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OFF-DUTY PRIVACY: HOW FAR CAN EMPLOYERS GO?

Kelly Schoening* and Kelli Kleisinger**

I. INTRODUCTION

This survey article offers a guide for Kentucky attorneys and employers exploring an employer’s potential liability for policing the off-duty conduct of its employees and seeks to anticipate future developments in Kentucky law in this area. With the pervasive influence of the internet and technology, individual privacy has become severely limited. Through these electronic mediums, employers often view, or have access to, their employees’ private lives. What action can occur when employers seek out negative or inappropriate information about their employees? This article attempts to resolve this issue based on current Kentucky employment law and precedent from other jurisdictions.

Part II of this survey highlights various claims an employee may bring against an employer in Kentucky. Subpart A focuses on Kentucky common law and statutory claims, and comments on the applicability of the respective claims to the regulation of off-duty conduct. Subpart B discusses possible federal claims against employers and the applicability of these statutes to the regulation of employees’ off-duty conduct.

Part III analyzes the case law and statutes of other jurisdictions that have been implemented to cope with the electronic age. Additionally, pending lawsuits dealing with termination of employees for their behavior on social networks, such as Facebook and MySpace, demonstrate the changing future of employment law. Part IV concludes by providing practical advice for the Kentucky practitioner advising employees or employers concerning this area of the law.

Throughout the article, the use of a hypothetical based on a recent New Jersey case will aid in the examination of Kentucky’s present and future employment law.¹ Imagine that you are the general manager of a Kentucky company, and one of your employees, John, has created a group on MySpace.com.² You learn of the group because another employee, Kate,

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1. See Brief of Defendant at 1, Pietrylo v. Hillstone Rest. Group, No. 06-5754, 2008 WL 6085437 (D.N.J. March 4, 2009); see also infra notes 244-257 and accompanying text.

2. See id.
received and accepted an invitation to the group and informed you of the page.³
The creator, John, sends email invitations to certain other employees, and, once
the email invitation is accepted, a link to the group appears on the new group
members’ personal sites.⁴

Upon your request, Kate gave you her MySpace password, so you could
view the site.⁵ You soon discover that the purpose of the group is to criticize
your company and employees.⁶ Moreover, the group page contains ethnic slurs,
derogatory comments about clients and managers, inappropriate photographs of
employees, and discussions about drug use and sexual acts.⁷ You discuss the
situation with other managers and decide to terminate John.⁸ If John then sues
you in Kentucky, what would be his likelihood of success?

II. EMPLOYER LIABILITY IN KENTUCKY AND ITS APPLICATION TO TERMINATION
FOR OFF-DUTY CONDUCT

Increasing advancements in technology have allowed for almost effortless
communications with family, friends, and co-workers; simultaneously, they have
exposed people’s private information to millions, including employers. Before
such advancements, employers only could see what employees did at work, but
with the onset of social networks such as Facebook, MySpace, Weblogs, Twitter,
Linked-In, and similar websites, employers may monitor their employees’ daily
activity through online journals, pictures, and comments. Some of this
information may displease employers to the extent that they will consider
reprimanding or even terminating the respective employees. A recent survey
demonstrates this tension between employer and employees: sixty percent of
employers feel that they have a “‘right to know’ how employees portray
themselves and their organizations online, while fifty-three percent of employees
contend that ‘social networking pages are none of an employer’s business.’”⁹
Consequently, it is not surprising that “one of the most controversial issues of
employment law is to what extent employee privacy rights should be recognized
and protected.”¹⁰ While private employees are rarely protected by the United
States Constitution or other federal statutes and regulations, such employees may
find refuge in state law.

Currently twenty-eight states and the District of Columbia protect an
employee, via statute, from an employer’s adverse actions based on the

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³. See id.
⁴. See id.
⁵. See id.
⁶. See id.
⁷. Brief of Defendant at 1, Pietrylo, 2008 WL 6085437.
⁸. See id.
⁹. Deloitte Dev. LLC, 2009 Ethics and Workplace Survey Results 2 (2009),
employee’s off-duty conduct. These statutory protections come in three different levels, shielding: (1) the use of tobacco only; (2) the use of lawful products; or (3) any and all lawful activities. Kentucky, like the majority of states, protects only off-duty smoking. “[W]hile it is lawful to restrict, even ban, workplace smoking, Kentucky law precludes adverse action against an employee simply because of the employee’s status as a smoker.” Kentucky Revised Statute Section 344.040(1) provides that failure to hire, termination, or discrimination based on an individual’s classification as a smoker or nonsmoker is an unlawful practice for a Kentucky employer.

While Kentucky law balances the regulatory rights of employers and the smoking rights of employees by allowing employers to regulate workplace smoking but prohibiting bans of off-duty smoking, the law remains silent on the issue of other off-duty conduct. Consequently, an analysis of potential Kentucky common law claims may aid an employer questioning whether to regulate employees’ off-duty conduct.

A. Kentucky Common Law

1. Invasion of Privacy

In 1927, the right to privacy was formally recognized in Kentucky by the Court of Appeals, Kentucky’s highest court at the time. “There is a right of privacy, and . . . the unwarranted invasion of such right may be made the subject of an action in tort to recover damages for such unwarranted invasion.” Like many other jurisdictions, Kentucky was influenced by Samuel D. Warren and Louis D. Brandeis’ celebrated law review article, The Right to Privacy, in which the two authors “argued for an enforceable right to live one’s life without the intrusion of others upon one’s private life and without unwarranted publicity about matters in which the public had no legitimate interest.” Fifty-four years later, in McCall v. Courier-Journal, the Kentucky Supreme Court adopted the tort of invasion of privacy provided in the Restatement (Second) of Torts Section 652. Section 652A sets out prohibited conduct:

12. Id.
18. Employment Law in Kentucky, supra note 10, at § 8.6; see also Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).
1. One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

2. The right of privacy is invaded by

(a) unreasonable intrusion upon the seclusion of another as stated in § 652B; or

(b) appropriation of the other’s name or likeness, as stated in § 652C; or

(c) unreasonable publicity given to the other’s private life, as stated in § 652D; or

(d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.  

This article focuses on the two means of invasion that are most applicable to an employee’s claim against its employer for regulation of off-duty conduct: (1) the unreasonable intrusion upon seclusion, and (2) publicity that unreasonably places the other in a false light before the public.

a. Intrusion upon Seclusion

A common claim for an employee, whether public or private, whose rights are invaded by his employer is the “unreasonable intrusion upon the seclusion of another.”  Relevant Kentucky case law in the employment context is scarce. Nonetheless, Kentucky non-employment cases and other persuasive authority shed light on a Kentucky court’s potential analysis of whether an employee who has been terminated for posting disparaging information about an employer on a personal website may have a successful intrusion upon seclusion claim.

In Stith v. Cosmos Broadcasting, Inc., the Jefferson, Kentucky, Circuit Court recognized three elements for the tort of intrusion upon seclusion: (1) an intrusion by the defendant; (2) into a matter which the plaintiff has a right to keep private; (3) by the use of a method which is objectionable to the reasonable person. The plaintiff in Stith was shown on the television program “Inside Edition,” and on this particular show, one of the topics was horse trainers’ alleged abuse of the horses. The plaintiff was taped explaining the use of chains on the horses, and his segment appeared in “between the comments of a man under indictment for felony abuse of horses and a man who claims to have inadvertently paid to have his horse tortured by a trainer.” The plaintiff argued that the reporters invaded his privacy by using hidden video equipment on the competition site.
However, the Stith court held that the plaintiff did not have a reasonable expectation of privacy at the horse show. First, the court reasoned that, because horse shows are open to the public, the plaintiff’s conduct at the show was not a matter that the plaintiff had a right to keep private; second, there was no indication that the plaintiff wished to keep his comments to the reporters private; and, third, the plaintiff’s relationship to the horse industry was well-known due to his success as a rider. Because of the plaintiff’s limited expectations of privacy, the reporters did not intrude upon the plaintiff’s privacy.

In Baggs v. Eagle-Picher Industries, Inc., the United States Court of Appeals for the Sixth Circuit analyzed Michigan’s comparable privacy law. Michigan also has adopted the principles set out in the Restatement (Second) of Torts Section 652 and requires the plaintiff to establish the same three elements to prevail under an intrusion upon seclusion theory: (1) an intrusion by defendant; (2) into a matter which plaintiff[s] [have] a right to keep private; (3) by the use of a method which is objectionable to the reasonable person.

In Baggs, the plaintiffs were hired as at-will employees by the defendant-employer; soon after, the employer received complaints from other employees and delivery truck companies about its employees’ drug usage. When an undercover agent revealed to the employer that “60 percent of the workforce used illegal drugs,” the employer fortified its anti-drug policies, requiring submission to a drug test as a “condition of employment.” After the employer issued a surprise drug test, the plaintiffs alleged that such a suspicionless drug test invaded their privacy and refused to submit to the test; the employer fired them pursuant to its policy, and the plaintiffs sued, claiming intrusion upon seclusion among other theories of recovery. While the Baggs court indicated that the urine test was an intrusion that a reasonable person may object to, the court found that “Eagle-Picher’s conduct did not invade a matter that the plaintiffs had a right to keep private under Michigan law.” Michigan law allows for an employer to use “intrusive and even objectionable means to obtain

25. Id. at *4.
26. Id.
27. Id.
30. Id. at 269-270.
31. Id. at 270.
32. Id. at 270-71.
33. Id. at 275.
employment-related information about an employee.”34 “In other words, a good business purpose obliterates an employee’s expectation of privacy.”35

Because of the similarities between Michigan and Kentucky privacy law, it is likely that a Kentucky employer with a good business purpose could defeat an intrusion upon seclusion claim. Therefore, in the hypothetical set out in the introduction, the employer, who accessed John’s password-protected group with Kate’s permission, will not be held to have intruded upon the seclusion of the group creator if the employer accesses the site with a legitimate business purpose. In some situations, knowing and preventing the disparaging comments of a company’s personnel in order to protect a company’s reputation and good name may be sufficiently employment-related to be considered a legitimate business purpose.36

Similarly, if an employee were to be fired for the posting of inappropriate pictures on a personal website or other like circumstances, an employer may be able to defend an intrusion upon seclusion claim with the defense that having employees of high regard in the community is a legitimate business purpose. Whether having a good company reputation or having employees in good standing with the community is sufficiently employment-related to be considered a legitimate business purpose is highly dependent on the type of company at issue. For example, it would be more likely for a court to uphold this defense for a private school that has terminated one of its teachers for her inappropriate pictures as opposed to a local bar that has terminated its college bartender for comparable photographs. Additionally, because the law in this area remains murky, The HR Specialist recommends safely policing employees’ off-duty conduct by focusing on the off-duty behavior’s effects on job performance, rather than the conduct itself.37

b. False Light

Another potential tort claim arising from an employee’s right to privacy is the false light claim. The false light tort protects “an individual’s interest ‘in not being made to appear before the public in an unreasonably objectionable false

34. Baggs, 957 F.2d at 275.
36. Also, there is a defamation privilege, which is applicable in many privacy cases and may be applicable here, allowing a qualified privilege to protect the publisher or intruder’s interest. See DAVID A. ELDER, DEFAMATION: A LAWYER’S GUIDE § 2:23 (1993) (“The general rule provides that the publisher of defamatory information is privileged where the publisher has ‘a correct or reasonable belief’ that information is available that ‘affects a sufficiently important interest of the publisher’ and the ‘recipient’s knowledge of the defamatory matter’ would be of service in ‘the lawful protection of the interest.’”); see also Baggs, 957 F.2d at 272-73.
light and otherwise than as he is.’” 38 In *McCall v. Courier-Journal*, the Kentucky Supreme Court held that the two basic requirements to sustain a false light claim are: “(1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the publisher had knowledge of, or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other was placed.” 39 Under Kentucky law, an oral statement does not give rise to an invasion of privacy claim. 40

In *McCall*, the plaintiff-attorney was accused of bribery in an article published by the Louisville Times Co., which owns the Courier Journal. 41 The attorney had been contacted about representing a potential client in two narcotics-related criminal charges. 42 The potential client told the newspaper’s reporters that the attorney was going to use part of his fees to bribe the judge, and the newspaper published the story. 43 The lower courts had granted the newspaper’s motion to dismiss, but the Kentucky Supreme Court held that a reasonable person would object to being represented as dishonest in one’s profession, and, therefore, the case was allowed to proceed to a jury, where the attorney would be given a chance to prove malice (that the defendant knew, or recklessly disregarded, the falsity of the published material). 44 Furthermore, the *McCall* court noted that Kentucky has “ruled in the past that if a publication deals with a matter of public interest or public concern, even if it invades a person’s privacy, it is not subject to the tort of invasion of privacy . . . .” However, this public interest defense is not available in situations where the published statements are false. 45

In *Stewart v. Pantry, Inc.*, the defendant subjected its employees, including the plaintiffs, to polygraph tests, and consent to periodic polygraph examinations was a pre-condition for employment with the defendant. 46 The polygraph results for the plaintiffs showed “deception indicated,” and, as a result, both plaintiffs were terminated. 47 The plaintiffs alleged that the potential gossip and negative reputation that may result from their termination established a false light claim. The United States District Court for the Western District of Kentucky, however, disagreed:

41. *McCall*, 623 S.W.2d at 883-84.
42. *Id* at 883.
43. *Id.* at 883-84.
44. *Id.* at 888.
45. *Id.*
47. *Id.* at 1362.
Most importantly, plaintiffs’ entire false-light claim rests upon [the employer’s] alleged “policy” of terminating employees “under circumstances where widespread publication . . . can be expected, and is in fact desired and intended . . . .” Beyond these contentions, plaintiffs have neither pleaded nor proved any “publicity” by [the employer], other than the overt act of firing plaintiffs . . . . False light liability must be limited only to those cases in which the employer unreasonably communicates to the public false reasons for a dismissal, not the mere fact of dismissal.48

Because the plaintiffs did not allege that the defendants publicized the matter and essentially based their claim on the spread of gossip throughout the town as a result of their termination, the plaintiffs’ false light claim was not successful.

In Jones v. Lexington H-L Services, Inc., a Kentucky Court of Appeals case, the plaintiff’s employer maintained an electronic bulletin board, access to which was limited to certain employees; however, any employee could post comments on it if she knew of its existence and how to access it.49 The plaintiff’s supervisor posted the following distasteful joke about the plaintiff, which had been previously stated during a casual conversation with the plaintiff: “Referencing forms of punishment, Amos [plaintiff] stated, ‘Susan Waggoner and I are big believers in caning,’ to which [the plaintiff’s supervisor] responded . . . ‘[W]hat you and Susan do in your spare time is none of our business.’”50 Although it was sexually explicit, the plaintiff admitted that it was both said and posted on the bulletin board as a joke.51 After another similar incident and a subsequent posting on the bulletin board, the plaintiff alleged sexual harassment, left defendant’s employment, and later sued the defendant for placing him in a false light before the public.52 The court held that “because the remarks posted on the . . . site were clearly meant as a joke and could not be taken seriously, they could not place . . . [the plaintiff] in a false light.”53 Therefore, the trial court had properly awarded the employer summary judgment on the plaintiff’s false light claim.54

So, in order for an employee to prevail against a former employer under a false light theory, the employer must have directly published the false material. Additionally, just as in Stewart, the court will not uphold a false light claim against an employer for the spread of gossip.55

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48. Id. at 1369-70.
50. Id. at *4.
51. Id. at *2.
52. Id. at *7.
53. Id. at *7.
54. Id.
discussion exaggerates his behavior. The employer directly published the false material, and the alleged false publication is not merely the spread of gossip. However, although John may be able to prove that this is a “false” publication which would be reasonably objectionable, John will also have to prove that the employer acted with malice, or “knowledge of the falsity of the statements or a reckless disregard as to the truth.”[56] Unless the employer purposely published this record with the requisite malice, John’s false light claim will not prevail.

2. Wrongful Discharge

The “at-will doctrine” allows for employees to be discharged at-will “for good cause, for no cause, or for a cause that some might view as morally indefensible.”[57] Nonetheless, Kentucky courts “have already recognized a cause of action for wrongful discharge based on public policy implicit in an act of the legislature.”[58] While the Kentucky courts have adopted the public policy exception to the at-will doctrine, they also “have adamantly guarded against expansion of [it].”[59] Thus, in order to safeguard the traditional at-will doctrine, Kentucky law imposes the following limitations on the public policy exception to the at-will doctrine: “(1) the discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law; and (2) that policy must be evidenced by a constitutional or statutory provision . . . .”[60]

The Kentucky Supreme Court in *Firestone Textile Co. v. Meadows* decided whether an employee had a cause of action for wrongful discharge when he had been terminated for pursuing a workers’ compensation claim under Kentucky Revised Statute Chapter 342.[61] The employee in *Firestone* was a maintenance specialist who suffered a back injury.[62] Following a leave of absence for his injury and returning to work, the employee initially was given a light load, but soon after he was assigned duties beyond his capacity.[63] The employee alleged that he was subsequently terminated for requesting workers’ compensation benefits.[64]

The *Firestone* employee conceded that the at-will doctrine is typically upheld, but claimed that an exception should be made when an employee is terminated for exercising a statutorily-provided right, or specifically for exercising the right to workers’ compensation benefits.[65] Although the Workers’ Compensation Act has no specific provisions that restrict an employer from

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57. Firestone Textile Co. v. Meadows, 666 S.W.2d 730, 731 (Ky. 1983).
58. *Id.* at 732.
60. Grzyb v. Evans, 700 S.W.2d 599, 401 (Ky. 1985).
61. *Firestone*, 666 S.W.2d at 731.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
terminating an employee for exercising rights under the Act, the court held that it “plainly exhibit[s] a policy that employees should be free to accept or reject coverage without coercion by their employers . . . and that they should not be deceived into foregoing lawful claims for benefits or into accepting less than is due them.”

Furthermore, “KRS 446.070 provides that ‘[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation.’” Accordingly, the Firestone court held that, even though Kentucky’s Workers’ Compensation Act does not provide a remedy for its violation, Kentucky Revised Statute 446.070 applied:

It is an important public interest that injured employees shall receive, and employers shall be obligated to pay, for medical expenses, rehabilitative services and a portion of lost wages . . . . The only effective way to prevent an employer from interfering with his employees’ rights to seek compensation is to recognize that the latter has a cause of action for retaliatory discharge when the discharge is motivated by the desire to punish the employee for seeking the benefits to which he is entitled by law.

Therefore, terminating an employee for seeking workers’ compensation benefits falls within the parameters of the at-will doctrine’s public policy exception.

The Kentucky Supreme Court has declined to expand the exception. In Gryzb v. Evans, an employee alleged that he was wrongfully terminated for fraternizing with a female employee. The plaintiff contended that his discharge constituted sex discrimination pursuant to Kentucky Revised Statute 344.040 because he was terminated for fraternizing with the female friend, but she was not terminated.

The Gryzb court acknowledged the public policy exception to the at-will doctrine, but held that it did not apply in the instant case. The plaintiff attempted to use Kentucky Revised Statute 446.070, as the plaintiff in Firestone did, to bootstrap in the public policy exception. However, the Gryzb court clarified that, while Kentucky Revised Statute 446.070 allows for a person injured by a violation of any statute to recover damages, it “is limited to where the statute [being violated] is penal in nature, or where by its terms the statute

66. Id. at 732 (citing Ky. Rev. Stat. Ann. § 342.395 (West 2009)). Four years after Firestone, the Kentucky legislature added a specific provision prohibiting employers from retaliating against employees who have filed Workers’ Compensation claims: “No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter.” Ky. Rev. Stat. Ann. § 342.197 (West 2009).
68. Id. at 733-34.
69. 700 S.W.2d 399, 400 (Ky. 1985).
70. Id. at 400-01.
71. Id. at 400.
72. Id. at 401.
does not prescribe the remedy for its violation.” Therefore, the court held that because Kentucky Revised Statute 344.040 allowed for the plaintiff to seek another form of remedy through the adjudication of the Kentucky Commission on Human Rights, Kentucky Revised Statute 446.070 did not apply to the plaintiff’s sex discrimination claim. “Where the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute.” Thus, the plaintiff’s claim for wrongful discharge failed.

Consequently, because of the Kentucky courts’ hesitancy to expand the reaches of the at-will doctrine’s public policy exception, if John is an at-will employee, he will have no claim for wrongful termination under Kentucky law because the legislature has not specifically defined a statute, or recognized a right established by the Kentucky constitution, protecting an employee against termination for off-duty conduct. In other jurisdictions where the legislature has created a statute making it unlawful to discharge someone for off-duty conduct, the public policy exception may apply.

3. Defamation

A successful claim for defamation requires proof of: (1) defamatory language; (2) about the plaintiff; (3) which is published; and (4) which causes injury to reputation. Although, in some circumstances, employers may assert the defense of privilege to prevent a defamation claim, an allegation may be successful if information about the employee is published to another party who does not have privilege to know the information.

In *Stringer v. Wal-Mart Stores, Inc.*, employees were terminated for eating candy that had been removed from the store’s shelves because they were open or torn. The defendant-employer had a specific policy against eating such candy and had surveillance tape of the employees taking the candy. Plaintiff asserted five allegedly defamatory written or oral statements: (1) oral statements made at a store-wide meeting “that indicated that theft would not be tolerated at the store . . . and that ‘left the impression that there was more to it . . . than just [eating unsellable] candy;’” (2) an oral statement from a manager to employees that “there was more to it than that;” (3) a written document from the plaintiffs’ termination interview identifying the reason for plaintiffs’ termination as the “unauthorized removal of company property;” (4) an oral statement at a district-wide meeting stating that four people had been terminated for “stealing out of

73. *Id.*
74. *Id.*
75. *Gryzb*, 700 S.W.2d at 401.
76. *Id.* at 402.
78. *Id.* at 786.
79. *Id.*
receiving;” and (5) the sending of termination documents, challenging the plaintiffs’ unemployment claims and showing that they were fired for the “unauthorized removal of company property.”

Because *Stringer* involved private plaintiffs and statements of a purely private concern, constitutional privileges of free speech and freedom of press did not apply. “[W]here there is no public plaintiff (public official or figure), no media defendant and no ‘issue of public concern,’ the ‘crucial elements’ which precipitated Supreme Court intervention in state defamation law were absent.” Thus, the plaintiffs’ defamation claim was governed by the common law of defamation. Pursuant to Kentucky common law, a defamatory statement is actionable *per se* if it involves a false accusation of theft. Words that are actionable *per se* receive a “conclusive presumption of both malice and damage.”

However, the defendant maintained that its statements were true, and, thus, it should be absolved from liability. The defendant also alleged that it had a qualified privilege: “because of the common interests implicated in the employment context, Kentucky courts have recognized a qualified privilege for defamatory statements in relation to the conduct of employees.” When a defendant proves that he is entitled to a qualified privilege, the “presumption of malice disappears, and thus ‘false and defamatory statements will not give rise to a cause of action unless maliciously uttered’.”

Still, a qualified privilege can be lost “if the defendant goes outside the scope of the privilege or abuses the privilege in that he publishes irrelevant defamatory materials which have no bearing on the interest he is entitled to protect” or if the defendant speaks maliciously. Accordingly, the court held that, while it was true that plaintiffs illegally ate the candy and that the speech related to the employment interest, the listeners and viewers of defendants’

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80. *Id.* at 792-93.
81. *Id.* at 793.
82. *Elder,* *supra* note 38, at 386-87 (citing Harley-Davidson Motorsports, Inc. v. Markeley, 568 P.2d 1359 (1977)).
83. *Stringer,* 151 S.W.3d at 795.
84. *Id.*
85. *Id.* at 794 (citing Walker v. Tucker, 295 S.W. 138, 139 (Ky. 1927)).
86. *Id.* at 795-96; *see also Elder,* *supra* note 38, at 133-34.
87. *Stringer,* 151 S.W.3d at 796. “Common interests” refers to situations where “the communication is one in which the party has an interest and it is made to another having a corresponding interest.” *Id.* (citing Baker v. Clark, 218 S.W. 280, 285 (Ky. 1920). Presumably in the employment context, “common interests” refers to the interest of the employer in preventing negative or illegal behavior and the interest of other employees of knowing that such behavior has occurred, either to monitor for such behavior or to dissuade others from engaging in the same behavior.
88. *Id.* at 797.
89. H. BRENT BRENNENSTUHL, KENTUCKY LAW OF TORTS 202 (The Harrison Co. 2d ed. 2001); *see also Stringer,* 151 S.W.3d at 797.
90. BRENNENSTUHL, *supra* note 89.
statements reasonably assumed that plaintiffs had stolen more than just candy; because of the falsity of this statement and its reasonable inferences, malice could be inferred.\textsuperscript{91} Therefore, the plaintiffs’ defamation claim was triumphant.\textsuperscript{92}

In \textit{Jones v. Lexington H-L Services, Inc.}, the plaintiff sued his employer for statements posted by his supervisor on the employer’s electronic bulletin board.\textsuperscript{93} As discussed above, the plaintiff sued for invasion of privacy, but he also brought a defamation claim against the defendant.\textsuperscript{94} The Kentucky Court of Appeals held that the comments were clearly meant to be humorous, “[could not] be taken literally” and “could not reasonably be considered a statement of fact.”\textsuperscript{95} The people who view a defamatory statement must believe it to be true; otherwise, there would be no injury to the plaintiff’s reputation and, thus, no defamation claim.

In \textit{Shrout v. The TFE Group}, the plaintiff alleged defamation for the publication of an inaccurate drug test.\textsuperscript{96} The plaintiff was a truck driver, who, as a condition of his employment, was subject to random drug and alcohol testing. The plaintiff submitted to a test, and later was informed that he had tested positive for amphetamines.\textsuperscript{97} Plaintiff assured his supervisor that the positive results were caused by legal drugs that he was taking; additionally, the plaintiff had requested a second test.\textsuperscript{98} However, for indeterminate reasons, no second test was conducted.\textsuperscript{99}

Subsequently, the plaintiff was referred to a substance abuse evaluation firm, where he was certified to return to work; nevertheless, the defendant terminated plaintiff for his prior positive test results.\textsuperscript{100} The plaintiff then submitted to a body hair drug test, which returned negative, “demonstrating that the February test had indicated a false positive.”\textsuperscript{101} The plaintiff’s termination remained in place, and he searched for more work; however, due to the defendant’s disclosure of the plaintiff’s prior drug test results to potential employers, he could not find work.\textsuperscript{102} According to the Department of Transportation’s regulations, the plaintiff’s test results should have been cancelled because no testing was conducted to determine whether legal drugs influenced the results of

\begin{footnotes}
\footnote{91. \textit{Stringer}, 151 S.W.3d at 798-99.}
\footnote{92. \textit{Id.} at 799.}
\footnote{94. \textit{Id.} at *2.}
\footnote{95. \textit{Id.} at *5.}
\footnote{96. 161 S.W.3d 351, 353 (Ky. Ct. App. 2005).}
\footnote{97. \textit{Id.}}
\footnote{98. \textit{Id.}}
\footnote{99. \textit{Id.}}
\footnote{100. \textit{Id.}}
\footnote{101. \textit{Id.}}
\footnote{102. \textit{Shrout}, 161 S.W.3d at 353.}
\end{footnotes}
the test. Consequently, the defendant’s motion to dismiss was reversed and the case was remanded for trial.

According to the Kentucky Supreme Court, “defamatory language” is language that “tends to (1) bring a person into public hatred, contempt, or ridicule; (2) cause him to be shunned or avoided; or (3) injure him in his business or occupation.” The publication of the plaintiff’s failed drug test was facially defamatory because it injured him in his business when he was unable to find subsequent employment. Had the test been accurate, the employer’s truth defense would have prevailed; however, because the test was inaccurate, the plaintiff’s defamation claim survived a motion to dismiss.

Let’s assume that John from our hypothetical sued for defamation because his former company informed prospective employers why he was terminated. Additionally, employees and employers had been discussing his termination at other meetings. First, Kentucky Revised Statute 411.225 protects an employer’s truthful disclosure of a former employee’s job performance, professional conduct, or evaluations to a potential employer when the disclosure is prompted by the potential employer. If the plaintiff proves “that the employer disclosed the information knowing that it was false, with reckless disregard of whether it was true or false, . . . with intent to mislead the prospective employer, or . . . as an unlawful discriminatory practice pursuant to KRS Chapter 344,” then the employer loses the protection provided by the statute.

Furthermore, three defenses are always available to the employer under Kentucky law: the truth defense, the qualified privilege defense, and the defense that the statements were made in jest. As long as the statements made are true, the truth defense will succeed, but, as evidenced by the above case, if the statements are exaggerated, the truth defense may be lost. Additionally, the qualified privilege may be lost if the defamatory statements were made maliciously, or the employer abused its privilege by making statements that are irrelevant to the employer’s interest. Therefore, in John’s case, his employer may always protect itself by ensuring that statements regarding his termination are true, are relevant to his employment, and are not made maliciously.

103. Id. at 356.
104. Id. at 357.
106. Shrout, 161 S.W.3d at 357.
107. Id.
108. KY. REV. STAT. ANN. § 411.225 (West 2009).
109. Id.
110. See ELDER, supra note 38.
111. See Shrout, 161 S.W.3d at 356-57.
4. Intentional Infliction of Emotional Distress

Initially, Kentucky was reluctant to adopt Intentional Infliction of Emotional Distress (IIED) as a separate tort claim; however, in 1984, the Kentucky Supreme Court embraced the IIED tort in *Craft v. Rice*.\(^{112}\) Kentucky, like many other states, allows IIED recovery when: “one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”\(^{113}\) The root of the IIED claim is “the right to be free from emotional distress that arises from the conduct of another, in other words, the right to be left alone.”\(^{114}\) The burden of proof for a successful IIED claim is extremely high:

> The plaintiff in an intentional infliction of emotional distress claim must prove that the sole intent of the defendant was to cause extreme emotional distress to the plaintiff . . . . If the infliction of emotional distress is not the only motive for the conduct, there is no claim [for IIED] . . . .\(^{115}\)

In *Stringer v. Wal-Mart Stores, Inc.*, the Kentucky Supreme Court endorsed this stringent threshold for an employee’s IIED claim.\(^{116}\) As mentioned above, the plaintiffs were terminated for eating unsellable candy.\(^{117}\) While this was explicitly against company policy, the plaintiffs claimed that the conduct was actually allowed, and the manager of defendant’s store “installed the video equipment in order to fabricate a pretense for terminating [the plaintiffs]. . . .”\(^{118}\) Because of the manager’s conduct, the plaintiffs alleged that they had suffered severe emotional distress.\(^{119}\)

In order to be held liable for IIED, not only must the defendant’s sole intention be to cause the plaintiff emotional distress, but also the defendant’s conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”\(^{120}\) In *Stringer*, the defendant’s conduct did not meet this high standard.\(^{121}\) Because plaintiffs were employees at will, defendant could fire them for any reason or no reason; therefore, even if defendant set up the surveillance just to catch the plaintiffs stealing the candy as
alleged, a claim for the infliction of emotional distress would not stand for plaintiffs who had no guarantee of employment.\textsuperscript{122}

Although the standards for an IIED claim are stringent, the claim may still be applicable to an employee who has been a victim of an employer’s extreme conduct.\textsuperscript{123} In \textit{Kroger v. Willgruber}, the plaintiff was fired after thirty-two years of employment; during his employment, the plaintiff had continuously received positive reviews, and Kroger had prospered under his care.\textsuperscript{124} However, without warning, the defendant presented the plaintiff with a resignation letter and possible severance package; at the same time, the defendant assured the plaintiff that another job awaited him in South Carolina.\textsuperscript{125} Although the plaintiff did not immediately resign, the defendant told co-workers that plaintiff had resigned. The plaintiff did eventually resign, but he complained of being “mighty sick” as a result of the deceit.\textsuperscript{126} Knowing that plaintiff was suffering from mental anguish, the defendant continued to tell the plaintiff of the position for him in South Carolina; sent him there to interview for it knowing that in reality there was no position available; attempted to persuade an insurance company not to cover him; and then convinced the insurance company to engage in surveillance of the plaintiff.\textsuperscript{127} The Kentucky Supreme Court in \textit{Willgruber} held that, because the defendant had prior knowledge of the plaintiff’s susceptibility to distress, the defendant’s actions were outrageous, offending “the generally accepted standards of decency and morality.”\textsuperscript{128}

Keeping in mind the stringent threshold Kentucky sets for IIED claims, a typical termination, much like John’s in our hypothetical, will not support an IIED claim, especially without the employer having knowledge of any susceptibility by John to emotional distress. However, even if the employee’s susceptibility and employer’s knowledge of the same are proven, the court still must determine that the conduct is outrageous. Mere termination, even resulting from the employee’s viewing of a private MySpace page, will not uphold an IIED claim.

5. Kentucky Whistleblower Laws

The Kentucky legislature has enacted two statutes designed to protect public employees who have engaged in whistleblowing.\textsuperscript{129} First, Kentucky Revised Statute 61.102 protects employees who have in good faith reported, disclosed, or

\footnotesize{\textsuperscript{122} Stringer, 151 S.W.3d at 791.\textsuperscript{123} See Kroger v. Willgruber, 902 S.W.2d 61 (Ky. 1996).\textsuperscript{124} Id. at 63.\textsuperscript{125} Id.\textsuperscript{126} Id.\textsuperscript{127} Id.\textsuperscript{128} Id.\textsuperscript{129} Tanya E. Milligan, \textit{Virtual Performance: Employment Issues in the Electronic Age}, 38 COLO. LAW. 29, 34 (2009) (stating that seventeen states have passed such laws).}
divulged “any facts or information relative to an actual or suspected violation of any law . . . or any facts or information relative to actual or suspected mismanagement, . . . fraud, abuse of authority, or a substantial and specific danger to public health or safety.” However, unlike the previous state claims discussed, Kentucky Revised Statute 61.102 only protects those employed by the Commonwealth or any of its political subdivisions.

In order to establish a violation of Kentucky Revised Statute 61.102, the plaintiff must prove:

(1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure.

The statute upholds a broad definition of “an appropriate body or authority,” and Kentucky courts do not limit it to an agency with investigatory ability. “[A]ny other appropriate body or authority’ should be read to include any public body or authority with the power to remedy or report the perceived misconduct.” This includes the employee’s own agency.

So, in John’s situation, even assuming he were a public employee, there is no legal support for the idea that discussions of company fraud on his MySpace page fall under the protection of Kentucky Revised Statute 61.102. If John had already reported the fraud to an agency of the Commonwealth constituting an “appropriate body or authority” and the point of his MySpace page was to gather information about company fraud, then perhaps one could imagine a case stretching Kentucky Revised Statute to provide protection for the statements on his MySpace page. However, this issue has not yet been raised in Kentucky courts.

Second, Kentucky Revised Statute 338.121 provides protection for employees who act on a belief that their employer is in violation of a standard established by the Occupational Safety and Health Administration (OSHA):

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted

130. KY. REV. STAT. ANN. § 61.102 (West 2009).
131. “Employee” means: “a person in the service of the Commonwealth of Kentucky, or any of its political subdivisions, who is under contract of hire, express or implied, oral or written where the Commonwealth, or any of its political subdivisions, has the right to control and direct the material details of work performance.” KY. REV. STAT. ANN. § 61.101(1) (West 2009).
133. Workforce Dev. Cabinet v. Games, 276 S.W.3d 789, 793 (Ky. 2008).
134. Id.
135. Id.
136. Id.
or caused to be instituted any proceeding under or related to this
chapter or has testified or is about to testify in any such proceeding or
because of the exercise by such employee on behalf of himself or others
of any right afforded by this chapter . . . .137

Unlike Kentucky Revised Statute 61.102, Kentucky Revised Statute 338.121
applies to both private and public employees, exempting only those who are
employees of the United States government or are employees of an employer
over which federal agencies other than OSHA govern.138

In John’s case, his weak claim arising under Kentucky Revised Statute
338.121 could possibly be strengthened if he had already reported the company’s
conduct to OSHA. Because Kentucky courts have not addressed whether
publication and discussion on a personal page could ever qualify as reporting
under Kentucky’s statutes protecting whistleblowers, if content deals with
company fraud or violation of Kentucky or federal law, “the employer should be
careful about making employment decisions based solely on the content of the
employee’s e-mails or blog postings . . . .”139

B. Federal Claims

Federal claims may also be available to an employee suing his employer for
viewing his “private” web page. As discussed below, these claims range from
constitutional protections to statutory safe guards, and their availability
turns on whether the employer is a governmental entity or acting with
the power of a governmental entity, a private actor (corporate or otherwise), or a
publicly traded company.

137. KY. REV. STAT. ANN. § 338.121(3)(a) (West 2009).
138. Id. at § 338.021(1)(b).
139. Milligan, supra note 129, at 34.
1. Constitutional Violations

An employee who claims his constitutional rights have been violated may only sue his employer if that employer is a governmental entity or entity acting with the authority of a governmental entity.\textsuperscript{140} Constitutional rights generally are not enforceable against private individuals, including non-governmental employers.\textsuperscript{141} However, Congress has provided a cause of action for individuals whose constitutional rights have been violated by a governmental actor.\textsuperscript{142}

a. First Amendment

The violation of an employee’s right to free speech might seem a particularly applicable claim to an employee who has been terminated for his communications via a social network such as Facebook or MySpace. However, the application of the First Amendment claim is limited due to rigid standards imposed by courts; furthermore, the employer must be a governmental entity or entity acting with the power of a governmental entity.\textsuperscript{143} Additionally, in order for a public employee to establish a successful First Amendment claim, the information that is spoken or written must be of “public interest.”\textsuperscript{144}

In the Pennsylvania case of \textit{Snyder v. Millersville University}, the plaintiff, a student teacher, and “public employee” for purposes of her First Amendment claim, was cautioned by the University that she may not refer any students at the cooperating school to her personal webpages or fraternize with them through a personal website while engaged in student-teaching; she was also warned not to post anything about the school or its students on her personal webpages.\textsuperscript{145} Although the plaintiff claimed otherwise, she did not heed the University’s warnings, and not only referred her students to her MySpace page, but also criticized her supervisors on the webpage.\textsuperscript{146} Additionally, inappropriate photographs of the plaintiff under the influence of alcohol could be found on the pages the students were viewing.\textsuperscript{147} Subsequently, when the University did not permit the plaintiff to finish her student teaching program because of her MySpace conduct, she alleged the University had violated her First Amendment

\begin{itemize}
\item \textsuperscript{141} See id.
\item \textsuperscript{142} Id. “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress . . . .” Id.
\item \textsuperscript{143} See id.
\item \textsuperscript{145} Id. at *5.
\item \textsuperscript{146} Id. at *5-6.
\item \textsuperscript{147} Id. at *6.
\end{itemize}
rights. The United States District Court for the Eastern District of Pennsylvania disagreed.148

The plaintiff was “obligated to show that the posting related to matters of public concern to receive First Amendment protection.”149 Because her postings criticizing her employer’s anxiety over her MySpace conduct were not matters of public concern, the plaintiff lost her First Amendment claim.150

Furthermore, in Nickolas v. Fletcher, the plaintiff challenged the Commonwealth of Kentucky’s “decision to prohibit state employees from accessing websites classified as ‘blogs’ from state-owned computers.”151 The plaintiff contended that this prohibition was in violation of the employees’ First Amendment rights to free speech.152 The United States District Court for the Eastern District of Kentucky deemed the prohibition from blogs on state-owned computers reasonable as it prevented employee inefficiency.153

While a public employer has a clearly established right to prohibit employees from viewing or posting to blogs and other personal webpages during working hours, the issue of whether an employer has the right to regulate an employee’s off-duty blogging or postings to a personal webpage is rather murky. In John’s case, assuming he would qualify as a public employee, a court would find his First Amendment rights to be violated only if his postings related to a matter of public concern.

If a public-sector employee were terminated for blogging and challenged the termination on First Amendment grounds, the court would balance the employer’s legitimate interest in delivering efficient government services against the employee’s interest as a citizen in commenting on a matter of public concern. Therefore, a public employee has greater protection if he or she discusses a matter of general public concern. However, that level of protection may be reduced if the public employee’s blog addresses a matter of public concern in a way that disrupts the public employer’s mission.154

Most likely, John’s criticisms of his employer, much like those of the plaintiff in Snyder, would not be found to be of “public interest,” especially if his statements could be deemed to disrupt or be disloyal to the public employer’s mission.155

148. Id. at *7-8, *14.
149. Id. at *14.
150. Snyder, 2008 WL 5093140, at *15.
152. Id.
153. Id. at *7, *9.
155. See Snyder, 2008 WL 5093140, at *15.
b. Fourth Amendment

“Public employees, unlike private employees, have constitutional rights to be free from unreasonable searches and seizures.”156 The Supreme Court of the United States has held that “public employees who have a legitimate expectation of privacy are protected by the Fourth Amendment to the United States Constitution against unreasonable workplace searches.”157 The key to succeeding on a Fourth Amendment claim is demonstrating first that the employee had a reasonable expectation of privacy, and “only if such reasonable expectation is found does the analysis proceed to the determination of whether the search was reasonable in its inception and in its scope.”158 “The analysis of what is reasonable involves the balancing of ‘the invasion of the employees’ legitimate expectations of privacy against the government’s need for supervision, control, and the efficient operation of the workplace.’”159

In United States v. Rosario, the defendant, a United States soldier, was charged with child pornography offenses after a search of his computer in his army barracks in Richmond, Kentucky.160 After the soldier’s supervisors received an anonymous phone call conveying suspicions that the solider had child pornography on his computer, a computer network engineer, accompanied by some of the soldier’s superiors, entered into the soldier’s living area and began to search his computer, and notified the Captain of the search results.161 The soldier “was not present during the search and no search warrant was obtained at that time.”162 After the soldier was charged, he claimed that he had accidentally downloaded the pornography onto his computer.163 The soldier consented to further searches, but this consent was revoked once he acquired an attorney.164

The soldier moved to suppress the evidence obtained from the search of his computer, alleging that it was unreasonable and, thus, unconstitutional.165 As mandated by the Supreme Court, “[i]n order to challenge a search as a violation of the Fourth Amendment, this Court must decide whether Rosario had ‘an expectation of privacy in the place searched, and whether that expectation was reasonable.’”166 Establishing a reasonable expectation of privacy requires

156. Employment Law in Kentucky, supra note 10, at § 8.4.
158. Employment Law in Kentucky, supra note 10, at § 8.20.
159. Employment Law in Kentucky, supra note 10, at § 8.20 (citing O’Connor, 480 U.S. at 719-20).
161. Id.
162. Id.
163. Id.
164. Id. at 725-26.
165. Id.
satisfaction of a two-pronged test: “(1) he must manifest an actual, subjective expectation of privacy; and (2) that expectation must be one that society is prepared to recognize as legitimate.” 167 The Rosario court held that the soldier did not have a reasonable expectation of privacy in his computer because the soldier connected his computer to a network which allowed others to access his files and his computer was not protected by a password. 168 Furthermore, the soldier’s expectation of privacy was weakened by the fact that he lived in army barracks. 169

In Knox County Education Association v. Knox County Board of Education, the Sixth Circuit Court of Appeals upheld the decision of the Knox County Board of Education to test employees for drugs and alcohol, despite a challenge from the local teachers’ union. 170 The school system had numerous drug and violence issues, and consequently adopted “a comprehensive drug and alcohol testing program for the Board of Education’s employees.” 171

The school’s drug and alcohol policy divided the testing into three categories: suspicionless drug testing for people in “safety sensitive” positions, suspicion-based alcohol testing, and suspicion-based drug testing for any employee. 172 The court held constitutional the suspicion-based testing for drugs; 173 suspicion-based testing for alcohol, however, was remanded to the district court for further determination. 174 For purposes of this article, the ruling on the suspicionless drug testing sheds the most light: the court held that the suspicionless drug testing was constitutional because the teachers occupied safety-sensitive positions. 175

The Knox County court thus recognized an exception to the rule requiring individualized suspicion to legitimate searches – the “special needs” exception. The special needs exception provides that “where a Fourth Amendment intrusion serves special needs, ‘it is necessary to balance the individual’s privacy expectations against the Government’s (or public’s) interest.’” 176 The government’s interest in the safety and security of children in schools was held to be one of the most important interests a community could protect. 177 The teachers’ expectations of privacy were diminished by the number of regulations controlling the profession as well as “the unique role teachers play in the lives of

167. Rosario, 558 F. Supp. 2d at 726.
168. Id. at 726-27.
169. Id. at 727.
170. 158 F.3d 361 (6th Cir. 1998).
171. Id. at 366.
172. Id. at 363-64.
173. Id. at 385.
174. Id. at 386.
175. Id. at 384.
177. Id. at 375-76.
our nation’s children.”178 In upholding the suspicionless testing, the court reasoned that the unique influence of teachers outweighed the teachers’ expectations of privacy.179

In sum, Fourth Amendment protections are available to public employees subject to limitations based on the reasonableness of the employees’ expectations of privacy and the magnitude of the government’s interest in regulating the specific conduct. In John’s case, a Fourth Amendment claim will most likely be unavailable even if John were a public employee. If access to John’s “private” page were limited to his personal computer, and his employer had gained access through a search of such computer, then a Fourth Amendment claim may apply. However, although access to the group was controlled by invitation, John’s employer received access to material displayed on the web by the consent of an authorized user. Because the material was displayed on the web, which may be deemed public even when “protected” by password,180 a Fourth Amendment claim would not succeed.181

For further protection of employers against Fourth Amendment claims connected to computer searches, Employment Law recommends “the implementation of an electronic communications policy . . . [to dispel] any reasonable expectation of privacy.”182 The inclusion of prohibitions against criticizing employers within company policy, particularly with company equipment and while on company time, may eliminate even the possibility of a Fourth Amendment claim being filed after an employee’s computer is searched. Furthermore, reserving “the right to take disciplinary action against an employee if the employee’s electronic communications and/or blogging violate company policy or harm the company in any way” may prevent employees from developing any expectation of privacy in their personal webpages and other electronic communications.183

178. Id. at 384.
179. Id. at 386.
180. For a discussion of “public forum” in regard to the internet and e-postings, see Orit Goldring & Antonia L. Hamblin, Think Before You Click: Online Anonymity Does not Make Defamation Legal, 20 HOFSTRA LAB. & EMP. L.J. 383, 412 (2003) (citing ComputerXpress, Inc. v. Jackson, 113 Cal.Rptr.2d 625, 638 (Cal. Ct. App. 2001)) (“Websites that provide free access to any member of the public to read and post messages qualify as a public forum.”). Although the material was protected by a password, the ease of accessing even “protected” material on the internet may persuade a court to hold that the password-protected site is “public.” See Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 875 (9th Cir. 2002) (“The nature of the Internet, however, is such that if a user enters the appropriate information (password, social security number, etc.), it is nearly impossible to verify the true identity of that user.”).
181. See, e.g., United States v. Rosario, 558 F. Supp. 2d 723, 725 (E.D. Ky. 2008); Knox County, 158 F.3d at 361.
182. Employment Law in Kentucky, supra note 10, at § 8.20.
2. The Sarbanes-Oxley Act

Employees of publicly-traded companies who have exposed company fraud through social networks like MySpace likely do not have a claim against their employers under the Sarbanes-Oxley Act. In response to Enron and a series of corporate and accounting scandals, President Bush signed the Sarbanes-Oxley Act (SOX) in 2002. SOX was “intended to be a comprehensive and permanent solution to management malfeasance, with the ultimate goal of re-establishing investor confidence in the integrity of corporate disclosure and financial statements.” One strategy for restoring the financial integrity of public corporations was to provide protection for employees of publicly traded companies who are terminated or discriminated against for identifying corporate deception or accounting abuses. “SOX protects internal whistleblowers who provide information regarding mail fraud, wire fraud, bank fraud, or securities fraud to a person of supervisory authority or a person who has the authority to investigate such conduct.”

In order to prevail in a SOX claim, the plaintiff must prove that: (1) she engaged in protected activity or conduct; (2) the employer knew or suspected, actually or constructively, that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor to the unfavorable action.

In Walton v. Nova, the plaintiff-employee, who suffered from severe depression, sent an email to supervisors and company executives indicating that the company was noncompliant with federal data security laws. One of the supervisors forwarded the email to another supervisor stating: “This is part of the issue. I cannot trust her to do this work and distribute this information appropriately.” The employee, who had been on leave during the time the email was sent, subsequently requested more time off work. The company said it could not accommodate her needs and threatened to terminate her if she did not come back by a certain date. When the employee was discharged for failing to return from her leave of absence, she

185. Id.
186. Id. at I-3.
189. Id. at *5.
190. Id.
191. Id.
192. Id. at *6.
193. Id.
accused the company of terminating her for exposing corporate conduct that amounted to federal criminal fraud.\textsuperscript{194}

The company moved for summary judgment, stating that the employee failed to establish that she engaged in a protected activity.\textsuperscript{195} The United States District Court for the Eastern District of Tennessee found that the employee did engage in a protected activity pursuant to 18 U.S.C.A. § 1514A,\textsuperscript{196} which defines “protected activity” as a lawful act done by the employee either:

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of… Federal law[s] relating to fraud… or (2) to file, cause to be filed,… participate in, or otherwise assist in a proceeding filed or about to be filed… relating to an alleged violation of… any provision of Federal law relating to fraud against shareholders.\textsuperscript{197}

The employee specifically identified a section of SOX, demonstrating certain conduct of the company that she believed to be illegal.\textsuperscript{198} However, she could not satisfy the “reasonable belief” standard of SOX.\textsuperscript{199} SOX requires “both a subjective belief and an objectively reasonable belief that the company’s conduct constitutes a violation of the relevant law.”\textsuperscript{200} “A belief that a violation is about to happen upon some future contingency” does not qualify as a “reasonable belief” under SOX.\textsuperscript{201} The employee’s communications with the company discussing database security “were at best potential violations of the relevant laws,” and, therefore, plaintiff’s claim could not survive summary judgment.\textsuperscript{202}

“It is not uncommon for employees to use e-mail or blogs to voice concerns or complaints about their employment conditions;” such employee e-activity could be protected by SOX if it relates to company fraud, accounting abuses, or matters of public policy.\textsuperscript{203} Walton demonstrates that SOX applies to electronic activity, such as emailing, but no case to date has applied SOX to social networking sites. If John was using his MySpace page, in part, to gather information about company fraud or accounting abuse to report to an investigating authority, then he may be seen as “causing information to be provided” or “otherwise assisting in a proceeding filed or about to be filed”

\textsuperscript{194} Id.
\textsuperscript{195} Walton, 2008 WL 1751525, at *6.
\textsuperscript{196} Id. at *7 (citing 18 U.S.C. § 1514A (2006)).
\textsuperscript{197} 18 U.S.C. § 1514A(a)(1)-(2).
\textsuperscript{198} Walton, 2008 WL 1751525, at *7.
\textsuperscript{199} Id. at *8.
\textsuperscript{200} Id.
\textsuperscript{201} Id. (citing Livingston v. Wyeth, No. 06-1939, 2008 WL 756068, at *8 (4th Cir. Mar. 24, 2008)).
\textsuperscript{202} Id. at *9 (emphasis added).
\textsuperscript{203} Milligan, supra note 129.
within the meaning of SOX.\textsuperscript{204} Whether discussing company fraud on a personal webpage without having yet specifically disclosed the fraud to an authority will be protected under SOX remains to be determined.

3. National Labor Relations Act

The National Labor Relations Act (NLRA) provides protections for employees and governs labor-management relations and union-management relations in the public and private sectors.\textsuperscript{205} Despite common misconceptions, both union members and nonunionized employees may seek refuge under the NLRA.\textsuperscript{206} The NLRA “is a federal act that protects the rights of employees to form unions, engage in collective bargaining, organize strikes, and engage in concerted activities.”\textsuperscript{207} Therefore, “[i]f an employer monitors employee electronic activities, it should take care to avoid improper interference with employee attempts to unionize, in violation of the Act.”\textsuperscript{208}

In \textit{Endicott Interconnect Technologies, Inc. v. National Labor Relations Board}, the plaintiff was terminated for publicly criticizing his employer.\textsuperscript{209} The plaintiff was an employee at a company that the defendant had recently purchased, and this purchase was followed by a ten percent reduction in the workforce.\textsuperscript{210} Although the employee was not laid off in this process, a local newspaper requested an interview with him, and he was quoted as speaking negatively about his new employer.\textsuperscript{211} After being threatened with termination for future comments, the employee subsequently posted a negative response about the employer on the newspaper’s public forum.\textsuperscript{212} The employer terminated the employee, and the employee instituted a claim with the National Labor Relations Board (NLRB), which held that his activity was protected by the NLRA.\textsuperscript{213} The employer appealed.\textsuperscript{214}

The NLRB found that the employee’s comments were “concerted activities” because “they were related to a ‘labor dispute’ – in the former, to the 200-person lay-off and in the latter, to both the lay-off and the ongoing union organization

\textsuperscript{205} See \textsc{VICTORIA ULLMANN, LABOR AND EMPLOYMENT LAW} 212-13 (2004). Some states have passed laws that provide general protections for union activities. For example, Kentucky has passed laws relating to collective bargaining for firefighters and police officers. \textsc{See KY. REV. STAT. ANN. § 67C (West 2010) (providing regulations for collective bargaining of police officers); KY. REV. STAT. ANN. § 345 (West 2010) (providing regulations for collective bargaining of firefighters).}
\textsuperscript{206} \textsc{ULLMANN, supra note 205, at 212-13.}
\textsuperscript{207} \textsc{Milligan, supra note 129; see also 29 U.S.C. § 157 (2006).}
\textsuperscript{208} \textsc{Milligan, supra note 129.}
\textsuperscript{209} 453 F.3d 532, 534-45 (D.C. Cir. 2006).
\textsuperscript{210} \textit{Id.} at 534.
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id.} at 534-35.
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.}
A two-part test was used by the NLRB to determine whether the employee’s communication to a third party was protected by the NLRA: (1) it must be “related to an ongoing labor dispute; and (2) it . . . [must not be] ‘. . . so disloyal, reckless, or maliciously untrue as to lose the Act’s protection.’” While the NLRB concluded that the employee’s actions were not disloyal or reckless, the United States Court of Appeals for the District of Columbia Circuit disagreed and reversed the NLRB’s decision. Although an employee’s activity could be considered “concerted activity,” even concerted activity is not protected if the employee’s conduct “constitutes ‘insubordination, disobedience, or disloyalty,’ which . . . is ‘adequate cause for discharge.’” The court held that the employee’s statements that “there were ‘gaping holes’ in the business and that ‘development and support people with specific knowledge of unique processes were let go’” were disloyal, and therefore the employee was properly discharged for cause.

The requirement that statements not be “disloyal, reckless, or maliciously untrue” rescues the employer from liability. Even if information on a personal website could be considered a “concerted activity” as defined by the NLRA, the statute will not protect an employee in John’s hypothetical case; criticism of an employer and the employer’s clients are considered disloyal and not protected under the NLRA, whether the statements are true or false. Additionally, such disloyal behavior may be protected through the implementation of a tailored company policy that forbids employees from engaging in faithless behavior such as posting information to a blog or social networking profile that either contains proprietary information or disparages the employer in a manner violating the employee’s duty of loyalty to the employer. At the same time, employers must be careful that any such policy is drafted so as not to limit expression that could be considered protected under the . . . [NLRA].

4. Federal Electronic Communications Act and Stored Communications Act

In 1968, Congress introduced the Omnibus Crime, Control and Safe Streets Acts, or Wiretap Act, “which prohibits private individuals and employers from intercepting wire or oral communications, including telephone, computer, or

215. Endicott, 453 F.3d at 534-35.
216. Id. at 537 (citing Am. Golf Corp., 330 N.L.R.B. 1238, 1240, 2000 WL 472839 (2000)).
217. Id. at 538.
218. Id. at 535 (citing NLRB v. Elec. Workers Local 1229, 346 U.S. 464, 477-78 (1953)).
219. Id. at 537-38.
electronic communications.” However, “intercepting” has been so narrowly defined that in order for the Wiretap Act to apply, the “interception must occur contemporaneously with transmission.” Therefore, the “Wiretap Act” has limited applicability to “employee monitoring contexts because, technologically, it is almost impossible for an employer to ‘intercept’ an email as that term is interpreted.”

The Electronic Communications Privacy Act of 1986 (ECPA) was created to expand the reaches of the Wiretap Act to electronic communications. However, the Ninth Circuit has noted that the same definition of “intercept” could not apply to both wire and electronic communications. So, while the ECPA overruled the requirement that an interception must occur contemporaneously with transmission with regard to oral and wire communications, the narrow definition still applied to electronic communications: an electronic communication could not be intercepted if it was not in transmission.

In Konop v. Hawaiian Airlines, Inc., the plaintiff, a pilot employed by the defendant airline, maintained a website where he posted negative information about his employer and regulated who viewed the site by requiring a login ID and password for access. He also created a list of people who could create a login ID, including two other pilots. Additionally, the website contained a “terms and conditions” section which prohibited any of the employer’s management from accessing the site. The employer sought and gained access to the site from one of the pilots who had authorized access. The employer found the employee’s site to be disparaging and, after viewing the site over twenty more times using different access IDs, suspended the employee.

The employee sued, alleging that the employer had violated the Wiretap Act, as amended by the ECPA. The Ninth Circuit analyzed whether the employee’s site fell into the “wire communication” category or the “electronic communication” category, concluding that the website constituted an electronic communication. The court next discussed whether, after the ECPA, the narrow definition of “interception” applied to electronic communications,

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221. Milligan, supra note 129, at 32.  
222. Milligan, supra note 129.  
223. Milligan, supra note 129, at 32-33.  
225. Id. at 877.  
226. Id.  
227. Id. at 872.  
228. Id.  
229. Id. at 872-73.  
230. Konop, 302 F.3d at 873.  
231. Id.  
232. Id.  
holding that it did indeed. The court noted the distinction drawn by the ECPA between electronic and wire communications: “Specifically the term ‘wire communication’ was defined to include storage of the communication, while ‘electronic communication’ was not.” The court held that the website constituted an electronic communication and, therefore, information in its electronic storage could not be intercepted pursuant to the Wiretap Act and ECPA.

The Stored Communications Act (SCA) is part of the ECPA and protects what the ECPA leaves vulnerable: communications in storage. While the SCA generally protects stored communications, some activities are excluded from protection: “(1) access authorized by the person or entity providing a wire or electronic communication service; or (2) access authorized by a user of that service with respect to a communication of or intended for that user.” While in the past the ECPA was considered “virtually useless to employees disgruntled over an employer’s email monitoring, save for extreme circumstances,” recent cases have found the SCA to be more beneficial to employees than originally thought.

In Konop, the employee also alleged that the employer had violated the SCA. While the trial court found that the employer’s viewing of the website fell within the second exception of “access authorized by a user of that service,” the Ninth Circuit noted that the permitted viewers had not necessarily viewed or “used” the site; if the other pilots who had given the employer access had not accessed and used the site, then the SCA would still protect the employee from the employer’s access. Thus, the court upheld the protections of the SCA through a technical loophole. It found that at least one of the pilots may not have accessed the site, and therefore reversed the lower court’s grant of the employer’s motion for summary judgment on the SCA claim.

The United States District Court for the District of New Jersey also upheld the protections of the SCA in Pietrylo v. Hillstone Restaurant Group. The facts of Pietrylo are those provided in the hypothetical used throughout this

234. Konop, 302 F.3d at 878.
235. Id. at 877.
236. Id. at 878.
237. Milligan, supra note 129, at 33.
238. Milligan, supra note 129, at 33.
239. ACCESS TO GOVERNMENT IN THE COMPUTER AGE: AN EXAMINATION OF STATE PUBLIC RECORDS LAWS 105 (Martha Harrell Chumbler ed., ABA 2007).
240. Konop, 302 F.3d at 873.
241. Id. at 880.
242. Id.
243. Id.
In order to prevail, the employees who had been terminated needed to prove that their employers “knowingly, intentionally, or purposefully accessed the [MySpace group] without authorization.” The SCA would not apply if the employer’s access to the site had been authorized by a user of the service. The employers argued that the employee who had divulged her password was an authorized user, and, therefore, the SCA exception rescued them from violation. On the other hand, the employees argued that the employers coerced the employee into sharing her password. The employee testified that “she felt she had to” give the password to the employers because they were her bosses, and that, if the employer “had not been her manager,” she would not have given her password to him. The jury subsequently ruled for the employee, and the trial court denied the employer’s motion for judgment as a matter of law. Therefore, based upon the outcome of Pietrylo, coercing or pressuring an employee to divulge the password does not exempt an employer from violation of the SCA.

Returning to the hypothetical, John’s personal webpage would be considered an “electronic communication,” and, consequently, could not be intercepted according to the ECPA. However, the interception of a stored communication is protected by the SCA. In John’s case, his personal webpage was intercepted, but his employer was given access by Kate who had both accessed and used the site. Because Kate had previously used the site, she would be considered a “user” and the employer would not have violated the SCA according to Konop. However, the Pietrylo rule may still apply. Although Kate initially sought out the boss to expose the website as in Pietrylo, the employer subsequently asked Kate for her password. As in Pietrylo, a jury could decide that Kate was pressured into

245. Id. at *1. The plaintiffs were employees of the defendants. The plaintiffs created a group on MySpace for the purpose of “venting about any BS” that went on at the workplace. The group was private and required a password to access it. While at the house of one of the managers, St. Jean, a fellow employee who had been invited to the group, showed the manager the site. Subsequently, other managers asked St. Jean for her password to view the site. Although there were no blatant threats of adverse employment action if St. Jean did not comply, St. Jean testified that she gave the password to “members of management solely because they were members of management.” St. Jean further testified that she thought she would get in trouble if she did not comply. After viewing the site several times, the defendants fired the plaintiffs, who had created the group. The plaintiffs filed numerous claims against the defendants, one of which was violation of the SCA.

246. Id. at *2.
247. Id.
248. Id. at *3
249. Id.
251. Id.
252. Id.
253. See Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 880 (9th Cir. 2002).
255. See id.
divulging her password, depending on the facts. Such coercion or pressure would negate the fact that the employer accessed the site with the permission of an authorized user. Thus, in our hypothetical, if the jury decided that Kate had been pressured into giving her password to the employer, the Konop exception would no longer apply, and the employer would have violated the SCA.

III. FUTURE OF EMPLOYER LIABILITY IN KENTUCKY FOR TERMINATION FOR OFF-DUTY CONDUCT

While both Kentucky case law and the Kentucky legislature have been silent on whether it is lawful for an employer to police employees’ off-duty conduct (besides smoking), other jurisdictions have addressed this issue. Indeed, some jurisdictions, such as California, Colorado, North Dakota, and New York, have established statutes relating to off-duty conduct.

For example, California’s statute provides that:

The Labor Commissioner and his or her deputies and representatives authorized by him or her in writing shall, upon the filing of a claim therefore by an employee, or an employee representative authorized in writing by an employee, with the Labor Commissioner, take assignments of: [. . .] Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer’s premises.

Adoption of a similar statute in Kentucky would provide a potential claim spawning directly from violation of the statute, but it may also offer plaintiffs a greater probability of success based on a claim of wrongful discharge. To illustrate, let’s take John’s case: if Kentucky were to adopt a statute similar to California’s, it would be possible that a wrongful discharge claim may at least pass summary judgment by relying on the at-will doctrine’s public policy exception. Currently, because the public policy exception requires a public policy to be exhibited by a statute in order to apply, a wrongful discharge claim would be unsuccessful in a Kentucky court. The adoption of a Kentucky statute making it unlawful to terminate an employee for off-duty conduct, however, may be strong enough to exhibit a public policy, and consequently create a wrongful discharge claim for a plaintiff in a situation similar to John’s.

256. Id.
257. Id.
259. CAL. LAB. CODE § 96(k) (West, current through 2009).
260. See Firestone Textile Co. v. Meadows, 666 S.W.2d 730, 731 (Ky. 1983) (quoting Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 835 (Wis. 1983)) (applying the Wisconsin rule that “an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law . . . . The public policy must be evidenced by a constitutional or statutory provision.”).
However, legal experts caution that “while private conversations might be covered under [such statutes], none of the [current] statutes specifically addresses social networking or blogging.” Therefore, the applicability of these statutes may be limited. *Barbee v. Household Automotive Finance Corporation*, although not directly on point, provides an example of how a court has limited application of such a statute. In *Barbee*, the plaintiff, the defendant’s former sales manager, was terminated for dating a member of his sales team. The employee argued that his termination due to his relationship with a subordinate violated section 96(k) of the California Labor Code, protecting the lawful conduct of an employee during nonworking hours.

The California Court of Appeals held that California Labor Code Section 96(k) did not establish a new public policy protecting all employees who engaged in lawful conduct during nonworking hours, but rather it authorized the “Labor Commissioner to vindicate existing public policies in favor of individual employees.” The *Barbee* court determined that California law did not exhibit any policy in favor of a supervisor pursuing an intimate relationship with a subordinate. While the employee may have a legally protected privacy interest in pursuing an intimate relationship, such a right is diminished by the employee’s lack of a reasonable expectation of privacy when his potential love interest is his subordinate. “The fact that courts have recognized that employers have legitimate interests in ‘avoiding conflicts of interest between work-related and family-related obligations; reducing favoritism; [and] preventing family conflicts affecting the workplace’ strongly suggests that a supervisor has no reasonable expectation of privacy in pursuing an intimate relationship with a subordinate.” Therefore, the employee’s wrongful termination claim failed.

However, a similar statute in New York may not be so limited in its application. The New York statute provides that:

> Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of . . . an individual’s legal

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263. Id. at 529.
264. Id. at 533.
265. Id. at 535.
266. Id. at 533.
267. Id. at 531-32.
268. *Barbee*, 113 Cal. App. 4th at 532 (citing Parks v. City of Warner Robins, 43 F.3d 609, 615 (11th Cir. 1995)).
269. Id. at 536.
recreational activities outside work hours, off of the employer’s premises and without use of the employer’s equipment or other property . . . 270

In New York v. Wal-Mart Stores, Inc., two employees were terminated for their “dating relationship,” pursuant to the employer’s policy prohibiting a relationship between a married employee and another employee other than his or her spouse. 271 The New York Appellate Division found that a “dating relationship” did not fall within the definition of “recreational activities.” 272 “Recreational activities” are defined as “any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading, and the viewing of television, movies and similar material.” 273 According to the New York Appellate Division, dating is not a recreational activity as defined by the statute. 274

Unfortunately, New York courts have not yet addressed whether the creation of a MySpace group page and discussion with co-workers regarding the company and its supervisors may fall within the scope of protected recreational activities. While the use of a social networking site may fit into the same category as watching television, movies, or other forms of entertainment, it may also fall into the category of maintaining friendships, professional relationships, or other relationships, such as dating. If the social networking site is seen as a form of entertainment, then courts will most likely consider it a recreational activity. However, if courts consider social networking sites to center on maintaining relationships, there is a possibility the use of the site may not be considered a recreational activity, just as dating was not considered a recreational activity by the New York Appellate Division. How the courts will handle such a situation remains to be seen.

Colorado law sheds the most light on John’s situation. Like New York’s statute, Colorado’s statute protects an employee engaging in “lawful activities off the premises of an employer during nonworking hours.” 275 However, Colorado law permits employers to restrict the off-duty conduct of their employees: (1) when it relates to a bona fide occupational requirement; or (2) if it is necessary to avoid a conflict of interest, or appearance of conflict of interest, with any responsibilities that the employee owes to the employer. 276

In Marsh v. Delta Airlines, the plaintiff, a twenty-six-year employee of the defendant, wrote a letter criticizing her employer to the editor of a local

270. N.Y. LAB. LAW § 201-d(2)(c) (McKinney 2009).
272. Id. at 151-52.
273. Id. at 151 (citing N.Y. LAB. LAW § 201-d(1)(b) (McKinney 2009)).
274. Id. at 152.
275. COLO. REV. STAT. ANN. § 24-34-402.5 (West 2009).
276. COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2009).
newspaper. Specifically, the employee criticized the employer’s decision to “employ hourly contract workers to replace laid-off full-time employees.”

The Colorado court upheld the employer’s decision to discharge the employee, finding “that the employee’s discharge fell within the statutory exceptions because the employee’s conduct violated the company’s duty of loyalty requirement, which was a ‘bona fide occupational requirement.’”

Similarly, in John’s situation, if the employer had a policy requiring employee loyalty, his claim would fail. Thus, it seems, notwithstanding statutory prohibitions on policing the off-duty conduct of employees, the law generally favors employers. However, because the regulation of off-duty blogging, online social networking, and many other lawful off-duty activities has not yet been addressed, the law compels caution when taking action against an employee for his off-duty conduct.

IV. CONCLUSION AND RECOMMENDATIONS

While the analysis of the select cases and statutes in this article seems to favor the employer, the permissibility of regulating off-duty conduct remains questionable. “The bottom line in privacy cases is that the courts are attempting to balance competing interests.” The outcome of such a balancing act is, and always will be, highly fact specific, and until the time comes when Kentucky courts or the Kentucky legislature decide to clarify the legal climate regarding this issue, policing off-duty conduct will continue to incur some risk.

Still, within the murky waters of off-duty conduct, there is room for some general tips for employers when deciding whether to take action against particular off-duty conduct. First, a recommendation to keep in mind is what the National Institute of Business Management (NIBM) contends is the litmus test for whether to police an employee’s off-duty conduct: “If an employee’s off-duty activity puts your company in legal or financial jeopardy, courts will be more willing to let you regulate it.” While this may afford an employer some guidance, it obviously is not a definitive legal standard. However, NIBM’s advice does serve as a good guide when determining whether to terminate an employee.

Second, a more aggressive step is to notify employees of potential monitoring. “Labor and legal experts say the outcome of many employee privacy cases hinges on workers’ expectations of their privacy rights – particularly whether they have been given notice that they are subject to monitoring.” Because the current state of the law is a balancing test, an

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278. Id.
280. Employment Law in Kentucky, supra note 10, at § 8.7.
employer can most quickly benefit by minimizing its employees’ expectations of privacy.283 One way for the employer to do this is to address the issues of social networking in the company’s policies; also, it may help to have clear consent to online monitoring as a pre-condition to hiring. If this consent is certified by a signed document, it will most likely provide a strong defense to any privacy claims that an employee may allege.

Not surprisingly, the law lags behind the technology and social networking phenomenon. Nonetheless, the law discussed in this article establishes that employers may take adverse employment action against employees who utilize social media to disparage them. Employees should have no expectation of privacy when posting information on a public website and employees should think twice before doing so.

However, employers should be cautioned that many factors should be considered when policing off-duty conduct by employees. For instance, the employer should consider where the information is posted, what is said, and how it may impact the employer. If the information is posted on a private site, the employer should take caution when accessing the site with the permission of an authorized user. Even if the employee initially provided access of her own accord, any further requests for access may be construed as pressuring the employee to comply. In light of these competing interests, employers should carefully analyze the facts of each situation before taking action.

283. Employment Law in Kentucky, supra note 10, at § 8.7.
I. INTRODUCTION

On May 6th, 1998, Kathryn Gregory (Katie) was driving her 1997 Ford Probe within the speed limit on Northbound I-75 in Boone County, Kentucky.1 Katie and her thirteen year-old daughter, Kristin, were returning home after enjoying an early Mothers’ Day visit with Katie’s mother and father, Martha and George Rassenfoss, at their home in Paris, Kentucky.2 Kristin, the only child of Katie and her husband Steven, was a member of her school’s student council, a cheerleader, and worked on the school office staff. She was also active in speech and drama at school. Katie worked as a dental assistant.

As Katie and Kristin talked about their plans for the evening, a tractor-trailer came barreling too fast down the ramp connecting I-71 and I-75.3 The driver struggled to keep the speeding truck under control as he negotiated the sweeping curve that joined the two highways. Inertia pulled the giant sixteen-wheeler across the three lanes of I-75, into the left lane where Katie was driving. An eyewitness, Bill Weidner, driving a few car lengths behind Katie but in the center lane, saw it all—almost.4 Mr. Weidner told the police and later testified that the speeding truck barreled across the three lanes of the interstate highway and...
plowed into Katie’s car. It ‘had to’ have hit Katie’s car, the witness said; ‘It just ran right over them. I saw it all’.

The truck, according to the witness, had crashed into Katie’s car and caused her to lose control. Her car went into the median and then came up on the southbound side of the highway where it was “T-boned” by a pick-up truck. Katie and Kristen were both killed instantly when a Chevrolet S-10 pick-up truck struck them at sixty miles-per-hour. The tractor-trailer that caused the disastrous crash did not stop. Indeed, it did not even slow down. Bill Weidner chased the truck for several miles, but ultimately could not keep up with it. While engaged in pursuit of the truck, Mr. Weidner tried to memorize its description and license plate number. Unfortunately, the number he gave the police was incorrect, and the truck was never found.

Steven Gregory wishes that he had died with his wife and daughter. They were his life. Encouraged by friends, Mr. Gregory engaged counsel to investigate the deaths of his wife and only child. Mr. Gregory hoped that the hit-and-run truck driver could be found and brought to justice. Only after many months of investigation and after every possible lead was exhausted without identifying the truck or its driver was a decision made to pursue the only remaining remedy: an uninsured motorist claim against the Gregorys’ own auto insurance carrier. The carrier, Owners Insurance Co., denied the claim. The burden under Kentucky law, they asserted, was on Mr. Gregory not just to show the obvious—that the recklessly operated tractor-trailer had caused the event that had taken his wife and only child—but that there had been actual physical contact between the unidentified truck and the car in which Katie and Kristen had been killed.

Under skilled cross-examination by experienced defense counsel, the eyewitness, Mr. Weidner, admitted that he had not actually seen the impact between the truck and the car. When the tractor-trailer careened across the highway into Mrs. Gregory’s lane, there was a moment that the trailer blocked Mr. Weidner’s view. He could not say whether the tractor-trailer actually hit the car, or whether Mrs. Gregory steered into the median and thereby avoided impact with the speeding sixteen-wheeler. No impact; no cause of action – that

5. Interview, supra note 2.
6. Interview, supra note 2.
7. See Interview, supra note 2.
8. See Complaint and Jury Demand, supra note 1, at 4-5.
9. See Complaint and Jury Demand, supra note 1, at 4-5.
10. Complaint and Jury Demand, supra note 1, at 5.
11. See Complaint and Jury Demand, supra note 1, at 5.
12. See Interview, supra note 2.
13. Interview, supra note 2.
14. See Interview, supra note 2.
is the law in Kentucky, and there are no exceptions. The “contact rule” is still the law in Kentucky. Since Katie and Kristen Gregory were killed in 1998, there have been several published opinions issued in which Kentucky courts continue to cling to this unjust, court-created rule that denies, often arbitrarily, recovery for deserving victims.

Most people presume that if one is run off the road by a speeding tractor-trailer, any injuries suffered as a result of the truck’s negligence would be compensable. Most people presume that recovery could be had from the tortfeasor, or in the case of an unidentified tortfeasor, damages would be covered under one’s own uninsured motorist policy. In fact, in most jurisdictions, Katie and Kristen Gregory’s estates and Steven Gregory would have had a cause of action against the tortfeasor, if found, or against their automobile insurer under their uninsured motorist coverage for their injuries.

Unfortunately, in the Commonwealth of Kentucky, victims of these common accidents cannot recover damages for injuries sustained without proof of actual contact between the victim’s car and the unidentified vehicle that fled the scene of the accident. In other words, by taking proper defensive driving action to avoid contact with an oncoming vehicle, the victim forfeits her right to recover for any subsequent injuries she may receive from colliding with another vehicle or object off the roadway. The victim is penalized for trying to avoid impact. In retrospect, from a financial perspective, she would have been better off letting the tractor-trailer collide with her car. Kentucky’s so-called “contact rule” ironically seems to promote collisions rather than encourage defensive driving and collision avoidance whenever possible.

While proponents of this rigid and antiquated rule incorrectly believe that physical contact is the only way to safeguard against illegitimate or fraudulent


16. See Shelter, 169 S.W.3d at 856 (“We have consistently held that the ‘physical contact’ condition is a valid requirement.”).

17. Id.

18. Fortunately for the family of Katie and Kristen Gregory, their attorneys were able to obtain sufficient expert support in the analysis of paint transfer and other trace evidence to create a jury issue on the question of whether there had been contact between their vehicle and the phantom truck. Knowing a jury would decide whether there was physical contact and faced with potentially limitless damages, the UM/UIM carrier paid the Gregorys’ policy limits. Many citizens are not so lucky. Often, deserving victims are denied any recovery by the contact rule.

19. See, e.g., Shelter, 169 S.W.3d at 856; Burton, 116 S.W.3d at 478.

20. Huelmsan, 551 S.W.2d at 582.


22. Shelter, 169 S.W.3d at 856.
claims, other jurisdictions have abandoned the contact rule and replaced it with modern approaches that allow meritorious plaintiffs to recover, while effectively safeguarding against insurance fraud and other potential abuses of the civil justice system. Considering the obvious illogic of the “contact rule,” Kentucky should review the public policy reasons for the rule’s existence, take stock of the injustices the rule inevitably leads to, and abandon the “contact rule” forever.

The Kentucky Supreme Court has held that the purpose of the contact requirement as a prerequisite to recovery in tort is

> to protect the insurer from having to defend against potentially fraudulent claims ‘arising in cases where the insured’s injuries are the result of his own negligence, without the intervention of any other vehicle, although it is alleged that the accident was caused by an unidentified vehicle which immediately fled the scene.’

The insurance industry argues that a physical contact requirement is necessary to prevent fraud and keep premiums down. On the other hand, the victims’ advocates argue that by taking the prudent action of trying to avoid the oncoming car, victims risk eliminating themselves from any right to recover compensation for injury or death in the event the evasive maneuver ends in a crash with an object or vehicle other than the one that caused the occurrence.


24. See Irvin E. Schermer & William Schermer, Physical Contact Requirement-Physical Impact Not Required, Automobile Liability Ins. 4th, § 24:7 (2009) (noting that “[t]he Arizona, Delaware, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, Oklahoma, Rhode Island, South Dakota, Utah, and Washington courts, in the absence of a statutory express requirement of physical impact, have concluded that the term ‘hit-and-run,’ as used in their statutes does not necessarily connote physical impact, and that the term applies rather to a class of motorist which, after causing an accident to occur, leaves the scene without being identified”).

25. Shelter, 169 S.W.3d at 856-57 (quoting Jett, 551 S.W.2d at 222).

26. Meredith C. Nerem, Miss-and-Run Accidents and the Physical Contact Requirement: An Unfair Advantage for Insurance Companies in the Insurance Capital of the Heartland, 54 Drake L. Rev. 535, 558 (2006) (arguing that although paying UM claims to motorists whose vehicle did not make physical contact with the “hit-and-run” vehicle would increase costs to the insurance company, “coverage for legitimate claims . . . is the reason insureds pay premiums . . . [and] it would not be an unjust and unwarranted expense”).

27. Montoya v. Dairyland Ins. Co., 394 F. Supp. 1337, 1340 (D.N.M. 1975) (citing ALAN L. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 2.41 (1969)) (noting that “[i]t seems unreasonable to establish a rule under which recovery is possible if there is a minute scratch on the
This Article discusses the physical contact requirement in “hit-and-run” cases and exposes how the Kentucky Uninsured Motorist Statute enables the insurer to place unreasonable restrictions on policies that make it extremely difficult for deserving victims to recover in these cases. Part II of this article briefly introduces the Kentucky Uninsured Vehicle Coverage Statute and explains how its language allows insurance companies to exploit individual policy holders. Part III provides examples of case law to highlight the history of this rule in Kentucky. Part IV analyzes the growing national trend to abandon the physical contact requirement in uninsured motorist claims and to assist the reader to critically resolve the absurd logic behind requiring physical contact in hit-and-run accidents. This final part discusses how other states have adopted more reasonable approaches to dealing with the problem of hit-and-run accidents that better serves victims’ needs. This Article concludes that the physical contact rule should be abandoned in Kentucky.

II. KENTUCKY STATE LAW

Generally, uninsured motorist insurance is a “fault-based coverage obligating insurers to provide indemnification for injuries caused either by uninsured or unidentified motorists.”28 Kentucky’s Uninsured Motorist Statute states that insurers are required to provide uninsured motorist coverage;29 however, it does not state that coverage must be afforded in situations where the insured is injured by a hit-and-run vehicle.30 The statute contains a loophole that states: “For the purpose of this coverage the term ‘uninsured motor vehicle’ shall, [be] subject to the terms and conditions of such coverage.”31 This allows insurance companies to place restrictions into their policies that define what is an “uninsured motor vehicle.”32 An insurance company, in affording the insured additional “hit-and-run” coverage, “has the right to require whatever conditions precedent to such protection as it sees fit, and once such a condition is clearly expressed in the policy and agreed upon by the parties, the courts must give it full force and effect…”33

29. KY. REV. STAT. ANN. § 304.20-020(1)-(2) (West 2010).
30. See Jett, 551 S.W.2d at 222-23 (stating that “[a]n examination of [KRS § 304.20-020] reveals that although insurers are required by it to provide uninsured motorist coverage, there is no requirement that coverage against loss cause by hit-and-run vehicles be afforded”).
31. KY. REV. STAT. ANN. § 304.20-020(2) (West 2010).
32. Jett, 551 S.W.2d at 223 (explaining that Kentucky’s Uninsured Motorist Statute allows insurers to “insert restrictions in their policies’ provisions defining what is an ‘uninsured motor vehicle’”).
33. Id. (citing Mullins v. Nat’l Cas. Co., 117 S.W.2d 928 (Ky. 1938)).
This rationale is extremely problematic, and the Kentucky uninsured vehicle coverage statute is to blame. By allowing a private insurer to put unreasonable coverage restrictions in its policies, Kentucky law has indirectly denied recovery of compensatory damages in “hit-and-run” accidents where the victim was unable to prove contact between his or her vehicle and the culpable vehicle that fled the scene. In order to appreciate the injustice of the physical contact requirement in Kentucky, consider the following cases.

III. KENTUCKY CASE LAW

The long line of Kentucky case law examining the issue of “hit-and-run” situations began in 1977 in the Jett v. Doe case. Jett was driving her vehicle “when an approaching automobile traveling at a high rate of speed in her lane of traffic forced her to swerve from the roadway.” Jett’s maneuver was successful in avoiding contact with the oncoming car, but it caused her to lose control of her own car. Thus, she smashed into roadside trees and struck a vehicle driven by another driver. The driver of the vehicle that Jett had avoided did not stop and remains unknown. As a result of the accident, Jett suffered injuries to her face, head, and body and brought a civil action for $27,500.

Jett’s complaint named her insurer, Kentucky Farm Bureau Mutual Insurance Co. (KFB), and the unknown driver who fled the scene. KFB filed a motion to dismiss for failure to state a claim, premised on the fact that because there was no physical contact between Jett’s car and the phantom vehicle, the policy’s uninsured motorist provision did not apply. In Jett’s response, she conceded that there was no physical contact, but she argued “that the ‘physical contact’ requirement is an unreasonable restriction and is inapplicable where . . . the accident is witnessed by an impartial observer who attests that it resulted from the actions of an unidentified vehicle.” After the court ruled in favor of KFB, treating the motion to dismiss as a motion for summary judgment and dismissing the case, Jett appealed.

The issue in Jett was “whether an insurance company can contractually restrict those portions of its uninsured motorist coverage defining a ‘hit-and-run’ vehicle as situations in which there is physical contact between the insured or the

34. Id. at 221.
35. Id. at 222.
36. Id.
37. Id.
38. Jett, 551 S.W.2d at 222.
39. Id.
40. Id.
41. Id.
42. Id.
43. Id.
vehicle he is occupying and the unidentified ‘hit-and-run’ automobile."\(^{44}\) The Supreme Court of Kentucky answered this issue affirmatively.\(^{45}\) Although the court sought guidance from other jurisdictions in its attempt to resolve this issue, it found that the Kentucky Uninsured Motorist Statute did not afford much leeway because it does not require that coverage be provided for loss caused by a “hit-and-run” vehicle.\(^{46}\) Moreover, the court stated that its hands were tied because the matter presented in \textit{Jett} was a “purely contractual issue between the insurer and its insured which [the Court] cannot disturb,” because the statute allows insurers to “insert restrictions in their policies’ provisions defining what is an ‘uninsured motor vehicle.’”\(^{47}\) The court reasoned that if the insurer extends coverage to “hit-and-run” situations, it has

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\text{the right to require whatever conditions precedent to such protection as it sees fit, and once such a condition is clearly expressed in the policy and agreed upon by the parties, the courts must give it full force and effect and abstain from making a new or different contract under the guise of interpretation at the instance of a disappointed party.}\(^{48}\)
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The court noted that it was the responsibility of the insured to bring herself within the requirements of the “hit-and-run” policy provision.\(^{49}\) Thus, in effect, because Jett had taken evasive, defensive driving maneuvers to avoid collision with the phantom vehicle, the court upheld the decision to deny Jett recovery.\(^{50}\) In other words, it is the public policy of Kentucky that a driver should try to avoid collision with a negligently driven vehicle only if (s)he is willing to forego compensation in the event (s)he is injured despite that effort.\(^{51}\) A month after \textit{Jett} was decided, the Kentucky Court of Appeals was presented with a similar “hit-and-run” case.\(^{52}\) In \textit{Huelsman v. National Emblem Ins. Co.}, Harry Huelsman was driving with his wife, Brenda, and their two infant children, Harry and Robin, in Kenton County when he noticed a black car approaching them at a high rate of speed.\(^{53}\) Huelsman steered his car to the right in order to let the black car pass - and smashed into a telephone pole.\(^{54}\) Huelsman’s car did not physically contact the black car, which did not stop.\(^{55}\)

Mr. and Mrs. Huelsman brought suit against the unidentified motorist and their own insurance company in order to recover for their injuries.\(^{56}\) The trial

\begin{itemize}
\item\(^{44}\) \textit{Jett}, 551 S.W.2d at 222.
\item\(^{45}\) \textit{Id}.
\item\(^{46}\) \textit{Id}, at 222-23.
\item\(^{47}\) \textit{Id}.
\item\(^{48}\) \textit{Id} at 223 (citing Mullins v. Nat’l Cas. Co., 117 S.W.2d 928 (Ky. 1938)).
\item\(^{49}\) \textit{Id}.
\item\(^{50}\) \textit{Jett}, 551 S.W.2d at 223.
\item\(^{52}\) \textit{Id} at 579.
\item\(^{53}\) \textit{Id}.
\item\(^{54}\) \textit{Id}.
\item\(^{55}\) \textit{Id} at 579.
\end{itemize}
court dismissed the claim against the insurance company because Huelsman could not prove that there was physical contact between the vehicles.\textsuperscript{56} The jury found that Mr. Huelsman was not at fault and that the unknown Defendant was entirely at fault, awarding over $13,500 to the Huelsmans.\textsuperscript{57} Because the identity of the unknown defendant was never discovered, the judgment was uncollectible.\textsuperscript{58} The Huelsmans appealed from the summary judgment granted to their insurer.\textsuperscript{59}

The issue on appeal in \textit{Huelsman} was “whether or not the physical contact requirement contained in an insurance policy providing uninsured motorist coverage is a valid contractual limitation.”\textsuperscript{60} The court held that the limitation is valid and not against public policy.\textsuperscript{61} In making this decision, the court stated that,

\begin{quote}
[where it has been determined that the applicable uninsured motorist statute does not require that coverage be extended to hit and run vehicles, or unidentified motorists, the policy requirement of physical contact has been upheld as a reasonable attempt to define the risks against which protection is to be provided and as a valid limitation to prevent fraud against the insurer.\textsuperscript{62}]
\end{quote}

Huelsman argued that the purpose of preventing fraud would not be frustrated in this case by allowing recovery because the jury found that the unidentified driver was at fault.\textsuperscript{63} The court of appeals rejected this reasoning and noted “that a jury verdict, in an uncontested tort case, [is not] necessarily a fraud preventer.”\textsuperscript{64} To support this belief, the court stated that:

\begin{quote}
To open the door for all claims against unknown and unidentified drivers, where no physical contact had occurred between the vehicle of the unknown party and the claimant, would open the door for all types of fraud. Many who simply run off the road would seek compensation by claiming that someone ran them off the road. Also, judgments could frequently arise from claimants who had simply over-reacted or who were negligent themselves in a traffic situation and sustained bodily injuries and property damages. [National Emblem Insurance Co.] argues, it is as likely as not that if there is no contact between the
\end{quote}

\begin{footnotes}
56. \textit{Id.}
57. \textit{Huelsman}, 551 S.W.2d at 579-80.
58. \textit{Id.} at 580.
59. \textit{Id.}
60. \textit{Id.}
61. \textit{Id.} at 581.
63. \textit{Huelsman}, 551 S.W.2d at 582.
64. \textit{Id.}
\end{footnotes}
vehicles, the negligent tortfeasor is fully insured but unaware that he has caused an accident. If there is physical contact and the driver leaves the scene, one of the more likely reasons for his flight is because he does not have insurance. The points may or may not be true or appropriate, but the physical contact requirement in the policy removes the need for such speculation.65

As a final note, the court stated that while sympathy was due to the injured in this case, recovery for the Huelsman family under the uninsured motorist policy was not.66

The court of appeals’ skepticism of a jury award is unwarranted. If juries are fully competent to decide between life and death in capital cases, then they certainly can serve as effective fraud preventers in uncontested phantom car cases.67 It is just as likely that in a personal injury case where the tortfeasor is known, named, and present at trial, the victim could have exaggerated her injuries as it is likely that a motorist exaggerated her injuries after a “hit-and-run” accident. Yet, this does not cause us to question the ability of the jury to accurately find facts. Indeed, the Kentucky Constitution § 7 states: “The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate.”68 The court’s reasoning in *Huelsman* is flawed. Jury verdicts are upheld everyday – presumably because we trust our juries not to be duped by frauds.

The next notable case in the line of “hit-and-run” cases in Kentucky courts is *Belcher v. Travelers Indemnity Co.*69 Allen Belcher was operating his car when “[a]n unidentified car, two vehicles in front of [him], came to a complete stop on the [Clay’s Ferry] [B]ridge” over I-75 in Fayette County, between Lexington and Richmond – seemingly for no good reason.70 Belcher and the driver of the car in front of his stopped, as did two vehicles behind Belcher.71 “A tractor trailer rig which was [located] three vehicles behind Belcher, however, [did not stop and] struck the car in front of it.”72 “This caused a chain reaction collision between all the vehicles except the one which initially stopped on the bridge.”73 None of the cars on the bridge ever came into contact with the car that initially stopped, and the stopped car’s driver was never identified because he or she drove away after the accident.74

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65. *Id.* at 582.
66. *Id.*
68. Ky. CONST. § 7.
70. *Id.* at 952.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
Belcher was injured in the accident and “filed a claim with his insurance company, Travelers Indemnity Co. (Travelers), seeking recovery under the uninsured motorist portion of his policy.”\(^{75}\) According to Belcher’s uninsured motorist policy, an

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\text{[u]ninsured motor vehicle means a highway vehicle or trailer of any type; and which is a hit and run highway vehicle, if neither the driver nor the owner can be identified, which causes bodily injury to an insured by physical contact with the insured or a vehicle occupied by the insured.}\(^{76}\)
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Because Belcher’s car did not come into physical contact with the unidentified vehicle that initially stopped on the bridge, Travelers denied Belcher’s claim.\(^{77}\)

Belcher filed suit against Travelers in Fayette Circuit Court, but the court granted Travelers a summary judgment and the court of appeals affirmed.\(^{78}\) The Supreme Court of Kentucky granted discretionary review and ultimately affirmed.\(^{79}\) Despite the fact that there were third-party witnesses in Belcher’s case, the court found no meaningful difference from \textit{Jett}.\(^{80}\) Regardless of the presence of witnesses, the court enforced the contractual restrictions on uninsured motorist coverage.\(^{81}\)

Although Belcher’s arguments against the physical contact provision fell upon deaf ears with the majority of the court, this case is interesting because for the first time in this line of cases, a dissenting opinion was offered.\(^{82}\) Justice Leibson, the author of the dissenting opinion (to which Justice Lambert joined), argued that the term “uninsured motorist” should be given a broad interpretation.\(^{83}\) Justice Leibson recognized that in the years since the Uninsured Motorist Coverage Statute of 1970 was implemented, the Kentucky legislature created the Motor Vehicle Reparations Act (MVRA), which requires insurers to extend basic coverage to include no-fault and uninsured motorist coverage.\(^{84}\) Justice Leibson, therefore, reasoned that “[t]his should give [the court] pause to reevaluate [its] thinking in \textit{Jett v. Doe}, [citation omitted], which was never really sound in the first place.”\(^{85}\) To further support his argument, he declared:

The underlying reasoning upholding the physical contact requirement expressed in \textit{Jett} was that an insurance company had a right to protect against fraud or collusion. The reason is simply meaningless in cases

\(^{75}\) \textit{Belcher}, 740 S.W.2d at 952.
\(^{76}\) \textit{Id.} at 953 (emphasis in original).
\(^{77}\) \textit{Id.} at 952.
\(^{78}\) \textit{Id.} at 953.
\(^{79}\) \textit{Id.}
\(^{80}\) \textit{Id.}
\(^{81}\) \textit{Belcher}, 740 S.W.2d at 953.
\(^{82}\) \textit{Id.} at 954 (Leibson, J., dissenting).
\(^{83}\) \textit{Id.}
\(^{84}\) \textit{Id.}
\(^{85}\) \textit{Id.}
where there is independent corroboration to prove that an unknown motorist caused the accident. To carry out the statutory purpose, the undefined statutory term, “uninsured motorist,” should be interpreted to include an unknown motorist in these circumstances. The reasoning in *Jett* is indefensible and the case should be overruled.86

A more recent attempt to abrogate the physical contact requirement occurred in 1995 in the case of *Masler v. State Farm Automobile Insurance Co.*87 In *Masler*, John G. Masler was driving northbound on National Turnpike while an approaching truck was traveling southbound.88 When the truck passed Mr. Masler’s car, a rock was propelled through the car windshield, injuring Mr. Masler.89 The truck that was responsible for launching the rock through Mr. Masler’s windshield did not stop.90

Mr. Masler brought an uninsured motorist claim against his insurance company, State Farm Mutual Automobile Insurance Co. (State Farm).91 The issue in this case was whether the physical contact requirement of an insurance policy provision regarding “hit-and-run” vehicles is satisfied by indirect contact from the offending vehicle.92 According to State Farm’s insurance policy relating to uninsured motorist coverage, “[t]he bodily injury must be caused by accident arising out of the operation, maintenance or use of an uninsured motor vehicle.”93 The policy defined an “uninsured motor vehicle” as “a ‘hit-and-run’ land motor vehicle whose owner or driver remains unknown and which strikes: a. the insured or b. the vehicle the insured is occupying and causes bodily injury to the insured.”94 In *Masler*, the court again relied upon *Jett* and its progeny, recognizing that the rationale for the “striking” requirement is to prevent fraudulent claims.95 The language of the policy clearly and unambiguously provides that a “hit-and-run” vehicle must actually and directly create contact with the vehicle occupied by the insured.96 The court reiterated that this type of insurance clause does not contradict Kentucky’s Uninsured Motorist Statute and is not against public policy.97

86. *Id.*
88. *Id.* at 634.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 637.
93. *Masler*, 894 S.W.2d at 635 (emphasis in original).
94. *Id.* (emphasis in original).
95. *Id.* (citing *Jett v. Doe*, 551 S.W.2d 221 (Ky. 1977); State Farm Mut. Auto. Ins. Co. v. Mitchell, 553 S.W.2d 691 (1977)).
96. *Masler*, 894 S.W.2d at 636-37.
97. *Id.* at 636-37 (Leibson, J., dissenting).
While the majority adhered to the holding in *Jett*, Justice Leibson’s dissent again argued that *Jett* and its progeny should be overruled. Justice Leibson’s view was that the statutory language mandating minimum coverage requires compensation for “hit-and-run” accidents. The coverage provided for in Kentucky Revised Statute Section 304.20-020(1) “requires no physical contact from the offending vehicle. It requires only that they claimant is ‘legally entitled to recover damages.’” Subsection (2) of Kentucky Revised Statute Section 304.20-020 expressly defines just three instances where coverage may be limited: “(1) where the insurer of the offending vehicle is insolvent, (2) where the offending vehicle has coverage ‘less than the limits described in KRS 304.39-110,’ and (3) where the insurer of the offending vehicle has ‘denied’ coverage.” Subsection (2) does not allow insurance companies to insert the “physical contact” requirement into policy provisions. Justice Leibson argued that the original meaning of the statute had been “stripped away” and that “[p]hysical contact between the vehicle driven by the offending motorist and the claimant’s vehicle, *per se*, has nothing to do with this statute, and nothing to do with [the] problem” presented in these cases.

Justice Stumbo also penned a dissent in *Masler*. Justice Stumbo argued that “an object which may have been either part of the load of the unknown vehicle or thrown from the wheels of the unknown vehicle striking the insured vehicle is sufficient to require coverage.” She stated that the distinction between a “direct contact strike, vehicle to vehicle, and the striking of another object by the uninsured vehicle, which object then strikes the insured or his vehicle causing injury” is unnecessary.

Because three justices took objection to the majority opinion in *Masler*, this case suggests that the Kentucky Supreme Court is beginning to acknowledge the unfairness of the physical contact requirement in uninsured motorist claims. Justices Stumbo and Lambert believe that the physical contact at issue in *Masler* is best left to a jury, while Justice Leibson advocates for *Jett* and its progeny to be completely overruled. Unfortunately, the holding in *Jett* continues to be applied in these cases. Until something is done, the citizens of the Commonwealth will be denied recovery for the damages they sustain during a

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98. *Id.* (Leibson, J., dissenting). Although Justice Lambert had joined Justice Leibson’s *Belcher* dissent, in this case Justice Lambert joined a different dissent written by Justice Stumbo.
99. *Id.* at 637.
100. *Id.*
101. *Id.*; *KY. REV. STAT. ANN.* § 304.20-020(2) (West 2010).
102. *Masler*, 894 S.W.2d at 637 (Leibson, J., dissenting).
103. *Id.* (emphasis in original).
104. *Id.* at 678-39 (Stumbo, J., dissenting).
105. *Id.* at 638-39.
106. *Id.* at 639.
107. See *Id.* at 636-39 (dissenting opinions provided by Leibson, J., and Stumbo, J., joined by Lambert, J.).
“hit-and-run” accident because they instinctively avoided full-on crashes. These victims have paid for uninsured motorist coverage, and it is time that they receive all the coverage they deserve.

IV. GROWING TREND TO ELIMINATE THE PHYSICAL CONTACT REQUIREMENT

While Kentucky still subjects its citizens to injustice by allowing insurance companies to dictate unreasonable obstacles to recovery under their uninsured motorist coverage, there is a growing trend in other states to hold these contract provisions unenforceable for reasons of public policy. Courts in twenty five states – Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia – have held that the physical contact requirement, designed to prevent false claims, should not be extended to defeat recovery in cases where fraud clearly does not exist. See, e.g., Inter-Ins. Exch. of the Auto. Club of S. Cal. v. Lopez, 238 Cal. App. 2d 441, 446 (2d Dist. 1965) (stating that “the physical contact requirement, designed to prevent false claims, should not be extended to defeat recovery in cases where fraud clearly does not exist”); see also Marchitelli, supra note 21. But see Clements v. U.S. Fid. & Guar. Co., 753 P.2d 1274, 1276 (Kan. 1988) (recognizing the insurer’s right under KAN. STAT. ANN. § 40-284(c)(3) to exclude or limit coverage “when there is no evidence of physical contact with the uninsured motor vehicle and when there is no reliable competent evidence to prove the facts of the accident from a disinterested witness”).

109. See, e.g., Inter-Ins. Exch. of the Auto. Club of S. Cal. v. Lopez, 238 Cal. App. 2d 441, 446 (2d Dist. 1965) (stating that “the physical contact requirement, designed to prevent false claims, should not be extended to defeat recovery in cases where fraud clearly does not exist”); see also Marchitelli, supra note 21. But see Clements v. U.S. Fid. & Guar. Co., 753 P.2d 1274, 1276 (Kan. 1988) (recognizing the insurer’s right under KAN. STAT. ANN. § 40-284(c)(3) to exclude or limit coverage “when there is no evidence of physical contact with the uninsured motor vehicle and when there is no reliable competent evidence to prove the facts of the accident from a disinterested witness”).

122. Ward v. Allstate Ins. Co., 514 S.W.2d 576, 578 (Mo. 1974) (holding that “in the absence of physical contact, there can be no recovery under the “hit-and-run” policy provision; but that the insured (plaintiff) may recover because of the provisions of the Missouri statute, in the situation where the other vehicle is known and identifiable, even though there was no contact between the vehicles, if he can meet the burden of proof that the other vehicle is uninsured”) (emphasis added).
Dakota, Utah, Virginia, and Washington—have held that physical impact is a not a condition precedent to recovery for victims of “hit-and-run” situations. In other words, many courts have opined “that the term ‘hit-and-run,’ as used in their [uninsured motorist] statutes does not necessarily connote physical impact.” These courts have extended the term to encompass a class of motorists who leave the scene and remain unidentified after causing an accident. These courts are not persuaded by the argument that physical contact is the only way to prevent fraudulent and collusive claims. Furthermore, an insurance policy provision requiring physical contact is void against public policy because the requirement goes beyond what is mandated under the states’ uninsured motorist statutes. Like Kentucky, the uninsured motorist statutes in these states are silent as to whether physical contact is required in a hit-and-run accident, but their courts reason that if the legislature wanted to give insurance companies the right to impose physical contract requirements on their uninsured motorist coverage, they would have done so explicitly.

Although some states have not yet completely abolished the requirement of physical contact in hit-and-run cases, there is a modern trend of permitting coverage where there is corroborating evidence from an independent third-party who witnessed the hit-and-run accident. This method is fair. It balances the interests of the insurance companies who want to prevent fraud and those of the insured who are rightfully entitled to recover damages for the injuries they suffer

135. See Schermer & Schermer, supra note 24, § 24:7 (referring to Arizona, Delaware, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, Oklahoma, Rhode Island, South Dakota, Utah and Washington courts). But see Clements v. U.S. Fid. & Guar. Co. Ins., 753 P.2d 1274, 1276 (recognizing that the Kansas legislature amended KAN. STAT. ANN. § 40-284 to allow insurer to require physical contact or corroborating evidence).
137. See supra notes 112-36 and accompanying text.
138. See supra notes 112-36 and accompanying text.
139. See supra notes 112-36 and accompanying text.
140. See supra notes 112-36 and accompanying text.
during a hit-and-run accident. Currently, Arizona, Georgia, Ohio, South Carolina, and West Virginia have adopted this approach. Those courts fully appreciate how illogical, unfair, and restrictive the requirement of actual, physical contact is in case law. According to the Supreme Court of Appeals of West Virginia:

This [c]ourt created the corroborative evidence standard to “soften” the stringent, and often unfair, standard of actual physical contact . . . . “Blind adherence to the physical contact requirement wrongfully deprives insured individuals of any recovery under uninsured motorist coverage even when reliable, independent third-party testimony is available. We believe proper use of the independent corroborative evidence test should assist in preventing the filing of fraudulent claims, while at the same time the test should help avoid the injustice of prohibiting clearly legitimate claims where no physical contact has occurred.”

To satisfy the corroborative evidence test, an independent third-party must testify that, “but for the immediate evasive action of the insured, direct physical contact would have occurred between the unknown vehicle and the victim.” Furthermore, “corroborative evidence must be independent, strong, reliable, and otherwise free of suspicion to avoid the possibility of fraud.” Corroborative evidence given by a friend or family member of the victim would not be sufficient.

To understand the superior logic used by state courts that favor the corroborative evidence approach, please consider the following hypothetical:

A tour bus full of Kentucky state and federal judges is visiting the District of Columbia. The tour bus stops in front of the United States Supreme Court, a place the judges have been eager to see. The judges exit the bus, cameras in hand, ready to snap pictures of the historic building. A majority of the judges pose in front of the entrance while only a few stay near the bus on the opposite side of the street to take a picture. Seconds before the picture is taken, an out of control minivan barrels down the street. The judges all stop and stare as the minivan swerves into oncoming traffic heading straight for a small compact car. In a split second, the driver of the compact car decides to veer off the road to

148. Id. at 232 (quoting Hamric v. Doe, 499 S.E.2d 619, 621 (1997)).
149. Id. (citing Syllabus Point 3, in part, of Hamric, 499 S.E.2d at 619) (emphasis omitted).
150. Id. (citing Hamric, 499 S.E.2d at 625).
151. Id. (citing Hamric, 499 S.E.2d at 624-25).
avoid a head-on impact. The compact car smashes into a fire hydrant and the minivan flees the scene of the accident. The judges are so shocked by what just happened that none of them managed to get the license plate number of the minivan. The driver of the minivan was never located.

Luckily the accident was not fatal; however, the driver of the car is severely injured and is rushed to the hospital. After a week in the hospital, the victim of the accident tries to bring a claim against her automobile insurance company under her uninsured motorist coverage for compensation for her hospital bills. Unfortunately, according to the “hit-and-run” provision in her insurance policy, the minivan had to have come into contact with her car in order for her to recover. When the victim calls to speak with her insurance agent, the agent informs her that the reason that proof of contact is necessary is because he does not believe her story about the out of control minivan, and instead believes that her reckless driving alone caused the accident. Desperate to recover the compensatory damages to which she is entitled, the victim contacts the Kentucky Supreme Court in order to speak with the justices who witnessed the accident. All of the justices recall the accident in vivid detail and offer to testify to the fact that the driver of the minivan’s negligence caused the accident in which the victim was injured.

Despite the insurance provision that explicitly states that the insured must prove actual contact with the unidentified vehicle in a hit-and-run situation, would justice be served if the victim could not recover because she could not prove that contact occurred even though she has a busload of Kentucky judges willing to testify on her behalf? If the venue of the case were in Kentucky and applied the law of the forum, the court would be compelled to deny the victim recovery. However, if this case were presented in a state that has adopted the corroborative evidence test, the victim would be able to recover for her injuries based on the testimony of the witnesses who would be able to verify that but for the victim’s avoidance of the minivan, the minivan would have come into direct physical contact with the victim’s vehicle.

This hypothetical case actually presents a common scenario in which an independent third-party witnesses the hit-and-run accident and can corroborate the validity of the victim’s claim. The only thing out of the ordinary in the hypothetical is that the witnesses happen to be judges. Across the river from Kentucky, Ohio courts have recognized the harshness and unfairness of the physical contact requirement.

Ohio adopted the corroborative evidence test in 1996, in the case of Girgis v. State Farm Mutual Automobile Insurance Co. In Girgis, the insured, Salwa Girgis, was driving on I-90 in Cleveland when an unidentified vehicle swerved into her lane. Ms. Girgis claimed that the unidentified vehicle struck the left

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153. Id. at 281.
front fender of her car, which caused her to lose control. She suffered personal injuries when her car overturned. Ms. Girgis brought a claim against her insurer, State Farm, which had denied her coverage because there had been no physical contact between the unidentified vehicle and Girgis’s car.

The issue in Girgis was “whether an automobile insurance policy requiring actual physical contact between the unidentified vehicle and either the insured or the insured’s vehicle as an absolute prerequisite to recovery comports with public policy.” The Supreme Court of Ohio held that the physical contact requirement is against public policy, stating “this absolute standard for recovery should be abandoned.” In place of the physical contact requirement, the court adopted the corroborative evidence test, which prevents fraud while still allowing legitimate victims to recover for their injuries even though they are unable to prove physical contact.

In abandoning the long-standing contact rule, the Ohio Supreme Court offered many persuasive explanations. First, the court stated that, “[a]dherence to the physical contact requirement effectively deprives insured individuals of any recovery under uninsured motorist coverage even when independent third-party testimony is available,” and “[i]t strikes us that this is precisely the sort of situation against which uninsured motorist coverage was designed to protect.” Second, although the court realized that its decision may increase the number of claims filed by insureds against their insurance companies, they were “confident that the jury system [would] be able to distinguish between legitimate cases and fraudulent ones, as they do in many other matters.” Furthermore, in a separate opinion, Justice Sweeney noted that an increase in potentially fraudulent claims “does not justify the judicial deprivation of a plaintiff’s right to bring an action in tort . . . .” In order words, the fear of fraud does not justify denial of legitimate, meritorious claims. Our judicial system was created to provide justice, and justice is not served by barring legitimate claims because other claims might be fraudulent.

Finally, Justice Pfeifer, writing in concurrence with the majority, believed that the court should even take this ruling a step further and eliminate the contact requirement in its entirety. Justice Pfeifer wrote, “[t]here is no reason that a case involving an automobile accident should be any different from any other

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154. Id.
155. Id.
156. Id.
157. Id. at 282.
158. Girgis, 662 N.E.2d at 282.
159. Id. at 283.
160. Id.
161. Id. at 284.
162. Id. at 286 (Sweeney, J., concurring in part and dissenting in part) (citing DeMello v. First Ins. Co. of Haw., 523 P.2d 304, 308 (1974)).
163. Id. at 284 (Pfeifer, J., concurring).
case that depends on the testimony of only one eyewitness. Accordingly, “the jury should decide the veracity of the witness and accord the testimony its due weight in light of the other evidence presented.”

In deciding to abandon the contact requirement, the Ohio Supreme Court acknowledged that there were two conflicting interests in this case, both of which had some degree of merit. On the one hand, insurance companies want to prevent fraud. On the other hand, insured victims are being denied compensation solely because they – thankfully – did not actually collide with the unidentified vehicle. To resolve this conflict, the court applied the corroborative evidence test to effectively address both concerns.

Kentucky should follow Ohio’s lead and resolve the conflicts between the insured and the insurer by adopting the corroborative evidence test.

V. CONCLUSION

There is a significant trend in state legislatures and courts to do away with the physical contact requirement in “hit-and-run” cases. The right – and hopefully automatic – thing to do when a vehicle comes into our path is to do everything possible to avoid collision and injury. Despite one’s best efforts, however, the driver will not always be able to prevent an accident. It makes no sense to allow tortfeasors and insurers to escape responsibility on this basis. For an insurance company to deny coverage when the driver who caused the accident cannot be identified and the insured did not have contact with the unidentified driver is arbitrary and unfair. At the very least, if an unbiased witness is present who can allay the insurance company’s concern that the accident was fraudulent, the victim should not be denied recovery. Unfortunately, these types of accidents are extremely common, and Kentucky courts and the Kentucky Legislature have continued to deprive citizens of compensation that is rightfully theirs.

More and more states are abandoning the physical impact rule because it is unjust and bad public policy. Kentucky should, at a minimum, adopt the corroborative evidence test. That would not abrogate the physical impact requirement entirely, but merely permit recovery when a disinterested witness is able to testify to the unidentified vehicle’s fault.

Until something is done, people all over the Commonwealth will find that they are not covered in “hit-and-run” accidents, despite doing the right thing by steering away from vehicles that cross into their path. These people paid for

165. Id.
166. See id. at 283 (majority opinion).
167. Id.
168. Id.
169. Id.
170. See supra notes 112-36 and accompanying text.
uninsured motorist coverage. It is time that Kentucky citizens get the coverage they deserve.
**A BIOLOGICAL FATHER’S RIGHTS EXTINGUISHED**

*Judge Christopher J. Mehling* and Matthew W. Swafford**

I. INTRODUCTION

Many states allow biological fathers not married to the mother of their child access to courts in order to assert parental rights. This opportunity is not available in Kentucky. The Kentucky Supreme Court recently denied an alleged biological father standing in a paternity action where the mother of the child was married to another man at the time of the child’s birth.¹ The court has created an irrefutable presumption of a husband’s legal paternity by adopting a narrow interpretation of Kentucky law. The goal of this article is to demonstrate the inherent unfairness of this judicial response and urge a more equitable paradigm in paternity disputes where the alleged biological father of the child is not married to the mother.

II. BIOLOGICAL FATHER’S RIGHTS EXTINGUISHED

A. J.N.R. v. O’Reilly

The Kentucky Supreme Court recently held that Kentucky family courts lack jurisdiction to hear an alleged father’s petition to adjudicate paternity of a child born to a woman lawfully married to another man.² In *J.N.R. v. O’Reilly*, J.G.R., an alleged biological father brought an action to establish his paternity of a child born during the mother’s wedlock.³ A paternity test had been conducted, which allegedly proved J.G.R.’s biological connection to the child, but the mother sought to extinguish her former lover’s right to establish paternity.⁴ She claimed the family court had no jurisdiction to hear the dispute because J.G.R. had not previously been lawfully adjudicated to be the father of the child and the child was not born out of wedlock.⁵

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2. *Id.*
3. *Id.*
4. *Id.* at 588.
5. *Id.* at 590-91 (comparing KY. REV. STAT. ANN. § 406.011 (West 2010) (supporting the paternity presumption if within ten months of marriage) with UNIF. ACT ON PATERNITY § 1 (1960).
Kentucky Revised Statute (KRS) Chapter 406 governs subject matter jurisdiction over paternity disputes. Section 406.011 states:

A child born during lawful wedlock, or within ten (10) months thereafter, is presumed to be the child of the husband and wife. However, a child born out of wedlock includes a child born to a married woman by a man other than her husband where evidence shows that the marital relationship between the husband and wife ceased ten (10) months prior to the birth of the child.

Hence, Chapter 406 provides jurisdiction to an alleged father only when a child is born out of wedlock. A child is considered to have been “born out of wedlock” if the mother is married where “evidence shows the marital relationship between the husband and wife ceased ten (10) months prior to the birth of the child.” Conversely, “[a] child born during a lawful wedlock, or within ten (10) months thereafter, is presumed to be the child of the husband and wife.”

The Kentucky Supreme Court determined in J.N.R. that the marital relationship between the mother of the child and her husband had not ceased ten months prior to the birth of the child, despite the apparent infidelity of the child’s mother. In fact, there had been no allegation in this particular case that the marital relationship had ceased ten months prior. The court’s opinion does not clearly establish what type of evidence must be present in order to show that the “marital relationship” has terminated. Nevertheless, Justice Abramson and other members of the dissent believed the marital relationship could be said “to have ceased when the wife of the marriage engaged in sexual intercourse with another man [even though] the ‘marriage’ may still exist as a matter of law.”

The constitutionality of foreclosing a biological father from establishing paternity rights was not addressed, as the paternity statute was not challenged on constitutional grounds. Because a legal marital relationship was still present between the mother of the child and her husband at the time of birth, her husband was the presumed father of the child, and J.G.R had no standing to

(giving a broad definition of “out of wedlock” that includes a child born to any man outside the marriage, which the Kentucky General Assembly did not adopt)).

6. KY. REV. STAT. ANN. § 406.011 (West 2010); see J.N.R., 264 S.W.3d at 590 (noting that KRS Chapter 406, the Uniform Act on Paternity, governs subject-matter jurisdiction for paternity suits).

7. KY. REV. STAT. ANN. § 406.011 (West 2010).
8. Id.; see J.N.R., 264 S.W.3d at 591.
10. Id.
12. Id. at 591.
13. Id. at 588.
14. Id. at 603 (Abramson, J., dissenting).
15. Id. at 589 (Minton, J., majority).
bring an action to establish paternity. Consequently, J.G.R. had no legal right under KRS § 406.011 to participate in the upbringing of his child.

J.G.R. attempted to establish standing based on KRS § 403.270, which provides that “[t]he court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent.” However, KRS § 403.270 concerns custody disputes only during dissolution of marriage, and the court ultimately concluded that the statute did not establish subject matter jurisdiction for the court to determine the custody of the child where the parties were not engaged in divorce proceedings.

B. Past Kentucky Cases Allowing the Presumption to be Rebutted

The Kentucky Supreme Court in J.N.R. overruled Montgomery v. McCracken, a Kentucky Court of Appeals decision that allowed a paternity action to be commenced despite the mother’s marriage to another man. The child in Montgomery was born seven months after the marriage of the child’s mother to another man. The court allowed a man, not married to the mother, to challenge the paternity of the child because it was found to have been born out of wedlock pursuant to KRS § 406.011. The case arose after paternity testing revealed the probability of fatherhood of the non-husband to be 99.83%. Although the court in Montgomery found that the non-husband had overcome the presumption of the husband’s paternity, the Kentucky Supreme Court in J.N.R. overruled Montgomery and adopted a narrower definition of KRS § 406.011’s use of the term “born out of wedlock,” concluding that the Kentucky General Assembly intended the stricter interpretation.

Even before Montgomery, the Kentucky Supreme Court in 1986 had allowed the presumption of a husband’s paternity to be rebutted where the natural father was attempting to shirk his support obligations. The decision in Bartlett v. Commonwealth of Kentucky marked one of the first instances the Kentucky Supreme Court addressed paternity issues where paternal testing was conclusive. The child had been conceived during marriage, but the non-

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16. Id. at 588.
17. J.N.R., 264 S.W.3d at 595.
18. Id. at 594.
19. KY. REV. STAT. ANN. § 403.270(2) (West 2010).
21. Id. at 592. See Montgomery v. McCracken, 802 S.W.2d 943 (Ky. Ct. App. 1990).
22. Montgomery, 802 S.W.2d at 944.
23. Id.
24. Id. at 943-44.
25. KY. REV. STAT. ANN. § 406.051(1) (West 2010).
26. J.N.R., 264 S.W.3d at 595 (“Chapter 406’s applicability is expressly limited to cases of children ‘born out of wedlock,’ and [the child] does not meet the General Assembly’s narrow definition of a child born out of wedlock.”).
28. Id.
spousal father of the child had admitted to having relations with the mother and providing some financial support to her and the child.\textsuperscript{29} Even when citing the historical significance of the presumption of a husband’s paternity, the court still believed the presumption to be rebuttable.\textsuperscript{30} The court concluded that the presumption had been sufficiently rebutted by the paternity testing, and the non-spousal father was required to provide support for his child.\textsuperscript{31} In this case, the husband to the marriage was not a party to the action.\textsuperscript{32}

Thus, the \textit{J.N.R.} decision highlights the court’s traditional view favoring the mother’s family unit in paternity disputes. Moreover, \textit{J.N.R.} reinstated the traditional view in Kentucky jurisprudence in 2008 after prior Kentucky case law had significantly departed from that view since the early 1970s.

\section*{III. ADDITIONAL FAVORITISM OF THE MATERNAL FAMILY UNIT
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\textbf{A. Boone v. Ballinger}

A Kentucky Court of Appeals case, \textit{Boone v. Ballinger}, was a precursor to \textit{J.N.R.}.\textsuperscript{33} In \textit{Boone}, a husband who was not the biological father of the children was denied the legal status of “father” after divorce proceedings had begun.\textsuperscript{34} The husband of a woman who had participated in an extramarital affair sought custody of the children after initiation of a divorce proceeding.\textsuperscript{35} Paternity testing had conclusively determined the adulterer, Boone, was the biological father of two of the children in question, and Boone subsequently intervened in the divorce action, asserting a claim to custody of the children.\textsuperscript{36} Kelly, the woman’s husband, was shocked to learn that he was not the children’s biological father, since he had cared for the children and had always believed himself to be their father.\textsuperscript{37} Kelly sought to be proclaimed the legal father of all of the children under the \textit{de facto} custodian provision in KRS § 403.270(1)(a).\textsuperscript{38}

Section 403.270, as described by the \textit{Boone} court, “permits someone who has acted as the child’s primary caregiver to be deemed the \textit{de facto} custodian of
Once a party has been declared a de facto custodian, he may then “stand on equal footing with the child’s biological parents in matters such as custody.”\(^{40}\) A de facto custodian may be granted custody of the child where it is in the child’s best interests.\(^{41}\)

An individual is deemed to be the de facto custodian of a child where the person:

[H]as been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department of Community Based Services.\(^{42}\)

Despite the fact that Kelly had previously believed he was the father of all the children and had acted accordingly in supporting and raising them, the Kentucky Court of Appeals adopted a narrow interpretation of the statutory language, holding that Kelly had to be “the” primary caregiver of the children rather than “a” primary caregiver in order to be granted de facto custodian status.\(^{43}\) Kelly was not determined to be “the” primary caregiver because Kelly’s wife concurrently provided care for the children, and he did not “literally stand in the place of the natural parent.”\(^{44}\) As a result, the case was remanded to determine Kelly’s status.\(^{45}\)

B. S.R.D. v. T.L.D.

A prior decision from the Kentucky Court of Appeals seems to contradict Boone.\(^{46}\) In S.R.D. v. T.L.B., a man, S.R.D., discovered through paternity testing that he was not the biological father of the child at issue, and he subsequently sought to be relieved of paying child support while retaining all other parental rights.\(^{47}\) S.R.D. and the mother of the child had divorced six years earlier, and evidence revealed that during the marriage, the mother had suggested to S.R.D. numerous times that he was not the father of the child.\(^{48}\) The court applied the doctrine of equitable estoppel and concluded that S.R.D. had made a material representation to the child, upon which the child relied to her detriment and prejudice, because she had been deprived of the opportunity to establish a

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40. Id.
41. Id.
43. Boone, 228 S.W.3d at 8.
44. Id. (quoting Consalvi v. Cawood, 63 S.W.3d 195, 198 (Ky. Ct. App. 2001)).
45. Id. at 15.
47. Id. at 503.
48. Id.
relationship with her biological father.\footnote{Id. at 508-09.} Therefore, the non-biological father was required to continue his child support payments despite not being the genetic father of the child.\footnote{Id. at 510.}

IV. THE KENTUCKY SUPREME COURT AFTER J.N.R.: SMITH V. GARBER

A potential biological father may have subject matter jurisdiction in a paternity dispute where a prior admission establishes that paternity existed outside of marriage and the marital couple had separated within the relevant statutory time frame.\footnote{Smith v. Garber, No. 2009-SC-000738-MR, 2010 WL 2470839 (Ky. June 17, 2010).} In \textit{Smith v. Garber}, Andrew Cahill sought to establish paternity and obtain custody of T.E.S., a child that had been born into the marriage of Trevor and Bethany Smith.\footnote{Id. at *1.} The Jefferson Family Court ordered that genetic testing be completed and the Smiths sought to enjoin the order by seeking a writ of prohibition.\footnote{Id.} The court of appeals denied the writ and the Kentucky Supreme Court affirmed their decision.\footnote{Id.}

The facts of the case are quite extraordinary and are unlikely to be replicated.\footnote{See id.} On July 16, 2004, T.E.S. was born to Bethany Smith.\footnote{Smith, 2010 WL 2470839, at *1.} Although the Bethany and Trevor Smith had previously divorced, the day before the birth they had remarried.\footnote{Id.} In the petition they alleged that Trevor was not the father of the child Bethany was carrying.\footnote{Id.} Three years later they again divorced and were awarded joint custody in that proceeding.\footnote{Id.}

Shortly thereafter, Bethany informed Andrew Cahill that he was the father of T.E.S.\footnote{Id.} Cahill filed a petition in Jefferson Family Court to establish paternity and seek custody of T.E.S.\footnote{Id.} The family court judge ordered genetic testing.\footnote{Smith, 2010 WL 2470839, at *1.} Despite the Smiths’ recent marital dissolution, they sought a writ of prohibition from the Kentucky Court of Appeals to prevent the genetic testing.\footnote{Id.} The court subsequently denied the writ and the Smiths appealed to the Kentucky Supreme Court, seeking a declaration that the family court had acted outside its jurisdiction.\footnote{Id.}

After a review of the \textit{J.N.R.} opinion in conjunction with the statutory

\begin{footnotes}
\footnotetext[49]{Id. at 508-09.}
\footnotetext[50]{Id. at 510.}
\footnotetext[52]{Id. at *1.}
\footnotetext[53]{Id.}
\footnotetext[54]{Id.}
\footnotetext[55]{See id.}
\footnotetext[56]{Id.}
\footnotetext[57]{Smith, 2010 WL 2470839, at *1.}
\footnotetext[58]{Id.}
\footnotetext[59]{Id.}
\footnotetext[60]{Id.}
\footnotetext[61]{Id.}
\footnotetext[62]{Id.}
\footnotetext[63]{Smith, 2010 WL 2470839, at *1.}
\footnotetext[64]{Id.}
\end{footnotes}
language of KRS 406.011, the Kentucky Supreme Court upheld the denial of the writ and concluded Cahill did have jurisdiction to initiate the paternity action.\textsuperscript{65} Two facts were critical to the court’s determination.\textsuperscript{66} First, the Smiths admitted that Trevor Smith was not the father of the child in their first divorce proceeding. Justice Noble asked “[a]re we to ignore judicial fact in order to make a strict construction of obviously debatable statutory language the rule?”\textsuperscript{67} Second, the Smiths’ apparent separation before conception was sufficient evidence to illustrate that the marital relationship had “ceased ten (10) months prior to the birth of the child.”\textsuperscript{68} The court stated that “[s]hort of a divorce, proof of separation is the clearest evidence one can present that the marital relationship had ceased.”\textsuperscript{69}

Furthermore, the court decided the case was “grounded more in equity than in law or procedure.”\textsuperscript{70} It stated that there was an “inherent injustice” in Cahill being “denied parenting of his biological child.”\textsuperscript{71} The court found injustice apparent despite the child’s significant relationship with Trevor Smith, who had acted as the child’s father since its birth.\textsuperscript{72} Cahill’s claim was strengthened by the absence of a need to support the sanctity of marriage, as the parties had remained divorced since 2007.\textsuperscript{73} Consequently, the court upheld the court of appeals’ determination and gave Cahill the opportunity to adjudicate the paternity of T.E.S.\textsuperscript{74}

The court’s opinion relied on equitable principles rather than strict statutory construction to come to a decision.\textsuperscript{75} It based its holding on the fact that there had been a prior judicial admission that Trevor Smith was not the child’s father.\textsuperscript{76} Had the Smiths decided not to make the judicial admission in the first divorce proceeding, it is unlikely that Cahill would have had jurisdiction to bring a paternity action pursuant to the court’s opinion in \textit{J.N.R.}\textsuperscript{77}

\textit{Smith} defines the termination of the marital relationship not only to include legal dissolution, but separation as well. However, if the couple remains together, as they did in \textit{J.N.R.}, the biological father would be shut out of the court room despite interests in equity that weigh in favor of giving him a chance to obtain access to the child. In sum, \textit{Smith} is promising because the court comes to an equitable conclusion. However, a process in which the family court judge

\begin{itemize}
\item[65.] \textit{Id.} at *5.
\item[66.] \textit{Id.} at *3-4.
\item[67.] \textit{Id.} at *3.
\item[68.] \textit{Id.} at *4.
\item[69.] \textit{Smith}, 2010 WL 2470839, at *4.
\item[70.] \textit{Id.} at *4-5.
\item[71.] \textit{Id.} at *4.
\item[72.] \textit{Id.}
\item[73.] \textit{Id.}
\item[74.] \textit{Id.} at *5.
\item[75.] \textit{Smith}, 2010 WL 2470839, at *4-5.
\item[76.] \textit{See id.}
\item[77.] \textit{See id.}
\end{itemize}
could weigh all the facts and come to an equitable determination as to the best interests of the child in all circumstances would perhaps be an even more equitable way to determine paternity.

V. THE KENTUCKY CONCLUSION

The mother of a child born from an adulterous relationship has legal weapons unmatched by any adversarial father in the courtroom. The Kentucky courts have given the mother the ability to influence, if not choose, which man should be declared the father of the child.\textsuperscript{78} If a child is conceived during marriage or within ten months thereafter, there is an irrefutable presumption that the husband of the marriage is the father of the child, so long as the marital couple chooses to stay together.\textsuperscript{79} Although the word “irrefutable” is never used within the statutes, the Kentucky Supreme Court has made the presumption impenetrable.\textsuperscript{80} The only evidence that will suffice to deem the marital relationship terminated is the actual extinction of the marriage itself.\textsuperscript{81} The husband of the child’s mother will be awarded parental rights if the couple remains married, and the biological father of the child will be excluded from all paternal rights and obligations, despite any overwhelming evidence provided by paternity testing.\textsuperscript{82}

Conversely, the husband who has helped care for the child is left without legal recourse if his wife decides to leave the marriage.\textsuperscript{83} If paternity tests prove the husband is not the father of the child, it will be difficult for him to establish parental rights on his own because the mother usually will have helped in raising the child. As a result, the husband will be denied de facto custodial status, since he will be unable to prove that he alone was the child’s primary care giver.\textsuperscript{84} Consequently, the mother may in many instances choose which man will be a part of the child’s life and which will not by deciding to remain in the marriage, as in \textit{J.N.R.}, or opting to leave, as in \textit{Boone}.

According to the Kentucky Court of Appeals’ application of the equitable estoppel principle, once a man has behaved as though he is the father of the child, he may not thereafter cease paying child support, even upon learning that he is not the child’s biological father.\textsuperscript{85} Although equitable estoppel is unavailable to a husband seeking parental rights to a child biologically not his own,\textsuperscript{86} it is available to a mother who seeks the continuance of child support.


\textsuperscript{79} See \textit{J.N.R.}, 264 S.W.3d at 590 (relying upon KY. REV. STAT. ANN. § 406 (West 2010)).

\textsuperscript{80} See id.

\textsuperscript{81} Id. at 591.

\textsuperscript{82} Id. at 593.

\textsuperscript{83} Boone, 228 S.W.3d at 9.

\textsuperscript{84} Id.


\textsuperscript{86} Boone, 228 S.W.3d at 12.
payments from a husband who had notice he may not be the biological father, yet continues to support the child. In *Boone*, the Kentucky Court of Appeals recognized this obvious inconsistency, but did not attempt to distinguish between the availability of the doctrine of equitable estoppel to a mother and the availability to a father or husband. The court stated “there is no doubt that a man can be a child’s ‘legal father’ without actually being [the child’s] ‘biological father,’” but failed to address the inequality of the mother’s power to influence the court’s determination without regard to the benefit to the child or pain to a caring father.

VI. “NO CATEGORICAL PREFERENCE”:
THE UNITED STATES SUPREME COURT IN *MICHAEL H.*

Restricting biological fathers’ rights also has come under constitutional attack. The Supreme Court of the United States in *Michael H. v. Gerald D.* reviewed the constitutionality of a California law, which gave rights only to the natural mother and her husband. The mother of the child had engaged in an affair with her neighbor, Michael H., and paternity test results revealed there was a 98.07% chance Michael H. was the father of the child. Under California law, Michael H. was restricted from challenging the paternity of the child because he was not a party to the marriage at the time of the child’s birth. The constitutional challenges of the California law went unnoticed by the California Supreme Court.

In the United States Supreme Court, Michael H. asserted that his substantive due process rights had been violated and that the state’s interest in preserving the marital relationship was insufficient justify severing his relationship with the child. The Supreme Court concluded that the relationship between Michael H. and his child was not “a protected family unit under the historic practices of our society.” Writing for the plurality, Justice Scalia stated, “in fact, quite to the

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89. *S.R.D.*, 174 S.W.3d at 508.
92. Id. at 113-14.
93. Id. at 125-26.
94. Id. at 115.
95. Id. at 121.
96. Id. at 124.
contrary, our traditions have protected the marital family." Justice Scalia believed the question of whether a natural father outside of an existing marriage may rebut the presumption of paternity to be a legislative prerogative rather than a constitutional question. The Court’s decision found that it was not unconstitutional for a state to give categorical preference to the husband of a marriage in cases involving paternity disputes.

In light of the Supreme Court’s holding in *Michael H.*, Kentucky may favor either the husband of an adulterous wife or the biological father of the child without running afoul of the United States Constitution.

VII. ADVANCES IN SCIENCE AND THE EROSION OF THE TRADITIONAL FAMILY

The legislative history of laws granting paternity rights or standing in paternity disputes must be considered in conjunction with medical history. Only recently have methods of establishing paternity produced results of near absolute certainty. Paternity testing began with the discovery of blood types in the 1920’s. Scientists learned that a person’s blood type was an inheritable trait that could be used to help establish biological lineage. This type of testing was unsuccessful to a large degree because the test could only prove to a reasonable degree of accuracy that a man was not the father of a given child and was totally ineffective when it came to identifying whether a given man actually was the father of a child.

More precise ways to definitively determine paternity were soon developed. Scientists identified proteins in the blood that could be used to trace genetic lineage. The blood group systems named RH, Kell, and Duffy were found to be genetically inherited, and scientists began using these groups to determine paternity in the 1940’s. This type of testing, called serological testing, only

98. Id. at 129-30.
99. Id. at 128.
106. SUSSMAN, supra note 102, at 63-82, 87-91.
yielded a power of exclusion up to a maximum of 60%.

Although more successful than blood typing, the use of serological testing was not conclusive in determining biological relationships.

The uncertainty surrounding these methods of paternity testing was a significant factor in legislatures establishing the presumption of a husband’s paternity: a presumption “recognized as one of the strongest known to law.”

The Kentucky Supreme Court in Bartlett v. Commonwealth of Kentucky believed the legislature had bestowed a presumption of fatherhood on the husband of an intact marriage because of the difficulties inherent in determining paternity.

The same Kentucky court later acknowledged in J.N.R. the difficulties of determining paternity at the time KRS § 406.011 was enacted in 1972, and it concluded that the legislature could choose to amend these statutes in light of new developments in paternity testing if it so wished, but that the decision was ultimately one for the legislature, not the court.

The methods of determining paternity at that time required the legislature to develop a statutory scheme which restricted individuals from seeking parental rights who could not be conclusively determined to have any biological connection to the child in question.

The inaccuracies of paternity testing began to evaporate when the medical community developed tissue typing in the middle of the 1970’s. Scientists found a protein located throughout the body deemed the human leukocyte antigen or HLA. Because of the “high variability of HLA types between different people,” HLA has yielded a power of exclusion of about 80%.

Scientists could use HLA testing coupled with blood and serological testing to yield a power of exclusion close to 90%. Despite this newfound success, HLA testing was not perfect. The accuracy of HLA testing was still questionable, and because of its intrusive nature, it was dangerous for infants under the age of six months.

107. See Sussman, supra note 102, at 8-9. “Power of exclusion” refers to results which exclude a particular man from possible paternity.
108. Sussman, supra note 102, at 8.
109. J.N.R. v. O’Reilly, 264 S.W.3d 587, 599 (Ky. 2008); see also Bartlett v. Commonwealth, 705 S.W.2d 470, 473 (Ky. 1986) (Winstersheimer, J., dissenting) (relying upon Tackett v. Tackett, 508 S.W.2d 790 (Ky. 1974) (arguing that the court has always opted for the husband as the father of the child where that possibility existed due to the difficulty in determining paternity for centuries)).
110. Bartlett, 705 S.W.2d at 472.
111. J.N.R., 264 S.W.3d at 593.
112. See id. at 593 (indicating that the Kentucky legislature adopted the current statute as a result of the inconclusive nature of determining paternity at the time the statute was drafted).
114. Id.
115. Id.
116. Id.
117. Id. (stating that large samples of blood were necessary to complete testing).
Paternity testing was perfected during the 1980’s when scientists began using DNA to identify biological lineage. Restriction fragment length polymorphism (RFLP) became the first biological test to use DNA to identify paternal relationships. The variability and uniqueness of DNA in the human body made its use for paternity testing ideal. The RFLP procedure yielded a power of exclusion higher than 99.9%, but it is not used frequently today because of the large samples of blood needed and the substantial time required to produce results.

A highly accurate, more efficient procedure was developed in the 1990’s. The process, known as the polymerase chain reaction (PCR) technique, provides an exclusion rate of over 99.9%, requires only a small blood sample from participants, and can provide results in a much shorter time.

In seventy years, scientists have developed almost infallible testing techniques, while the laws of Kentucky and other states have been slow to respond. Despite the advances of science, judicial voices have continued to support the traditional nuclear family without accommodating the discovery of biological truth to achieve judicial equity. Justice Scalia, writing for the plurality in Michael H., believed the courts had always protected the family in a traditional marriage. Justice Cunningham of the Kentucky Supreme Court, while concurring with the majority opinion in J.N.R., believed the court should protect the marriage contract from outside attacks because marriage is “the anchor of the family unit.” Cunningham believed the decision in J.N.R. would strengthen the institution of marriage in Kentucky by giving the legal privilege of marriage significant advantages, such as immunity from attacks of interlopers. Recognized by both the Supreme Court of the United States and the Kentucky courts, the presumption of a husband’s paternity of a child born

121. Id.
123. Id. See also JAMES J. GROSS, FATHERS’ RIGHTS: A LEGAL GUIDE TO PROTECTING THE BEST INTERESTS OF YOUR CHILDREN 6 (Sphinx Publishing) (2004).
126. J.N.R., 264 S.W.3d at 600.
127. Id. at 599.
during marriage has often been cited as “one of the strongest known to law”\textsuperscript{128} and “deeply rooted in this Nation’s history and tradition.”\textsuperscript{129}

The stigma of illegitimacy also has been cited as a factor weighing against awarding a non-spousal biological father any parental rights to a child born in marriage. In 1777 England, Lord Mansfield’s Rule prevented a husband or wife from testifying in a way that would bastardize a child born during their marriage.\textsuperscript{130} This development is rooted in the absence of legal status awarded to the \textit{filius nullius}, or “no one’s son.”\textsuperscript{131} A child deemed \textit{filius nullius} had no right to support or inheritance from either parent.\textsuperscript{132} In the United States, legal equality of children born outside of marriage did not become the norm until after the Uniform Parentage Act of 1973 triggered widespread state-level reform.\textsuperscript{133}

Recently, American society has become more accepting of the non-traditional family, as single parents and blended families have become more common place.\textsuperscript{134} Divorce rates in America have skyrocketed since the evolution of no-fault divorce in the middle of the twentieth century.\textsuperscript{135} California was the first state to adopt no-fault divorce standards, and all states had adopted some form of no-fault divorce by 1985.\textsuperscript{136} After the adoption of no-fault, the divorce rate rose sharply from the 1960’s to the 1980’s.\textsuperscript{137} In fact, one recent survey has found that unmarried adults head the majority of American households.\textsuperscript{138}

These changes in the makeup of the average American family have resulted in a more tolerant view of single mothers and children born out of marriage.\textsuperscript{139} One commentator suggests that “[t]he last half century has witnessed a virtual end to the stigma of illegitimacy and single parenthood.”\textsuperscript{140} In \textit{Michael H.}, Justice Brennan concluded that “illegitimacy no longer plays the burdensome and stigmatizing role it once did.”\textsuperscript{141} Corresponding with this trend, there has

\begin{thebibliography}{99}
\bibitem{b}Bartlett v. Commonwealth, 705 S.W.2d 470, 473 (Ky. 1986) (citing Tackett v. Tackett 508 S.W.2d 790 (Ky. 1974)).
\bibitem{m}Michael H., 491 U.S. at 124.
\bibitem{d}Denbow v. Harris, 583 A.2d 205, 206 (Me. 1990) (explaining that Lord Mansfield’s Rule was adopted in England as a means to prevent a father from contesting child support duties, setting forth a presumption of legitimacy in the English courts) (citing Ventresco v. Bushey, 191 A.2d 104, 106 (Me. 1963)).
\bibitem{i}Id.
\bibitem{a}Id. at 553-54.
\bibitem{e}Id.
\bibitem{f}Id. at 21.
\bibitem{k}Id. at 23.
\bibitem{l}See id. (citing an American Community Survey which revealed that unmarried adults were head of 50.3% of the nation’s households in 2005).
\bibitem{n}See id. at 26.
\bibitem{q}Difonzo & Stern, \textit{supra} note 134, at 26.
\end{thebibliography}
been a significant increase in the number of illegitimate births during the latter part of the twentieth century.\textsuperscript{142} This may be due to the destabilization of the institution of marriage, as well as its decreasing popularity.\textsuperscript{143} The post-modern family “now encompasses a collection of diverse, often fragile domestic arrangements….”\textsuperscript{144} These post-modern families most certainly include a significant number of children born out of wedlock.

Some judicial voices have recognized the changing traditions of the American family and have shifted their views, often giving more support to non-marital fathers in court.\textsuperscript{145} Fathers’ rights have been promoted by state legislatures, and traditional child-rearing and gender roles have been challenged by judicial devices such as joint custody.\textsuperscript{146} In \textit{Michael H.}, Justice Brennan’s dissent expressed his belief that a biological link coupled with a commitment to raise the child was a relationship worthy of protection under the Due Process Clause.\textsuperscript{147} The husband’s presumption of paternity, according to Justice Brennan, was outdated “in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child….”\textsuperscript{148}

Justice White addressed the changing patterns of familial organization in \textit{Michael H.} and noted that “[i]t is hardly rare in this world of divorce and remarriage for a child to live with the ‘father’ to whom her mother is married, and still have a relationship with her biological father.”\textsuperscript{149} In Kentucky, family patterns have reflected the national trend, and in fact, when the Kentucky Supreme Court’s decision in \textit{J.N.R.} was issued, Kentucky had a divorce rate higher than the national average.\textsuperscript{150} While the social trends in Kentucky mirror those in the nation at large, the Kentucky courts have been reluctant to reject the traditional presumption that a husband is the father of a child born into the marriage.

\textbf{VIII. EQUITABLE STATE SOLUTIONS TO PATERNITY DISPUTES}

Disposition of paternity cases varies from state to state. The Supreme Court in \textit{Michael H.} recognized that state legislatures may give categorical preference

\begin{itemize}
\item \textsuperscript{142} Glennon, \textit{supra} note 131, at 549.
\item \textsuperscript{143} \textit{See} Difonzo & Stern, \textit{supra} note 134, at 23-25 (arguing that marriage has become but one of many permissible options accepted within American culture).
\item \textsuperscript{144} Difonzo & Stern, \textit{supra} note 134, at 27-28.
\item \textsuperscript{145} Glennon, \textit{supra} note 131, at 575-76.
\item \textsuperscript{146} Glennon, \textit{supra} note 131, at 585.
\item \textsuperscript{147} \textit{Michael H.} v. Gerald D., 491 U.S. 110, 142-43 (1989) (Brennan, J., dissenting).
\item \textsuperscript{148} \textit{Id.} at 140.
\item \textsuperscript{149} \textit{Id.} at 162 (White, J., dissenting).
\item \textsuperscript{150} \textit{J.N.R.} v. O’Reilly, 264 S.W.3d 587, 599-600 (Ky. 2008) (Cunningham, J., concurring); \textit{see also} Tejada-Vera B., Sutton, PD, \textit{Births, Marriages, Divorces, and Deaths: Provisional Data for April 2009}, \textit{NATIONAL VITAL STATISTICS REPORTS} 5 (National Center for Health Statistics, Vol. 58 No. 9, 2009) (reporting Kentucky totaled 6,584 divorces in the months January through April of 2009, the most recent data available).
\end{itemize}
to either paternal party in familial proceedings. In J.N.R., Justice Scott of the Kentucky Supreme Court referenced a significant number of jurisdictions that deny a biological father standing to determine the paternity of a child born into an intact marriage. On the other hand, as noted by Justice Cunningham’s dissent in J.N.R., the majority of jurisdictions at that time would allow biological fathers their day in court. Nearly two-thirds of states as of the year 2000 allowed a biological father to rebut the marital presumption of paternity. Analyses of some of these decisions are presented below.

A. Colorado: R. McG. v. J.W.

The Colorado Supreme Court has held that failure to provide standing for an alleged biological father to establish paternity violates equal protection under the federal and state constitutions and the equal rights amendment under the Colorado Constitution. Colorado law allowed only a natural mother or a man who was married to the natural mother at the time of birth to seek a declaration of parental rights. The court in R. McG. v. J.W. held that this denied equal protection to the apparent, non-spousal biological father of the child “by impermissibly discriminating between natural mothers and claiming natural fathers, and [that] such statutory classification [was] not substantially related to an important governmental interest.” Therefore, a natural father outside of an existing matrimonial engagement whose paternity had been established to be 98.89% was granted standing to bring an action to obtain rights to the child.

B. Indiana: In re Paternity of S.R.I.

Indiana allows a man claiming to be a child’s biological father to file a paternity action to establish parental rights and responsibilities. The Indiana statutes make no reference to the marital status of the mother at the time of conception or birth. The Indiana Supreme Court in In re Paternity of S.R.I. granted an alleged biological father standing to determine paternity because of the “substantial public policy in correctly identifying parents and their

151. Michael H., 491 U.S. at 128-29 (relying upon Lehr v. Robertson 463 U.S. 248, 262 (1983)).
152. See J.N.R., 264 S.W.3d at 600-02 (Scott, J., concurring).
153. Id. at 606 (Cunningham, J., dissenting).
154. Id. (citing UNIF. PARENTAGE ACT § 607, 9B U.L.A. 341 (2000) commentary, which states thirty-three States allow a man to rebut the marital presumption of fatherhood).
156. Id.
157. Id. at 670.
158. Id. at 668.
160. Id. (referencing IND. CODE ANN. § 31-6-6.1-2 (West 2010)).
offspring.”161 The only requirement enunciated in the Indiana Code is that the action must be filed in a timely manner.162 As a consequence, the biological father was allowed to establish paternal rights and assume the role of supporting his biological child.163

C. Minnesota: In re Paternity of B.J.H.

The Minnesota legislature has determined that a presumption of paternity exists where an apparent natural father of a child has a paternity index that reaches or exceeds 99%.164 A presumption of paternity also is granted to a woman’s husband.165 These conflicting presumptions were implicated in In re Paternity of B.J.H.166 Minnesota law determines conflicting paternity standards by using the best interests standards enunciated in Minnesota Statute § 518.17.167 The statute prohibits automatic preference of one parent over another in determining the best interests of the child.168

The Minnesota Court of Appeals found that the lower court appropriately applied the statute in granting the biological father legal status.169 Legal status was awarded to the biological father for many reasons, including the desire of the natural father to have a relationship with the child and the court’s doubts concerning the continued stability of the wife’s marriage.170 By “not unnecessarily impairing blood relationships,” the court’s holding emphasized public policy considerations, especially the importance of allowing genetically related individuals to form relationships with one another.171 The biological parent of the child was awarded paternal rights despite the fact the child was born into a marriage of another couple.172

IX. RECOMMENDATION

The majority decision in J.N.R. is based upon legislative interpretation, but echoes outdated policy considerations to deny the existence of biological truth.173 As a result of the J.N.R. decision, courts in Kentucky are unable to consider whether or not a non-spousal biological father should have rights to the

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161. Id.
162. IND. CODE ANN. § 31-6-6.1-2 (West 2010).
164. MINN. STAT. ANN. § 257.55 (West 2010).
165. Id.
167. Id. at 100-01.
168. See id. at 102.
169. Id. at 103-04.
170. Id.
171. Id. at 103.
172. In re Paternity of B.J.H., 573 N.W.2d at 105.
child he consensually created with another.\textsuperscript{174} When courts favor the husband over the biological father in paternity disputes, policy considerations are often proffered, including the desire of preserving the historical nuclear family of America and relieving the child from the stigma of illegitimacy.\textsuperscript{175} The Kentucky courts have, perhaps unintentionally, empowered a mother to unilaterally shut out the husband or the father based strictly on her interests rather than the interests of the child.\textsuperscript{176} It can be argued, however, that allowing the mother the discretion to influence the court’s determination of paternity does not preserve the nuclear family, but rather undermines the institution of marriage by sweeping under the rug fidelity issues that often result in more damage to the family unit.\textsuperscript{177}

The recognition of the biological relationship between a parent and child at one time had been considered important by the Kentucky Supreme Court.\textsuperscript{178} The court in \textit{Bartlett} believed “[t]ruth and justice are irrevocably bound” and are “Siamese twins sharing a single heart beat.”\textsuperscript{179} Consequently, “[w]hen the advances of science serve to assist in the discovery of truth, the law must accommodate them.”\textsuperscript{180} Science is now able to definitively determine the biological father of a child, and “[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to

\textsuperscript{174.} \textit{Id.} (indicating that the Kentucky General Assembly could decide to provide an adequate remedy to biological fathers who are currently labeled as “strangers to the marriage,” but until that remedy is provided the Kentucky Supreme cannot recognize such standing).

\textsuperscript{175.} See \textit{Michael H. v. Gerald D.}, 491 U.S. 110, 120, 124, 131 (1989) (stating that family integrity is a constitutionally protected right and that illegitimacy pressed upon a child disrupts the marital union).


\textsuperscript{179.} \textit{Bartlett v. Commonwealth}, 705 S.W.2d 470, 473 (Ky. 1986).

\textsuperscript{180.} \textit{Id.}
develop a relationship with his offspring.”\textsuperscript{181} Despite the obvious importance of the biological relationship between father and child, Kentucky does not now ensure a biological father his day in court.

Children have a significant interest in discovering the identity of their biological parents. In some situations, the child may benefit greatly by having two father figures. This scenario would be no different from the prevalent relationships of children and their fathers and step-fathers in today’s society. The discovery of truth has health and medical benefits as well. Genetic predispositions for many diseases and illnesses have been discovered.\textsuperscript{182} If a child is unsure of his biological father’s family medical history, he or she may not be able to guard against or prevent diseases or illnesses which may have a genetic link.

Some members of the Kentucky state legislature have taken steps toward granting a biological father standing in court in order to gain paternal rights.\textsuperscript{183} The proposed amendments to KRS § 406.011, as submitted in February of 2009, specifically identify the marital presumption of paternity as rebuttable.\textsuperscript{184} The definition of a child born out of wedlock could also change.\textsuperscript{185} In the proposed amendments to Section 406.011, a child born out of wedlock includes “a child born to a married woman by a man other than her husband where evidence shows that a man other than her husband is the biological father of the child.”\textsuperscript{186} As a result, this bill would deny a husband an irrebuttable presumption where paternity tests conclusively show another man to be the biological father of the child, instead allowing the biological father to assert his paternal rights.\textsuperscript{187}

An equitable legislative model of fairness should be implemented in order to best determine which man should be deemed a child’s legal father. One’s biological status of father should not be conclusive in granting him legal status, as certain situations may exist in which the best interests of the child would not be effectuated by granting the biological father legal status. The family court should weigh legislatively enumerated factors in order to reach an equitable decision regarding which man should be deemed the legal father of a child. The family court judge should balance these factors on a case by case basis in order to determine the child’s best interests, because the best interests of the child should always be paramount in any decision. This legal paradigm would allow

\textsuperscript{181} Michael H., 491 U.S. at 128-29 (Brennan, J., dissenting) (citing Lehr v. Robertson, 463 U.S. 248, 262 (1983)).

\textsuperscript{182} See HUMAN GENOME EPIDEMIOLOGY: A SCIENTIFIC FOUNDATION FOR USING GENETIC INFORMATION TO IMPROVE HEALTH AND PREVENT DISEASE (Muin J. Khoury et al. eds., Oxford Univ. Press) (2004).


\textsuperscript{184} Id.

\textsuperscript{185} Id.

\textsuperscript{186} Id.

\textsuperscript{187} See id.
courts to consider the best interests of the child, which may include a significant relationship with two men who potentially could be referenced as “father.”