representative, of a person's background or character. When an employer bases an adverse decision on bad or incomplete information, it violates the very public policy that was seminal in passing and enacting current laws that Congress and state legislatures designed to protect employees.

Many have heard and heeded the almost trite admonishment that one cannot believe everything one sees and hears. A single photograph of someone does not accurately portray what she looks like as a whole person; moreover, it certainly doesn't portray the totality of her character. However, one photograph placed on a MySpace profile can eliminate an applicant from consideration for employment if the employer makes assumptions about the person based on what an agent of that employer saw in the photograph. And because personal values and bias, which vary from one recruiter or human resources director to another, can form the basis for adverse employment decisions in this area, the opportunity for abuse and unfairness rises, and applicants, employees, and employers all suffer.

A serious, though not widespread, problem exists when a candidate competing for a highly coveted job for which she believes the employer may run an online search of the candidates creates a false profile for her competitor with false but damaging information. Her competitor does not know that this profile exists and may never find out, since the employer would not be required to tell her that it decided not to choose her based on the profile that it found about "her." Manipulative and unfair, the other candidate for the job might get the position even if the aggrieved candidate possessed greater qualifications for

TV, *Profile Poachers* (Nov. 13, 2006), available at http://abclocal.go.com/wls/story?section=special_coverage&id=4758493.

the job. While this may seem like an unlikely and far-fetched hypothetical, it is one that is certainly possible in the status quo.

To a lesser degree, and absent malicious intent, problems arise when employers find information about a candidate through someone else's profile. Even when an individual maximizes her expectation of privacy by setting her online profile privacy settings at their highest, she may still fall victim to having information posted about her that she did not consent to having posted and that she may be unaware even exists. While she has done everything possible to prevent an employer from reaching into her off-duty personal life, she cannot hide. Situations such as this and the one above call for new measures of fairness in employer searches of online profiles – measures that give the candidate or employee a way to know that the information about them exists and to ensure its accuracy, relevancy, and truth, or to have it removed.

Other harms result when employers make incorrect assumptions based on information posted on an actual profile. Often, online social networking users post on their profiles photographs of themselves and others taken at social events. To them, it is an excellent and efficient way to share these photographs with many people at once. However, if an employer sees photos of a candidate or employee at parties, the employer may unfairly and incorrectly conclude that Jane Doe is a partier or an alcoholic. An agent of an employer may tend to forget her own youthful indiscretions and quickly pass judgment on the character of an applicant or employee based on an incomplete and inadequate portrait of that person. People create their online social networking profiles with a limited social purpose in mind. Arguably, if these profiles were meant to portray the person as a whole to be used in determining a person's worthiness for employment,

Jane Doe would build a profile that more accurately portrays who she is as a whole person, not just who she is outside of work when her professionalism is not at issue.

B. A Back Door to Unlawful Employment Discrimination

Employers, currently not required to disclose their searches of candidate and employee profiles, may easily fall into temptation to eliminate candidates from consideration to whom they would not otherwise be able to deny employment opportunity. Congress enacted Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act all in part to eliminate discrimination in employment based on immutable characteristics. Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²¹ As a result, employers may not properly ask questions pertaining to the above protected categories unless they are relevant to a bona fide occupational qualification²².

Online social networking profiles often present personal information that would not properly be the subject of employer-employee dialogue within the scope of an employment decision process. An employer may not be able to ask John Doe what religion he practices during his interview or after he has begun employment. Any adverse decision that an employer would make subsequent to discovering by John’s own

²¹ 42 U.S.C. § 2000e-2(a)(1) (2000).

²² A bona fide occupational qualification is a minimum qualification requirement needed as a prerequisite to being able to do a particular job. For example, female gender is a bona fide occupational qualification of the position of server at Hooters Restaurant and self-identification as a Christian is a bona fide occupational qualification of being the pastor of a Christian church. 42 U.S.C. § 2000e-1 (2000).

admission that he is a Mormon would be impermissible, yet obvious enough to make the illegal decision actionable under the civil remedy provision of Title VII. However, if his employer were to discover this fact through a covert search of his MySpace profile, without his knowledge, the employer could take adverse action against him without his ever knowing why, leaving him with little or no remedy against his employer for its illegal adverse decision.

In a similar hypothetical, John Doe has placed a red ribbon on his MySpace profile demonstrating his support for HIV/AIDS prevention and research. John's best friend suffers from advanced HIV and he regularly gives money and participates in fundraisers to benefit HIV/AIDS research. Upon viewing his profile as a part of its "background check" of John, the human resources director assumes that John is HIV-positive and fears that hiring him would drive up the company's health insurance costs. As a result, he sends John the standard rejection letter, stating that while they were impressed with his resume, they are unable to offer him a position at this time. The employer's decision, probably a violation of the Americans with Disabilities Act²³, seems innocent to John. Little does he know that his benevolence and proud public support for a worthy cause precluded him from getting the job that he had always wanted.

²³ The Americans with Disabilities Act makes it unlawful to deny a person employment or public accommodations based on a real or perceived disability. If John is not actually HIV-positive, but his employer or potential employer regards him as such and consequently denies him employment, his employer has violated the ADA. 42 U.S.C. § 12102(2)(C) (2000). The Supreme Court explained Congress' policy reasoning in making the "regarded as disabled" theory available in legislation that preceded but inspired the ADA: "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).

Should John have known better than to show his support for a valid, worthy, and legal cause? Or should the employer have known better than to make assumptions about John based on an incomplete picture of who he is as a person and a professional, and to then discriminate against him in violation of federal law? In this case, the employer turned down John, one of the top in his field of management, because of an unfounded fear and baseless assumption. The burden must fall on the employer to assemble a fair and accurate portrait of its candidates and employees based on complete and verifiable information, especially when the employee has every right to express himself freely through his online persona. The law must ensure that John know precisely why his would-be employer did not select him so that he will have a fair chance to provide correct and accurate information and exercise his legal remedies if he is denied employment after providing that information. Had the employer been required to disclose its search of John's MySpace profile, it would probably have been deterred from its adverse decision, knowing that its reasons for that decision might become obvious to John. While an employer may view the solution proposed in Part IV as too restrictive, it will help reduce employer liability for discriminatory employment decisions that would violate federal law by creating accountability and removing the temptation to take adverse action for illegal reasons.

C. Expectation of Privacy in Off-Duty Conduct

On its face, to many, this seems an issue of naïve youth stupidly posting personal information publicly for the whole world to see. Ostensibly, by making information available that they know or should know that almost anyone can see, they have lost their expectation of privacy and thus the issue is moot. In the view of some, they have

assumed the risk that their parents, potential employers, or anyone else might be able to find out what they do on a Saturday night or a Sunday morning. However, the weight of the evidence suggests the opposite – Americans *do* expect privacy in their off-duty lives. While information on these online profiles may be seen by many, including people who are not a member of an individual’s online social network, it takes a search to produce the profile and the information. When a candidate for employment applies for a position, she does not e-mail her potential employer the URL for her MySpace profile and invite her employer to view its contents; an employer must use search methods to find the information just as it must make an affirmative request for a candidate’s consumer report. The latter search currently falls within the ambit of reasonable privacy protection for the employee; the former search, despite being accompanied by an even greater risk of false or irrelevant information, does not.

In addition, a number of lifestyle protection laws enacted by states, along with some specific federal laws and the common law of privacy, suggest that when Americans leave work, they expect to be let alone²⁴. These laws prevent employers from snooping too far into the personal lives of employees, especially when what they would find has no bearing on their business interests or the employee’s job performance. States that have enacted such lifestyle laws have begun to erode the employment-at-will doctrine and have firmly codified an expectation of privacy in an employee’s off-duty lives, when their off-duty conduct has no bearing on the employer’s business interests. Colorado and North Dakota have both enacted sweeping statutes that forbid discrimination in

²⁴ For a more in-depth discussion of the provisions of these state laws, see Pagnattaro, *infra* note 34, at 640.

employment decisions on the basis of off-duty behavior.²⁵ California’s legislature, which has enacted the broadest and most employee-friendly of these statutes, did not include language that would accommodate an employer’s business necessity or conflicts of interest in basing adverse employment decisions on off-duty conduct.²⁶ New York’s legislature enacted a statute that establishes four categories upon which employers may not base employment decisions: legal recreational activities, consumption of legal products, political activities, and union membership²⁷. Other states have enacted much more limited statutes protecting specific categories of lawful off-duty conduct and lifestyle, including consumption of tobacco products, sexual orientation, and marital status. In a world where we have simply begun to conduct much of our social lives over the internet, the same expectations apply – an employer shouldn’t be snooping into an employee’s personal life when it has nothing to do with business.

Many have written in the area of employee privacy law, mostly regarding an employee’s right to privacy within the scope of her employment. Recently, law reviews and journals have begun to see more writing on the subject of an employee’s off-duty privacy. While the views and proposals represent varying degrees of employee protection, most seem to agree that employees enjoy the highest expectation of privacy with regard to their employer when they are away from work and their off-duty conduct

²⁵ COLO. REV. STAT. 24-34-402.5 (2006) (forbids termination by employer based on *any* lawful activity conducted off the premises of the employer during non-working hours) (emphasis added); N.D. CENT. CODE 14-02.4-03 (2006) (forbids failing or refusing to hire in addition to forbidding discharge based on off-duty conduct during non-working hours).

²⁶ CAL. LAB. CODE 98.6 (2006) (“no person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or applicant engaged in any conduct . . . described in subdivision (k) of Section 96.”).

²⁷ N.Y. LAB. LAW 201-d (McKinney 2006).

does not significantly impact their employer's business or subject their employer to liability.²⁸

Some scholars writing in the area of employee privacy law have noted that Americans' conceptualization of privacy rests on the idea of protection of personal autonomy.²⁹ Professor Stephen D. Sugarman describes this as "the importance we place on giving people the liberty to shape and act out their own lives as they wish, free from the scrutiny of how others might think about that conduct or what they might say about it."³⁰ Professor Terry Dworkin explains that part of the importance that privacy plays in our society rests upon the fact that privacy encompasses a right to self-determination and "to define who we are."³¹ Self-determination includes the freedom to associate with the people one chooses.³²

If these statements accurately reflect on how Americans feel about privacy, American employees should have the ability to expect privacy in all aspects of their personal lives, whether conducted within the online community or within the physical confines of their homes or social establishments. Employers might be able to easily discover what their employees are up to outside of the workplace, but thinking about employee privacy in terms of Professors Sugarman's or Dworkin's definitions mean shaping and acting out one's personal life without having to worry about the

²⁸ See Terry Morehead Dworkin, *It's My Life – Leave Me Alone: Off the Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 94, 95 (1997).

²⁹ Catherine L. Fisk, *Privacy, Power and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006).

³⁰ Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377, 403 (2003).

³¹ Dworkin, *supra* note 28, at 94-95.

³² *Id.*

consequences of what one's employer thinks or says about that lawful conduct. Privacy seems more about autonomy and the right to define oneself free from the consequences of others' judgment than about some physical notion of hiding from those who might be watching.

Several privacy advocates have called for severely limiting the use of off-duty conduct in making employment decisions. These authors' solutions range from suggestions that employers be more mindful of privacy rights³³ to proposing federal "lifestyle discrimination" legislation designed to greatly limit the ability of an employer to make an adverse employment decision based on off-duty conduct.³⁴ "Arguably, as long as [employees] are fulfilling their job responsibilities, they are off their employer's moral, social and political clock."³⁵

One case in Illinois, *Johnson v. K-Mart*, demonstrates the important expectation of privacy that employees have in their off-duty private lives. Fifty-five plaintiffs brought an action for invasion of privacy based upon unauthorized intrusion into their seclusion.³⁶ K-Mart hired private investigators to pose as employees in one of its distribution centers in Illinois and to record employees' conversations and activities both at work and at social gatherings outside of work, which they then released to K-Mart.³⁷

³³ See Dworkin, *supra* note 28.

³⁴ Ann L. Rives, Note, *You're Not the Boss of Me: A Call for Federal Lifestyle Discrimination Legislation*, 74 GEO. WASH. L. REV. 553 (2006); see also Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct As the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625 (2004).

³⁵ Pagnattaro, *supra* note 34, at 627.

³⁶ *Johnson v. K-Mart Corp.*, 723 N.E.2d 1192, 1194 (Ill. App. Ct. 2000).

³⁷ *Id.* at 1194, 1196. The reports contained information about the employees' family matters, sex lives, and other personal and private matters such as health problems. This is the kind of information that is very

K-Mart admitted that it had “no business purpose for gathering information about employees’ personal lives.”³⁸ The plaintiffs in that case maintained a reasonable expectation of privacy in their conversations with coworkers, especially during social gatherings outside of work, not expecting that their employer would use covert and deceptive methods to peer into their private social lives.³⁹ The court found that “a material issue of fact existed regarding whether a reasonable person would have found [K-Mart’s] actions to be an ... objectionable intrusion.”⁴⁰

In much the same way, employees today who use social networking as a way to communicate among peers outside the scope of their employment do not reasonably expect their employer to pry into their private lives by sending agents into their online social gatherings. K-Mart spied on its employees by sending its agents into private social gatherings to secretly obtain information about its employees, assumedly with the purpose of evaluating their fitness for continued employment. Now, we see employers secretly sending their agents into the *online* social gatherings of their employees. While the physical boundaries have disappeared, employees’ reasonable expectations have not.

III. THE FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act, enacted in 1970 and given effect in 1971, served as Congress’ response to a growing problem in the United States – inaccurate credit reports that caused harm to consumers in a variety of ways. One such class of consumers that Congress specifically and explicitly intended to protect includes employees whose

similar to what an employer can find by investigating an employee’s social networking profile. In both cases, the employee is unaware of the intrusion.

³⁸ *Id.* at 1197.

³⁹ *Id.* at 1196.

⁴⁰ *Id.* at 1197.

employers perform background checks on them as both a pre-condition to employment and as an ongoing method of keeping tabs on them. Before this Act, little or no protection existed for an employee who was denied employment or fired because of false or inaccurate information on the consumer report that her employer obtained from a private consumer reporting agency. She had no right to know that she was the subject of a credit check and no right to know that she was denied employment, fired, or demoted based on information on her consumer credit report.

Inaccurate, incomplete, irrelevant, or false information could easily form the basis for very unfair employment decisions. In fact, abuse within the credit reporting industry was so rampant that many credit reporting agencies required investigators to fill quotas of negative information on consumers⁴¹. To do this, investigators often made up false information and submitted that information to the credit reporting agency⁴². The credit reporting agencies often included lifestyle information collected from investigators on a consumer's credit report, causing consumers to be denied employment and credit based on untrue, irrelevant, or incomplete information⁴³.

In enacting the FCRA, Congress stated its underlying purpose, policy, and intent, which was to ensure that decisions affecting extension of credit, insurance, and employment, among other things, were based on fair, accurate, and relevant information about consumers.⁴⁴ In addition, federal appeals courts have stated that the Fair Credit

⁴¹ Electronic Privacy Information Center, *The Fair Credit Reporting Act and the Privacy of your Credit Report*, <http://www.epic.org/privacy/fcra/> (last visited Dec. 20, 2006).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 15 U.S.C. §1681(b) (2000); *see also* Jones v. Federated Fin. Reserve Corp., 144 F.3d 961 (6th Cir. 1998); Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329 (9th Cir. 1995); Ackerley v. Credit Bureau of

Reporting Act must be construed liberally, in favor of the consumer.⁴⁵ This kind of language indicates that Congress enacted the FCRA to protect the employee from the far-reaching arm of the employer with respect to an employer's inquiry into the private lifestyle matters of the employee.

The FCRA allows employers to obtain a "consumer report" from a "consumer reporting agency" for the purpose of making any significant employment decision from hiring to termination. Congress defined a "consumer report" as information (oral, written, or other communication) provided by a "consumer reporting agency" about credit matters as well as about a person's "character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for...employment purposes."⁴⁶

Another kind of "consumer report," called an "investigative consumer report" contains information on a consumer's character, general reputation, personal characteristics, or mode of living that is obtained through personal interviews with friends, neighbors, and associates of the consumer.⁴⁷

Either a "consumer report" or the more subjective "investigative consumer report" must be obtained through a "consumer reporting agency," defined by statute as "any person who regularly engages in whole or in part in the practice of assembling or

Sheridan, Inc., 385 F. Supp. 658 (D. Wyo. 1974); Retail Credit Co. v. United Family Life Insurance Co., 203 S.E.2d 760 (Ga. App. 1974); Rasor v. Retail Credit Co., 554 P.2d 1041 (Wash. 1976).

⁴⁵ *Jones*, 144 F.3d at 964; *Guimond*, 45 F.3d at 1333.

⁴⁶ Fair Credit Reporting Act [hereinafter FCRA] § 603(d)(1), 15 U.S.C. § 1681a(d)(1) (2000).

⁴⁷ FCRA § 603(e), 15 U.S.C. § 1681a(e).

evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.”⁴⁸

The FCRA requires three essential mechanisms of due process to ensure the accountability of employers in procuring and using the background information of its employees – notice, authorization, and disclosure. When an employer seeks to procure any consumer report for employment purposes, the employer must provide the employee with the following notices and certifications⁴⁹.

First, an employer must provide the employee or applicant with a written notice that the employer intends to obtain or will obtain a consumer report for employment purposes. Next, or as part of the first step, the employer must obtain the employee’s or applicant’s written authorization to obtain her consumer report. Before receiving the consumer report, the employer must certify to the consumer reporting agency that it has complied with the above notice requirements and that the information in the consumer report will not be used in violation of any applicable federal or state law or regulation regarding employment opportunity.

Before taking any adverse action based on information contained in the consumer report, the employer must provide the applicant or employee with a copy of both the consumer report upon which it would base its decision and a summary of rights that the Federal Trade Commission has published, called “A Summary of Your Rights Under the Fair Credit Reporting Act.” After waiting a “reasonable” amount of time, the employer must advise the applicant or employee of its adverse decision.

⁴⁸ FCRA § 603(f), 15 U.S.C. § 1681a(f).

⁴⁹ FCRA § 603(o), 15 U.S.C. § 1681b(b).

If the employer plans to procure an “investigative consumer report,” the FCRA requires that it make the following additional disclosures to the consumer⁵⁰: No later than three days after requesting a report, the employer must provide the applicant or employee with written disclosure that an investigative consumer report may be obtained. This disclosure must inform the applicant or employee of her right to request additional information about the nature or scope of the background investigation and must provide the FTC’s summary of rights. The employer must then certify to the consumer reporting agency that the employer has and will comply with all notice and disclosure requirements. Finally, upon written request made by the applicant or employee within a “reasonable time,” the employer must provide complete written disclosure of the nature and scope of the investigation that it requested.

The FCRA provides civil remedies for those injured by an employer’s failure to comply with the provisions mentioned above.⁵¹ An employer or agent of such an employer who knowingly or willfully procures a consumer report under false pretenses may also be liable criminally and could face fines and incarceration of up to two years.⁵²

IV. EXPANDING THE FCRA TO REACH ONLINE SOCIAL NETWORKING SERVICES

The law should empower employers with the ability to research their candidates carefully, and do so by taking advantage of modern methods such as online searches. It should also alleviate employees of fears that their employers lay lurking, unbeknownst to them, in the shadows of their online personas. It must continue to regard fairness, accuracy, and relevancy as utmost values when allowing employers to obtain information

⁵⁰ FCRA § 606, 15 U.S.C. § 1681(d).

⁵¹ FCRA §§ 616, 617, 15 U.S.C. § 1681(n-o) (2000).

⁵² FCRA § 619, 15 U.S.C. § 1681(q) (2000).

on the personal and private lives of its applicants and employees. Requiring notice, authorization, and disclosure serves as the most effective way to balance these rights and interests.

As discussed in Section III of this note, the Fair Credit Reporting Act establishes broad definitions of the terms “consumer reporting agency,” “consumer report,” and “investigative consumer report.” Courts have also interpreted these definitions broadly, giving wide range to who may qualify as a consumer reporting agency. Apparently, courts interpret these definitions in such a way to comport with the consumer-protective purposes of the FCRA.

Amending these definitions slightly to include social networking services as “consumer reporting agencies” and to make the online profiles that these social networking services store “investigative consumer reports” simply updates the law to provide continuing protection as employers find new ways to investigate their candidates. Until now, employers have relied on third party consumer reporting agencies to compile and sell information on individuals. But now, as online social networking searches prove a much quicker and less expensive means of obtaining the kind of information that an employer used to have to rely on someone else to obtain, no statutory buffer exists that seeks to filter that information and ensure its fairness, relevancy, and accuracy. Expanded to cover these new online background checks, the FCRA would provide an adequate filter and buffer to hold employers accountable and to help ensure that their decisions are based on fair, relevant, and accurate information.

A. Distinguishing Between Social Networks and Other Online Information Outlets

The first step in expanding the definitions of the FCRA to update it for new methods of online background searching includes distinguishing between social networking services and other information outlets on the web for the purpose of extending FCRA protections. An important preliminary question to address inquires into what makes online social networking services different enough from other sources of online information to justify covering only these services and not every information source on the internet. The answer lies in three primary areas of difference between sources online social networking services and other online information outlets such as blogs, webzines and online newspapers – intent, purpose and expectation - all of which are linked to one another.

The target audience for which the information has been provided represents a key difference between social networking services and other information outlets. While the nature of the World Wide Web allows many member of the general public to gain access to MySpace profiles, their creators intend their use and accessibility for members of their MySpace social networks, not for the general public as a whole. Other information sources such as blogs, online newspapers, and online magazines publish information for a general public purpose. The attitude that many have expressed as the online social networking debate heats up, that people should just “watch what they say” on their MySpace profile, could have a chilling effect on free speech and associational rights, rights that Americans exercise through their online profiles. Employees should not carry the burden of “watching what they say,” rather, employers should carry the burden of “watching what they do” with that information.

Online newspaper and magazine articles feature individuals who have been given an opportunity to offer the best information about them as possible, with the important understanding of the very public nature and purpose of such articles. John Doe, contacted by the Daily Times to provide information about his life and background for a human interest piece on community leaders, has been put on notice that his information will be broadcast publicly for a general informational purpose. He will carefully select information that portrays him in the kind of favorable light that would be welcome by many facets of the public eye, including potential employers.

While blogs fall somewhere in between information sources such as online newspapers and online social networking websites, they still represent a source of information that seems to have a general public purpose. Bloggers generally write with the intent and purpose of providing information and viewpoints to the general public on various issues. Because bloggers write with an informational purpose and a public audience in mind rather than with a social purpose and limited private audience in mind, this note does not advocate for the expansion of the FCRA to cover blogs.

When an individual creates a MySpace profile, she creates a profile about herself that may be more light-hearted, less serious, and clearly meant for use within a private social community, a community whose membership relies on invitation. MySpace social networks represent the online equivalent of social clubs or social gatherings; their members do not contemplate or expect their use as tools for employers to continually and secretly watch their private lives. MySpace members write their profiles with a social purpose and limited audience in mind.

The FCRA's purpose reaches information that may create an inaccurate or unfair portrayal of the candidate for employment purposes. Because using information found on social networking profiles for employment purposes increases the risk of making an unfair decision based on irrelevant, unfair, or inaccurate information, the FCRA should cover only online social networking services and not all information generally available about a candidate on the internet.

Giving definitional boundaries to the term social networking service for the purposes of the FCRA will become important to avoid assigning legal liability to an endless and vast array of online entities. Keeping in mind the reasons for which the FCRA should extend to cover social networking services, they should be defined both in terms of their purpose and their function. If the purpose of an online service is, as MySpace has stated it, to create a private community through which members can communicate and network, the FCRA should consider it a social networking service. The Federal Trade Commission, which enforces the FCRA, can provide administrative guidance as to what websites comprise the body of social networking services on the web.

B. Amending the FCRA

One of the most simple and attractive options in considering an amendment to the FCRA includes amending two key definitions – “consumer reporting agency” and “investigative consumer report” – and adding one more, “social networking service.” Experts on the FCRA, such as legal counsel for the Federal Trade Commission, would seem best suited to draft any specific statutory language for an amendment. However, for

purposes of fostering discussion on a concrete proposal, this note proposes sample language for an amendment.

Sections (e) and (f) of 15 U.S.C. §1681a follow, with proposed changes in italics:

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living, is obtained through:

1) personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information; *OR*

2) an online social networking service described in part (f)(2) of this subsection.

However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means:

1) any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports; *OR*

2) any online social networking service that electronically stores and displays personal information entered through individual online social networking profiles maintained and edited by its users, members, or subscribers, for the purpose and function of personal use in social networking, communication, information sharing or other foreseeable aspects of online social networking.

A new subsection (g) of 15 U.S.C. §1681a, defining "online social networking service" would state that:

(g) The term “online social networking service” means any website or other world wide web-based service that exists and functions for the purpose of allowing its users, members, or subscribers to create, maintain, use, or edit private social networks or personal profiles containing information provided for a social purpose.

An amendment to the FCRA should also include a provision to except these social networking websites from the provisions of the FCRA that have no relevance to employment. Such an exception would preclude social networking websites from the requirements of parts of the FCRA that should apply only to traditional credit reporting agencies and consumer reports. A new 15 U.S.C. §1681a(g)(1) would state that the term “online social networking service”:

(1) applies only to the provisions of this Act that govern the access and use of consumer information by employers.

Expanding the definitional section of the FCRA to reach online social networking providers such as MySpace or Facebook will update a law that has provided very necessary and important protections for employees. The Fair Credit Reporting Act, as amended to cover online social networking, will continue to provide the necessary balance between employer and employee rights. It will create accountability for the employer in order to ensure that employment decisions continue to be based on fair, accurate, and relevant information about applicant and employees and provide civil remedies to the aggrieved.

V. CONCLUSION

As the internet has expanded and proven an incredibly attractive vehicle for progress, the meaning of privacy remains the same. American employees still expect privacy in their off-duty lives, whether they conduct their social lives in traditional ways

or through new popular methods such as online social networking. The current debate regarding online social networking and employment decisions should not focus on whether or not millions of people *can* access information about individuals online; it should focus on the acceptable and permissible uses of that information. The very nature of the internet permits vastly greater degrees of public access to information. After all, the age in which Americans now live has been dubbed the Information Age. Consequently, as Americans conduct their lives in this new Age, they will find it increasingly difficult to hide information about themselves behind physical walls. Therefore, thinking about privacy should shift to thinking about how to filter that information to ensure its proper and acceptable uses.

Because searches of online social networking services such as MySpace and The Facebook only stand to become more prevalent and popular among employers, Congress should expand the Fair Credit Reporting Act to ensure employees that use these websites adequate protection from unfair, illegal or arbitrary employment decisions. The original purposes of the FCRA both allow for and demand its expansion to cover the potential problems caused when employers go searching for a candidate or employee's online social networking profile. Employers also stand to gain from such an expansion of legal protections because, while retaining the rights and privileges of access to online information about candidates and employees, an amended FCRA will hold them accountable to make fair employment decisions. This solution effectively strikes an agreeable balance between an employer's right to know its candidates and employees and an employee's right to privacy and fair employment decision making.