

Spanish Labour Law and Employment Relations Journal

November 2013

Volume 2

Issues 1-2

EISSN: 2255-2081
www.uc3m.es/sllrj

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EISSN 2255-2081 - www.uc3m.es/sllrj

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Layout: tallergraficoyeditorial.com - Universidad Carlos III de Madrid

ARTICLES

Regulation of Dismissal and Mobilization of Labor Rights: a Critical Perspective on the Spanish System*

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Received: 1 February 2013 / Accepted: 31 May 2013

Abstract: In recent times, reflections on the institution of dismissal have focused almost exclusively on understandings of employment protection as a cost for the employer and on the supposed negative effects of these costs for net employment creation. These approaches –more or less favourable to the regulatory intervention of the State– are usually in debt to the paradigm that sees labor law as consisting of a number of restrictions on the “free” market established in order address certain social issues.

This paradigm is not so much wrong as it is incomplete. For that reason this work aims to start from a different approach. Certainly, labor law isn’t an element disconnected from the labor market that distorts the “pure” interaction between the supply of and demand for labor, but it plays, amongst others, a role in forming that market. Market construction, in terms of maximization of its social effectiveness, is carried out through a re-balancing of power between employees and employers which requires the empowerment of workers. The “protection” of workers is not an end in itself, but rather a tool to provide them with power in the context of unequal relations of production.

Taking these distinct approaches as a starting point, this article argues that dismissal is the main institution through which the legislator’s intervention may have a significant impact on the power relationship between the parties. Hence it is the cornerstone of labor law, determining its entire effective application and, therefore, the mobilization of rights ‘in the shadow of the law’ in the day by day of employment relations. This article identifies the elements that dismissal regulation should have in order to be effective, offering at the same time a global critique of the Spanish model of employment protection, with special consideration to the alterations suffered under the Labor Reform of 2012.

Keywords: Employment protection legislation, mobilisation of worker rights, effectiveness of labor law.

1. Labor law and the “empowerment” of workers

In recent times, theoretical approaches regarding dismissal regulation and so-called “labor reforms” have been focused fundamentally on the perspective of considering that employment protection legislation provides job security to the worker but implies a labor cost to the employers. Thus, it is claimed that the legal mechanisms of employment protection involve “excessive” costs for enterprises that hinder employment creation, make it difficult to manage human resources adequately or reproduce

*This article is a reworking and updating (Labour Reform 2012) of the communication presented at the European Congress of Labor Law hold in Sevilla in September 2011. In addition, this paper forms part of the research project “Evaluación sustantiva de las reformas laborables: una nueva metodología interdisciplinar” (DER2012-33178), financed by Spanish Ministry of Economy and Competitiveness.

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labour market segmentation. The academic debate may and must address seriously this question in order to move beyond the mere expression of ideological prejudices. In my judgement, the emphasis that is placed on these aspects obviates some issues of transcendental importance.

This is a consequence of the fact that law in general and labor law in particular end up being contemplated from a perspective originating in the prevailing discourse in economics. This perspective is not worthless, but neither does it describe reality in a totally precise way. Most economists tend to consider law a set of restrictions –more or less appropriate– on the “free” interaction between “supply” and “demand” in markets, which are ideally conceived as spontaneous and self-organising orders. Although this perspective assumes a moderate position, accepting the necessity of a certain level of regulation, the intervention of law is contemplated as the intervention of State’s power over an economic order ideally conceived as a reality perfectly separated from legal regulations and the rest of society. This dissociation is brought about to a large extent by academic specialization. In the actual context of workers’ weakness in the balance of power between capital and labor, this cognitive framework often causes “markets” to be seen as idealised and almost personified entities that do not depend on human behaviour, thus making law, *by the very nature of things*, “invasive” regulation.

This view of the legal system as a set of restrictions on the interaction of supply and demand in the “free” market seems to be of some usefulness, but it is incomplete if accepted in absolute terms. Indeed, the “market” is a contingent institution, which does not exist in all known human societies and that only since industrialisation (and through the intensive activity of State’s power) has turned into the essential basis of human subsistence¹. “Supply” and “demand” do not emerge *ex nihilo*, but rather spring up from social life, as a result of the intervention of various social actors with different degrees of power and influence; among these actors, the State plays a leading role. Thus, in real terms, law not only imposes restrictions on markets but also performs a fundamental role in their creation, configuration and maintenance².

Opposing this limited, economic perspective, some academics have stressed the role of labor law in the creation, configuration and maintenance of labour markets. Among them we want to emphasize the approach of Deakin and Wilkinson³. These authors consider that the redistributing and protective roles of labor law have a positive function in the configuration of the labor market, as they correct inherent problems attached to unregulated markets and therefore promote greater social utility. So, for example, protection against dismissal of pregnant workers constitute a substantive freedom that permits effective integration of women into the labour market. This idea is combined with the concept of “*capabilities*,” borrowed from the economist Amartya Sen, so that social rights are interpreted as “institutionalised forms of capabilities which provide individuals with the means to realise the potential of their resource endowments and thereby achieve a higher level of economic functioning”⁴.

In my opinion, this theory has some limitations, principally as a result of its rhetorical function; since it is a question of *convincing* the reader that labor law and labor market are not opponents but rather complements, much emphasis is placed on considering law from an almost exclusively economic perspective. In my opinion, the view of law as an instrument for the configuration of markets and for the maximization of economic efficiency must be complemented with the consideration of other aspects of a legal, sociological or political nature. Thus, on the one hand, it should not be forgotten that labor law and social security law have the purpose of channelling social conflicts (what, of course, will probably benefit economic effectiveness and, where appropriate, productivity). On the other hand, analysis of legal reality should not fail to take political values into account and, in particular, the value of democracy; a legal system will be more democratic in so far as it involves greater controls on power. In this sense, labor law will be more democratic in so far as the channels it promotes to guide the resolution of

¹ POLANYI, K., *The great transformation: the political and economic origins of our time*, 2nd edition, Beacon Paperback ed., Boston, MA: Beacon, 2011.

² I have already defended this argument in the article “La regulación de las migraciones laborales en tiempos de crisis”, *El Cronista del Estado Social y Democrático de Derecho*, nº 2, pp. 34-35.

³ DEAKIN, S. WILKINSON, F., *The law of the labour market: industrialisation, employment and legal evolution*, Oxford University Press, Oxford, 2005.

⁴ *Ibid.*, p.347.

conflicts permit an effective limiting of the power exerted by the employer, and which is inherent in the capitalist mode of production⁵.

In any case, what I find more relevant from the approach of these authors is that they emphasize –although using other language– the *empowerment* of workers more than the *protection of workers* as an absolute value. The notion of “*protection*” could even be seen as paternalistic in nature, insofar as it considers workers as playing a passive role in defending their own interests. The key to channeling social conflict in order to democratize (within the inherent limits of the capitalist system) salaried work relationships and to maximize labor market efficiency is the *re-balancing of power* in the context of industrial relations in order to allow workers to defend personally and collectively their interests and to operate as autonomous and free individuals in the market and in the society. In this context, workers’ “*protection*” may be important, but it is a means to carry out this re-balancing of powers rather than an end in itself.

2. Everyday mobilization of labor rights

Law is a social sub-system functionally specialised in the channelling of conflicts that operates through the generalisation of expectations⁶. The legal system provides solutions or predetermined resolution schemes for conflicts that could hypothetically arise, therefore enabling conflicting parties to adjust their expectations toward these solutions.

In abstract terms, there can be several reasons for conflicting people to comply with the solutions provided by the legal system. The most obvious reason for them to abide by the rules is the eventuality of *coercion*; parties can impose on their opponents the solutions established in the legal system through resort to the State’s power, which seeks to have a monopoly on the legitimate exercise of violence and exerts that monopoly in a relative –if not absolutely– credible way.⁷ If the coercion mechanisms are effective, they do not have to be exerted directly; rather, they operate indirectly, as the recipients of the rule anticipate the possibility of the imposition of solutions, or seek to avoid the performance of the expected sanctions, and thus comply with the rule *spontaneously* in their daily life without the need for formal state intervention. Beyond coercion, in certain contexts legal rules are complied with due to the need to achieve a minimum of security in social and economic relations; people need to know what they should be doing in their dealings with others and legal regulation can provide them with some certainty, although it may also compete in this regard with another normative systems alien to the State’s power. Finally, sometimes norms are obeyed either because they have been internalized, that is, because the social players have assumed them within their own discourses and not as external orders, or because the issuing authority enjoys a certain degree of legitimacy in the community.⁸

In spite of the above observations, it is evident that in certain social contexts the failure to comply with rules is rather widespread and it goes far beyond that the emergence of isolated and occasional deviant behaviour. In effect, legal rules are not the only *reasons for action*, or the only schemes that attribute meaning to human behaviour; rather, they are competitors in the social space with other regulatory systems and with other motivations, desires and interests on the part of individuals or social groups.

⁵ In this vein, linking protection against dismissal with democratic values, BAYLOS GRAU, A., PÉREZ REY, J., *El despido o la violencia del poder privado*, Trotta, Madrid, 2009, pp. 46-50. This entire monograph constitutes an important reference to the theme addressed in the present article.

⁶ This definition is built through Luhman and Teubner’s theories which represent law as an “autopoietic” system. I think these theories are very suggestive and can contribute some interesting ideas, but this doesn’t mean that I have assumed them with all their consequences; particularly, I consider problematic the emphasis that has been placed on the autonomy of systems, which could lead to an excessive idealisation of certain aspects of social reality that only should be viewed apart from the rest for analytical purposes.

⁷ WEBER, M., *Economía y sociedad: esbozo de sociología comprensiva*, Fondo de Cultura Económica España, Madrid, 1993 [1922]

⁸ See my discussion on the efficacy of employment law in “Una aproximación metodológica al problema de la eficacia de las normas laborales”, *Revista de Derecho Social*, nº 59, 2012, pp. 76-83.

Specifically, it must not be assumed that labor rights are brought to bear automatically because they have been formulated in the rules. These rights must be *mobilized* individually by right-holders (individual and collective actors), not only in the most critical moments of open conflict demonstration but also in the daily performance of the employment relationship⁹. The mobilization of rights not only occurs when social actors make recourse to institutional mechanisms of coercion, but also when conflicting parties refer to the law as a tool (among others) to strengthen their position in the course of the bargaining process and everyday contexts of employment relations. Certainly, when employees consider that their interests are protected by rules, they may feel especially legitimated to put pressure on the employer in defence of those interests¹⁰.

In any case, beyond this “moral” motivation, the effective binding of rights depends in the last resort on the context of power relationships within the enterprise¹¹. If power relations are highly biased towards the employer, the formal recognition of social rights lacks importance. At the same time, however, as was pointed out previously, well-designed and well-implemented labor regulations are able to produce a certain re-balancing of powers. Therefore, the efficacy (or ineffectiveness) of labor regulations with respect to the “empowerment” of workers is self-reinforcing. This means that the more balanced the powers are, the easier it will be for the labor precepts that contribute to this balance to be applied while, in so far as labor legislation is not able to achieve this empowerment effect, it will make the performance of other labour precepts more difficult, thereby amplifying the dysfunction.

For this reason, it appears appropriate to identify the essential parameters that determine to a great extent the relations of power between the parties. Insofar as labor legislation manages to impact these parameters, there will be a positive feedback effect, which will influence the efficacy of the entire system. In my opinion, these parameters are principally the following¹²:

- *The capacity of employees to organize* and the relative power of their collective avenues of representation. This parameter depends mostly on social, historical and economic factors, although it may be influenced considerably by the institutional framework designed by norms.
- *The effective functioning of the mechanisms of protection* provided by the legal system. This parameter depends nearly exclusively on institutional and legal factors, as it refers to the accessibility of institutional procedures for the protection of rights, as well as to the efficacy of these procedures and to the sanctions and remedies foreseen by the legal system. In any event, it should be taken into account that protection and coercion procedures usually require that recipients mobilize labor rights for themselves, either individually or collectively, and this is not always going to be easy if power relations are unbalanced.
- *The global cost of the termination and replacement of workers*. This parameter is at the same time made up of two elements: the economic and bureaucratic costs of a possible dismissal and the costs to replace the worker. The first of these elements depends almost exclusively on institutional and statutory factors, while the second is mainly connected to the worker’s qualifications (officially recognised or not), the job requirements and the characteristics of the available labour force.

⁹ In this regard *Vid.* ALBISTON, C.R. “Bargaining in the shadow of social institutions: competing discourses and social change in workplace mobilisation of civil rights”, *Law & Society Review*, Vol.39, nº 1, 2005, which combines theoretical reflection with an empirical examination of family leave.

¹⁰ *Ibid.*, p. 29. This motivation is increasing through informal social interaction with family, friends, colleagues or legal representatives, who encourage the employee to put “his or her rights” into play (p.27); in the case of leave, the legitimation obtained by the recognition of interests is used as well against the possible rejection by one’s colleagues (pp. 37-38).

¹¹ *Ibid.*, pp. 16, 23-25.

¹² Actually, although I refer to three main parameters, I consider that there exists a fourth—the “moral” legitimation of power structures producing labour rules and of the rules’ content. This parameter is constituted more by socio-cultural and political factors than by legal ones and in any case, its incidence in the context of enterprises orientated toward the maximization of benefits is limited. This does not imply that regulation cannot interfere with these parameters, but rather that its capacity to influence is limited.

3. Particular importance of the dismissal regulation in the “empowerment” of workers

In my opinion, dismissal regulation is the most relevant legal institution in the composition of these parameters. This is why *the dismissal regime constitutes the cornerstone of labour law*,¹³ as a statutory system directed toward the channelling of social conflict and to the maximization of the social efficiency of the labor market through the generation of expectations and the re-balancing of power relationships between employers and workers.

Apart from the nuances that might arise in every concrete situation, the inherent power imbalance of employment relations in a free-market capitalist economy derives fundamentally from the fact that salary is the only, or at least, the main livelihood or the principal source of sustenance and welfare for working people, as well as the dominant path for personal and social integration. In this context, workers' fear of losing their jobs generally constitute the employer's most important weapon in everyday employment relations. Obviously, these worries increase in a context of massive structural unemployment, even where sufficiently generous social benefits are able to partially mitigate this effect.

An employee whose employment stability is precarious in nature is reluctant to organise in conjunction with other workers, to put him or herself forward in an election of representatives, to become a member of a labor union or to exercise collective action in the defence of his or her interests or those of others in similar situations. At the same time he or she is an employee who will have difficulty mobilizing individually rights recognised in the legal system through the exercise of legal actions, registering formal complaints to administrative bodies in charge of controlling the enforcement of labour regulations, or simply defending his or her interests through everyday bargaining “in the shadow of the law”, that is, under the legitimation of rights officially stipulated by regulation. For these reasons, *dismissal regulation affects very significantly the three parameters that have been mentioned previously defining the power relationship between the parties*. Other elements affecting these parameters (business size, union traditions, the internalization and legitimation of norms, business culture, workers' qualifications and labor supply shortages) derive to a great degree from factors that less closely linked to the content of legal norms.

It should also be noted that in most cases *the termination of the employment contract is the final cost for a poorly resolved conflict inside the enterprise*. In the daily living of any productive organisation slighter or greater conflicts between employees and employers arise continuously. Pathological cases aside, this conflict is gradually channelled through permanent and daily bargaining (individual or collective) in which the parties give way or gain footing according to their power relations. In this context, the typical scenario is that the possibility of termination (both at the initiative of the employee as well as at the initiative of the employer) is always present, implicitly or explicitly, and determines decisively the equilibrium of power. Both the employers' representatives and employees know that if conflicts are not adequately resolved, they become amplified, with the final result often being that the employee is separated from the business. Therefore, the higher the cost of termination, the greater the employee's power in these everyday situations and, thus, the greater the employer's incentives to find channels for resolving such conflicts peacefully and, critically, within the business.

The importance of dismissal regulation for the equilibrium of power relations increases in the context of small and medium sized enterprises. In small enterprises there are structural reasons hindering both the existence of employees' representatives and, if they do exist, their proper functioning according to the expectations created by traditional labor unions; certainly, some partial solutions against this “representative deficit” could be considered, but the effects of these solutions are always going to be limited. Moreover, the elevated unreliability, individualization and personalization of relationships in the context of smaller enterprises means that formal resort to mechanisms of protection stipulated by the legal system is relatively limited (or completely non-existent) during the life of the employment relationship; in a small organisation, the fact of invoking a third party outside the firm to impose binding solutions often signifies a breakdown of the personal relationships that are so central to production in these types of firms.

¹³ I pursue the same idea, although with somewhat different and more developed arguments in the monograph, *Vicisitudes y extinción de la relación de trabajo en las pequeñas empresas*, CES, Madrid, 2007, pp. 329-335.

Ideological constructions of the “flexicurity” model tend to ignore the importance of dismissal regulations in the empowerment of workers. The replacement of stability by the supposed improvement of active and passive employment policies potentially undermines the re-balancing of power between the employee and the employer. There is thus a very high risk that this paradigm will be utilised to legitimise the deregulation of dismissal without seriously improving employment policies; in any event, even where the improvement is effective, some dysfunctions in power relations do occur. Undoubtedly, the fear of losing one’s job is less significant if good employment benefits are contemplated along with retraining and relocation mechanisms, but for several reasons this effect is limited.

In the first place, the efficacy of active policies depends to a high degree on the real demand for labor, which is very low if unemployment is structural and massive. Secondly, passive policies are limited by several causes, as they cannot replace completely the role of employment even in its dimension of a minimum income guarantee (and far less so for more non-material aspects). In the third place, beyond the worker’s “fear” of losing his or her job, we also have to consider the influence of regulation on the behaviour of the opposing party. If termination is the final cost of an unresolved conflict and this cost is low for the employer (because the cost has been “socialised” through public spending on active and passive measures), then most of the incentives for managing appropriately the conflict disappear and it is likely that employers’ preferred strategy will rest on an elevated involuntary job rotation. Such strategies of course affect productivity negatively and thus end up being counterproductive for overall social welfare and economic efficiency.

Discourses about the so-called Danish “flexicurity” model tend to ignore that in Denmark there are remarkably high rates of union membership and that unions are well organized. Dismissal conflicts are generally channelled through a series of relatively efficacious conflict resolution mechanisms, so that the number of arbitrary dismissals is extremely reduced and the control of managerial power is carried out principally through union intervention¹⁴.

4. Elements for the control of managerial power in the regulation of dismissal: a general critique of Spanish legislation

The control of the employer’s unilateral power through dismissal regulation is based primarily on four factors: just cause for dismissal, dismissal procedures, the consequences associated with the failure to comply with legal norms and the mechanisms for protection against unlawful managerial decisions (along with, if relevant, judicial decisions).

The cause of dismissal is the key element for controlling management’s arbitrary power over industrial relations. Thus, voices associated with employer interests frequently promote –directly or indirectly–, some kind of deregulation of the legal requirement for just cause (for example, through the “single contract of employment” approach). These proposals are justified with the argument that deregulation will increase employment rates. I consider this reasoning quite feeble in general and particularly weak in the Spanish context. In my view, this demand plays an ideological function that masks a fundamentally political matter: in so far as arbitrary dismissals are allowed, there will in practice not be any possibility to control the employer’s power within the organisation. In any case, it should be noted that the requirement of dismissal for justified grounds is derived directly from Article 35 of the Spanish Constitution (according to Constitutional jurisprudence) and Convention 158 ILO.

Logically, the stricter the regulation of just cause, the greater the power bestowed on the employee in everyday interest bargaining. However, “extremely” inflexible regulation that fails to suit business necessities could be counterproductive, as demands for flexibility would be channelled in a dysfunctional way. For dismissals on disciplinary grounds or dismissals on objective grounds stemming from the employees’ circumstances, it is essential that the legal system demand that the grounds involved be significant; small offences or worker dysfunctions should not be used to disguise dismissals pursued in reprisal for the exercise of rights and legitimate interests or that derive from poor management of

¹⁴ I explain this in greater detail “Informe sobre la regulación del despido en Europa”, *Temas Laborales*, nº 99, pp. 282-286.

employment conflict. Regarding dismissal for economic, technical, organisational or production-related grounds, the degree to which the cause may be indicated may vary, but the minimum demanded would have to be set by the effective guarantee that the job has not been subsequently recreated.

The fact that the cause is the “key element” does not deprive any relevancy to the rest of the elements, but simply means that these are largely at the service of the justified ground requirement. In fact, it could be the case that a poor regulation of the remainder of the elements makes illusory the requirement for cause.

In the Spanish legal system, the regulation of cause had been traditionally quite restrictive; this rigidity was maintained or even increased by the interpretation and implementation of juridical bodies (although this last affirmation should be contrasted with systematic, empirical evidence). However, after several labor reforms undertaken in 1994, 1997, 2010 and 2012, the standard demanded for dismissal related to economic, technical and organisational or production-related grounds has been reduced to the minimum allowed by the Spanish Constitution; there is thus no obstacle to using the figure of dismissal for legally admissible objective grounds to adapt staff volume to productive necessities within the organisation, even in contexts where enterprises are profitable. Thus, Spain can be located among those countries that, without permitting “free dismissal” on a general basis, apply a more flexible regulation to these causes. However, this relaxing of standards of cause has not been accompanied by an increase in guarantees that extinguished positions are not replaced by other employees; in my opinion, these guarantees will have to be created through judicial interpretation to avoid the fraudulent use of the institution of economic dismissal in such a way that unlawful decisions reinforcing de facto employer power are not allowed.

Dismissal on objective grounds with concurring circumstances related to the employee (sudden incapacity, justified by frequent absence, etc.) has not been much utilised by Spanish employers. Recently (Labour Reform of 2012) the regulation of some of these grounds has been changed on the employer’s side, although it is still too soon to know if this is going to involve a wider utilisation of this option. Regarding dismissal on disciplinary grounds, Spanish legislation has not experienced significant modifications since the original drafting of the *Estatuto de los Trabajadores* (Workers’ Statute); nevertheless, in this case the content of the law depends significantly on the judicial interpretation of each particular case according to the concurring circumstances, supported by the doctrine –called “Gradualist”– of the Supreme Tribunal. Beyond the polemics on this question, it would be necessary to carry out empirical research to determine if judicial interpretation of dismissal on disciplinary grounds is today inclined more towards managerial flexibility or toward employment security.

Another issue of interest is that the labour reform of 2012 has established a new contractual modality for enterprises with less than 50 employees where the termination of employment is completely free (requiring neither grounds nor procedural requirements) during the first year of the contractual relationship. During this period the prohibition of discriminatory dismissals persists formally but in all other cases management’s discretion is maximal.

The regulation of dismissal procedures can meet diverse goals, but displays clear importance in the control of managerial power. On the one hand, the promotion of adequate procedures enables a certain level of dialogue between the employer and the employee or between the employer and union representatives that can facilitate the resolution of conflicts by peaceful means, avoiding immediate recourse to unexpected or immediate dismissals that may consolidate draconian managerial power. On the other hand, the communication of dismissal to the employee stating the reasons for dismissal in writing results is essential to ensure the possibility of a subsequent judicial control of just cause.

With regard to non-collective dismissals, the procedural demands in Spain have always been very poor compared to most European countries (even in comparison to countries with more flexible regulations). In Spain, the dismissal is effective upon its mere communication to the employee, with no requirement for any previous procedure granting the employee the opportunity to defend himself or to claim arguments against the termination decision. A notice period is not required in any case of dismissal on disciplinary grounds (even in the case of openly arbitrary dismissals), while in other countries it is always obligatory except when the worker misconduct is truly serious. Therefore, there is a historical tendency in the Spanish legal system for dismissal being a managerial decision that cannot be questioned until it become effective.

Notwithstanding the foregoing, Directive 2002/14/CE (transposed literally at this point by the Spanish legislator in Article 64 of the Employees' Statute) requires dialogue with employees in order to reach an agreement before taking decisions that could prompt a fundamental breach of conditions in employment contracts; in my opinion, this previous consultation duty covers dismissals, although it should not necessarily be applied in a formal way. The effective application of this legal mandate nevertheless differs from the cultural standards actually dominant in the Spanish context, thereby making it difficult to implement.

Spanish legislation does make obligatory the communication of the employer's dismissal decision in writing, although there is a dysfunction about the legal consequences foreseen by the failure to comply with this formal requirement. For a variety of reasons, wrongful or unfair dismissal (*despido improcedente*) has been used as the normal legal channel for Spanish employers' decision to terminate the employment contract (after the labor reforms, partly by inertia), even when there is a well-justified ground. At the same time, currently, the only sanction foreseen by failure to comply with formal requirements is the wrongful qualification. Thus, when the employer is ready to acknowledge the unfair dismissal, either because there is not cause or because the small compensation for unfair dismissal is less costly than the judicial review of the cause, he or she hasn't the slightest incentive to obey formal requirements, because the failure to comply does not involve any legal consequence which differs from the qualification of wrongful dismissal. In the same way, verbal and even unspoken dismissals are encouraged. In many cases, this can cause defencelessness for employees since the employee has 20 days to contest the dismissal from the moment that the employee receives management's notice. Thus, an employee could appeal a dismissal too late because he did not adequately interpret a series of employer actions that subsequently could be considered by the judicial courts as indicative of the employer's will to terminate the contract of employment.

With regard to collective redundancy, the Spanish tradition had an established *ex ante* procedure for administrative control that is unusual in comparative terms. After the labour reform of 2012, however, the necessity for administrative authorisation has disappeared. At this time, procedural demands for collective dismissals are situated broadly in the minimum established by EU Directive.

Regulation of the legal consequences for failure to comply with obligations is critical for ensuring just cause in dismissal and, therefore, the effective prohibition of employers' arbitrary actions. The Spanish system has explicitly chosen to free employers who use their power of termination unlawfully from administrative or criminal responsibility. Although in labor law many minor infractions have been considered to be questions of "public order" worthy of administrative sanction, in the case of dismissal, the only effective control is legal action by the affected worker with the objective of obtaining reinstatement or compensation for the damages suffered. Administrative sanctions do exist for failures to comply with obligations regarding temporary employment; however, for one or another reason, these have not shown efficacy in preventing fraud.

Regarding the contractual consequences of unfair or wrongful dismissal, European doctrine distinguishes between *effective protection* (*tutela reale* in Italian), which implies reinstatement, and *mandatory protection* (*tutela obbligatoria*), which signifies the establishment of economic compensation. From a purely abstract perspective, effective protection seems a more appropriate channel for ensuring the requirement of just cause for dismissal. This is why many lawyers, especially those most committed to defending and advancing the interests of employees, advocate this form of protection. In practice, however, on numerous occasions the purity of legal principles contrasts harshly with economic and social reality, which makes reinstatement impossible or undesirable even for employees. For this reason, countries in which reinstatement is officially contemplated, frequently end up in practice converting the compulsory act of reinstatement into an economic compensation¹⁵; thus, the true role of 'reinstatement' is to reinforce the employee's position in negotiations over the level of monetary compensation for dismissal.

In Spain, reinstatement is formally applicable as a general rule of the legal system, although in fact it is never applied, with the exception the Public Administration and perhaps in larger enterprises.

¹⁵ I come to this conclusion in the "Informe sobre la regulación ...", Op. Cit., p. 292 (summarising practice in different countries).

With what is in my view a paternalistic perspective, our legal system conceives reinstatement as the most desirable option for employees (without being relevant the employee's opinion), while at the same time it allows, in practice, what has come to be called "at will compensated dismissal". This illusory and incoherent regulation generates several dysfunctions.

First of all, the employee who contests a dismissal *cannot apply for a remedy other than reinstatement*; he or she is a "passive victim" of unlawful conduct whose interest is protected without bearing his or her preferences in mind¹⁶. If the dismissal is qualified as wrongful and the employee is not a representative, the choice between reinstatement or compensation rests exclusively with the employer. Thus, in most cases where the employer opts for readmission, this is done in order to put pressure on the employee who does not desire to be re-employed (because the relationship has deteriorated in a small enterprise, because he or she fears being the victim of harassment, or because he or she has found another job...) so that the worker ends up resigning without obtaining the corresponding compensation. It goes without saying that this "employer empowerment" scarcely favors the peaceful channelling of conflicts in enterprises. It would be more logical that in cases of wrongful dismissal the contractual relation could only continue to exist if both parties were to agree; otherwise reinstatement should be replaced with a payment sufficient to compensate the damage caused and to discourage future arbitrary dismissals.

In the event that dismissal is qualified as null and void, the employee must be reinstated even if he or she does not want to continue in the position. This situation is not difficult to imagine, given that in many of these cases the employer has infringed the employee's fundamental rights. Article 286.2 of the *Ley de la Jurisdicción Social* (procedural law for Labor Courts) lets the employee opt for compensation when the dismissal is voided due to sexual harassment or harassment related to the victim's gender, but this exception does not apply to the other dismissal cases declared null and void. It is only logical that the employee should be able to decide between reinstatement and compensation for the unlawful job loss. In practice, once again, the employee can use the power that the compulsory reinstatement gives to him to agree on a relatively high compensation, but it does not seem that this is an appropriate way to peacefully channel conflicts in the employment context.

Secondly, the false predominance of the possibility of reinstatement in the law gives rise to procedural problems generated by rules intended to make this mandatory protection effective. The employee has only 20 days to take legal proceedings against dismissals, instead of the deadline of one year that works as a general rule; this makes sense if the employee intends to seek reinstatement, but it lacks justification if what is sought by the employee is solely financial compensation. On the other hand, it is very possible that the consideration of reinstatement influenced the traditional prohibition of an accumulation of dismissal claims with any others, regardless of whether the employment relation's termination coincides with legitimate claims for other rights at the same time. The new *Ley de la Jurisdicción Social* extenuates significantly this prohibition of accumulation. Finally, in cases of wrongful dismissal, when the employer does not acknowledge compensation within a period of 5 days, it is automatically considered that he or she has chosen reinstatement, which hardly coincides with reality and thus imposes an unnecessary procedure for executing the court's decision.

In the third place, this symbolical emphasis on an illusory reinstatement obscures the weakness of compensation regulation. In most countries, the courts have a certain legal margin to determine the compensation amount on a case-by-case basis, although caps are often established. In the Spanish legal system, compensation for wrongful dismissal depends exclusively on wages and seniority and not on other factors like the firm's economic capacity, the degree of arbitrariness of the employer's decision, the behaviour of the parties during the conflict and during the process, etc. Today, after the 2012 Reform, the general right of perceiving 45 days' pay per each year of service up to a maximum of 42 months' salary has been decreased to 33 days' pay per year of service up to a maximum 24 months' salary. At the same time, the so-called "procedural wages" have completely disappeared if the employer opts for the severance payment. At the same time, severance payments are established for dismissals with legally admissible objective grounds that are also linked to wages and seniority (so that "the cost of the unlaw-

¹⁶ Vid., FERNÁNDEZ LÓPEZ, M^aF., "La ejecución forzosa de las sentencias dictadas en los procesos por despido", RL-I-1991, p. 214.

fulness” to employers is constituted by the difference between these two amounts). Finally, the legal sanction that is applicable to the termination of a fraudulent fixed term contract is the presumption that the contract of employment is permanent and the termination as wrongful dismissal; the protection in strictly legal terms is exactly the same.

In this context, the “*despido improcedente*” (wrongful or unfair dismissal) has become the normal channel for the unilateral termination of employment contracts, even when there is a cause. The corresponding compensation, totally predictable, is considered by Spanish employers as the economic cost of a normal management decision and not as the sanction for an illicit one. This explains employer pressures for reductions of wrongful dismissal compensation, leading to progressive reductions in employees’ protection against arbitrary decisions.

As a consequence, in the Spanish system it is the seniority of the employee and not the “just cause of dismissal” that is the relevant element to determine the protection against dismissal and, thus, the effectiveness of the entire content of labor law in the everyday mobilization of labor rights. This causes serious dysfunctions in extent to which labor law achieves its purpose of worker “empowerment”, reproducing labor market segmentation, which is not exclusively determined by the fixed term contracts, but rather by the employee’s seniority in the enterprise. While there are a good number of employees who are unprotected –to different degrees– from managerial arbitrariness, there may well be a core of long-standing “excessively protected” workers; as a result, precarious workers suffer to a large degree employer demands for flexibility. Incessant employer demands aimed at the de-regulation of the cause for dismissal and the reduction of wrongful or unfair dismissal compensation are progressively decreasing veteran workers’ protection, but, at the same time, these changes are making even more precarious the situation of those workers without seniority, who are in a more vulnerable position.

5. Conclusions

Labor and social security law cannot be seen solely as a variety of external disruptions to the functioning of the labour market, but rather must also be seen as having a constitutive role in the configuration of the market, typically with a goal of trying to reconcile market efficacy with the satisfaction of the economic necessities of society. This latter outcome is principally achieved through the *empowerment* of workers.

With some nuances, the principal channel through which labour law can influence the re-balancing of powers between employees and employers is dismissal regulation, which is the most important part of labor legislation.

Spanish legislation establishes a system officially based on a just cause for dismissal requirement where reinstatement is symbolically claimed as the main remedy for unlawful dismissal; nevertheless, in practice, it constitutes a system of “mandatory protection” that rests on employees’ seniority more than on just cause for dismissal. This means that a large number of employees do not enjoy the protections afforded by labour rules in everyday bargaining surrounding their interests. Moreover, this reality has contributed toward the consolidation of employer strategies that are detrimental for productivity.

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Social Media, Privacy, and the Employment Relationship: The American Experience

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Received: 16 August 2013 / Accepted: 1 October 2013

Abstract: This article posits that privacy issues arising in the United States from the use of social media and the employment relationship are similar to those that have arisen around the world. It suggests, however, that the patchwork of governing legal claims arising under different laws in different jurisdictions may be unique. After a brief introduction, the second section describes the recent passage of legislation in several states that may protect the privacy of job applicants' passwords to social-media sites. The third section describes the various claims employees may bring under the federal Electronic Communications Privacy Act, in tort for invasion of privacy, pursuant to the Fourth Amendment, or to enforce just cause provisions in collective bargaining agreements. The fourth section describes protection from overbroad discovery of social media when employers and former employees are involved in litigation. The article concludes by assessing the likelihood of further legal reform.

Keywords: social media, social networking, privacy, employment, electronic communications, hiring, discovery

1. Introduction

Electronic communications by employees and employer monitoring of those communications raise issues for both employers and employees. The problems created by social media as it relates to the employment relationship are a subset of these issues. Moreover, the issues facing employers and employees as a result of advancing technology are similar in the United States and around the globe. Boundaries between home and office have become blurred. Employees often socialize, including with those outside the workplace, perform personal tasks at work, and work during their off hours, including while at home. Employers express concern that employees are not working enough, or, worse, are engaging in inappropriate or unlawful behavior while they are on the clock. They worry that workers, even while at home, may be sharing confidential information or disparaging the employer in a public forum. On the other hand, employees are concerned that employers may abuse their technological ability to monitor the activities of their workers.

What may be unique about the experience in the United States is that, unlike some other countries, the United States has no comprehensive regulations governing the employment relationship. Laws differ depending upon, among other things, the type of claim involved, the state in which the work takes place, whether the work is performed for the government or a private employer, and whether the workforce is

*The author thanks Lauren Claycomb and Sharon Wright for research assistance, and Philip Heleringer, as well as two anonymous external reviewers, for editorial assistance. All views are solely those of the author, as are all errors.

unionized. Likewise, there exists no truly comprehensive scheme that regulates electronic communication or the protection of personal data.

Because so much depends upon the nature of the claim, the jurisdiction, and the particular circumstances, no generalized rules apply to every case. However, some predictive considerations emerge from a review of the cases decided to date. Protection is unlikely when the communication is with the public, or a large group of people. Protection is more likely when the communication is with a limited set of people and even more likely when with just one individual. Regardless of the number of people involved, however, social-media privacy protection is more likely when the social-media account is password protected. Privacy in social media is less likely to be protected when the media is used at work, and even less likely when on employer equipment. In particular, if the employer has notified the employee that it will monitor the social-media use, privacy is unlikely to be protected at all.

This article explores the various laws that come into play to protect employee privacy when an employee communicates via social media and an employer seeks to monitor or discover that activity. The article focuses on protection of privacy rather than the host of other related issues raised by the use of social media and the employment relationship. Among these other issues are the extent of the right to use social media to engage in advocating for a change in working conditions (ROBERT SPRAGUE, 2012), the applicability of anti-discrimination laws in hiring screens (NICOLAS P. TERRY, 2012) and in online worlds, the right to free speech online (MARY-ROSE PAPANDREA, 2012), the ways in which employers who are harmed by employee use of social media can be compensated, and, generally, whether and how employment rules apply to those working via avatar on social media sites such as Second Life (ALEX FELSTINER, 2012).

The article focuses on three broad topics regarding social media and privacy in the employment relationship. First is the issue of whether a potential employer can access a job applicant's social-media profile for use in making a hiring decision. Second is the issue of whether an employer can monitor a current employee's social media use, whether at work or not. Third is the issue of whether an employer can access a prior employee's social-media account, a question that generally arises within the context of a lawsuit.

2. Hiring

Social media provides an easy and inexpensive way for employers to gather information about job applicants to see if they will fit well in the workplace or do a good job. Employers also sometimes use social media to gather information about current employees, including those who are on disability leave, those who have filed workers' compensation claims, or those who have simply reported late to work. Employer monitoring of social-media use is nothing new (NICOLAS P. TERRY, 2012). However, a series of recent, highly publicized cases involving employer requests for social-media passwords led a number of states to enact legislation regulating the practice. In Maryland, the state Department of Public Safety and Correctional Services asked job applicants and employees returning from leave to provide their social-media passwords. The American Civil Liberties Union objected, and pressured the employer to cease asking potential hires and returning employees for passwords.

Maryland, Illinois, and California became the first three states to pass legislation prohibiting employer requests for social-media passwords. Nine states have since passed similar legislation, and legislation is currently pending in seventeen other states.¹ Two bills have been introduced at the federal

¹ On December 28, 2012, Michigan became the fourth state to pass such legislation. 2012 Mich. Pub. Acts 478, H.B. 5523 substitute, available at <http://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2012-PA-0478.pdf>; *Cyberlaw—Socialmedia: Michigan Employers May Not Ask for Passwords*, 81 U.S.L.W. 981, 2013 WL 68443 (Jan. 8, 2013). In 2013, Arkansas, Colorado, New Mexico, Nevada, Oregon, Utah, Vermont, and Washington passed statutes. As of July 2013, legislation remains pending in Georgia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, and Wisconsin. National Conference of State Legislatures, *Employer Access to Social Media Usernames and Passwords 2013*, NCSL.ORG, <http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords-2013.aspx> (last updated July 31, 2013).

level during the current congressional term, although they are not likely to pass.² In the United States, a social-media site might also bring a breach-of-contract claim against a user—including an employer—who uses the site in an unauthorized manner. For instance, Facebook reacted to employer requests for applicants' passwords by clarifying that Facebook's Statement of Rights and Responsibilities prohibits soliciting a Facebook password. Facebook released a privacy statement emphasizing that it would take appropriate action against employers who violate the Statement, including shutting down the employer's Facebook account or initiating legal action.³

Other federal acts do not bear directly on privacy, but warrant brief mention. Federal anti-discrimination laws provide some measure of protection for at-will employees by prohibiting discrimination on bases including race, sex, disability, and age. To avoid liability, an employer who uses Facebook to screen potential hires, whether looking at public or private information, should have someone other than the person making the hiring decision conduct the initial screen and delete any data pertaining to protected characteristics.

The following sub-sections focus on the first three state laws that were passed in order to assess the extent to which different state laws protect the privacy of applicant and employee passwords. The review of the statutes discloses that the details of the text matter. Pertinent issues include the following: 1) Will these laws be equally effective in protecting applicants and employees from viewing of social media sites by employers? 2) Will some be more likely to reinforce an employer's ability to monitor because of the inclusion of broad exceptions? 3) Are the statutes equally effective in providing an enforcement mechanism or is a method of enforcement lacking? 4) Are remedies provided, and, if so, are they sufficient?

a. Viewing Social Media

The state laws differ as to whether they only prohibit acquiring the means to access a social media site, such as a password, or also prohibit viewing of a social media site. The Maryland statute defines "electronic communications device" broadly,⁴ and the operative section states that "an employer may not request or require that an employee or applicant disclose any user name, password, or other means for accessing a personal account or service through an electronic communications device."⁵ Thus, the blog of a well-known, management-side employment firm noted that, subject, of course, to judicial interpretation, the law may not prohibit an employer from asking to view or obtain a print copy of an employee's social-media profile, as long as the employer does not ask for the employee's password or other protected means for accessing a protected account (PHILIP L. GORDON, 2012).⁶

² Social Networking Online Protection Act, H.R. 537, 113th Cong. (2013), available at [http://op.bna.com/tpif.nsf/id/mlon-94nrgd/\\$File/Social%20Networking%20Online%20Protection%20Act.pdf](http://op.bna.com/tpif.nsf/id/mlon-94nrgd/$File/Social%20Networking%20Online%20Protection%20Act.pdf); Password Protection Act, H.R. 2077, 113th Cong. (2013), available at <http://www.govtrack.us/congress/bills/113/hr2077>.

³ *Protecting Your Passwords and Your Privacy*, FACEBOOK (Mar. 32, 2012, 5:32 AM), www.facebook.com/note.php?note_id=326598317390057.

⁴ MD. CODE ANN., Labor and Employment § 3-712 (West 2012) (effective Oct. 1, 2012).

(a)(3)(i) "Electronic communications device" means any device that uses electronic signals to create, transmit, and receive information.

(a)(3)(ii) "Electronic communications device" includes computers, telephones, personal digital assistants, and other similar devices.

⁵ *Id.*

(b)(1) Subject to paragraph (2) of this subsection, an employer may not request or require that an employee or applicant disclose any user name, password, or other means for accessing a personal account or service through an electronic communications device.

⁶ As Philip L. Gordon states:

Passwords To Devices: While the Maryland law bars employers from requesting log-in credentials for "accessing a personal account or service," the law does not prohibit employers from requesting or requiring log-in credentials to access an employee's personal device, such as a smartphone or tablet. This distinction is critical as employers increasingly are implementing "Bring-Your-Own-Device" policies.

...

Because the Act's restrictions on its face arguably apply only to the disclosure of log-in credentials, it remains to be seen through judicial interpretation whether the Act's restrictions bar an employer from, for example, asking an employee or applicant

In contrast, the prohibition contained in the Illinois statute broadly bars viewing of social media sites by employers. The Illinois law was an amendment to a statute already in effect that prohibits employers from asking applicants about workers' compensation or safety claims. The law is more targeted toward social media than the Maryland law. Rather than using a broad definition of "electronic communication device" like the Maryland statute, the Illinois statute pertains only to an "employee's account or profile on a social networking website."⁷ The Illinois law, in contrast to that of Maryland, however, clearly prohibits an employer obtaining access in any manner to an applicant or employee's social networking website. It prohibits an employer from demanding "access in any manner," so requesting to view the account or a paper printout clearly fall within the prohibition.⁸

California's law focuses on protecting employees' and applicants' use of social media but broadly encompasses the use of an electronic service or account, similar to the Maryland law.⁹ The law prohibits an employer from requiring or requesting: 1) a user name or password "for the purpose of accessing personal social media"; 2) an applicant or employee to "access personal social media in the presence of the employer"; and 3) divulgence of "any personal social media."¹⁰ Thus, like the Illinois law, and unlike the Maryland law, the California law clearly prohibits an employer from obtaining access to an applicant's or employee's personal social media site by any method, including viewing or printing its content.

b. Breadth of Exceptions

The statutes include a variety of exceptions for employer monitoring of social-media accounts. All the exceptions remain subject to court interpretation, but some statutes, such as the Illinois statute, appear to exempt more monitoring by employers than others, such as the Maryland statute.

In the Maryland statute, an exception is provided to permit an employer to require disclosure of means for accessing non-personal accounts "that provide access to the employer's internal computer or information systems."¹¹ Additionally, the statute provides that it does not permit employees to "download unauthorized employer proprietary information."¹² It further provides that the statute does not prevent an employer from:

to log into a personal account without disclosing the log-in credentials to the employer so the employer can observe the content of the personal account or asking an employee or applicant to print the content of a personal account. Before an employer chooses this route, they should speak with their employment counsel to educate themselves about the legal risks of doing so. While Maryland is the first jurisdiction to enact this legislation, it is not likely to be the last. Indeed, bills proposing similar restrictions currently are pending in various states, including but not limited to California, Illinois, Minnesota, New York, and Washington. In addition, U.S. Senator Richard Blumenthal (D-CT) has stated his plan to introduce similar legislation "in the very near future."

⁷ 820 ILL. COMP. STAT. ANN. 55 / 10 (West 2013), available at <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2398&ChapterID=68>.

⁸ The Illinois statute may be amended to adopt the more narrow terminology used in the Maryland bill. See H.B. 1047, 98th Gen. Assemb., Reg. Sess. (Ill. 2013). available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1047&GAID=12&DocTypeID=HB&LegId=71494&SessionID=85&GA=98>.

⁹ CAL. LABOR CODE § 980 (West 2012).

(a) As used in this chapter, "social media" means an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations.

¹⁰ *Id.*

(b) An employer shall not require or request an employee or applicant for employment to do any of the following:

(1) Disclose a username or password for the purpose of accessing personal social media.

(2) Access personal social media in the presence of the employer.

(3) Divulge any personal social media, except as provided in subdivision (c). (d) Nothing in this section precludes an employer from requiring or requesting an employee to disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device.

¹¹ MD. CODE ANN., Labor and Employment § 3-712 (West 2012) (effective Oct. 1, 2012).

(b)(2) An employer may require an employee to disclose any user name, password, or other means for accessing nonpersonal accounts or services that provide access to the employer's internal computer or information systems.

¹² *Id.*

(d) An employee may not download unauthorized employer proprietary information or financial data to an employee's personal Web site, an Internet Web site, a Web-based account, or a similar account.

- (1) based on the receipt of information about the use of a personal Web site, Internet Web site, Web-based account, or similar account by an employee for business purposes, from conducting an investigation for the purpose of ensuring compliance with applicable securities or financial law, or regulatory requirements; or
- (2) based on the receipt of information about the unauthorized downloading of an employer's proprietary information or financial data to a personal Web site, Internet Web site, Web-based account, or similar account by an employee, from investigating an employee's actions...

A close reading of the statute reveals language that will be subject to interpretation. What does "based on the receipt of information" mean? Does permitting investigation allow an employer to view personal account information? Because the act has been in effect for only a short time, the answers remain to be seen.

The Illinois statute, while containing a broader prohibition on viewing social media, also includes broad exceptions stating:

- (2) Nothing in this subsection shall limit an employer's right to:
 - (A) promulgate and maintain lawful workplace policies governing the use of the employer's electronic equipment, including policies regarding Internet use, social networking site use, and electronic mail use; and
 - (B) monitor usage of the employer's electronic equipment and the employer's electronic mail without requesting or requiring any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website.

Unfortunately, this last provision is very unclear—may an employer use a keylogger to monitor what an employee does on the employee's social networking site while on the employer's electronic equipment?¹³ While the intent may be more limited, the law arguably permits intentional unauthorized monitoring of electronic communications that is potentially challengeable under the federal Stored Communications Act and raises the issue of a potential conflict with that act.

Like the Maryland law, the California law includes an exception for investigations. Unlike Maryland's law, however, California's exception clearly permits an employer to require an employee to divulge content of a personal social media site during the investigation. The exception reads:

- (C) Nothing in this section shall affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.

Because the exception relies on pre-existing employer rights, the law is unclear as to what type of evidence of misconduct might be required before the employer could use the exception to require access to an employee's personal social-media site.

c. Effectiveness of Enforcement Mechanisms

No matter how comprehensive a prohibition, a statute is only effective if it contains a mechanism of enforcement. Moreover, in the employment context, if a statute contains no anti-retaliation provision,

¹³ A keylogger is available as hardware or software and monitors each keystroke that an employee makes. Keyloggers are sometimes used by employers to monitor their employees. Other software, such as SpectorSoft, that monitors everything a particular employee does on a computer is also available.

then its effectiveness will often be minimized because of the ability of an employer to discharge, or otherwise discipline, a complaining employee.

A close reading of the Maryland statute leaves the reader with one key question: how is the statute enforced? The Maryland statute contains no enforcement mechanism, likely rendering it primarily ineffective, unless amended to include one (PHILIP L. GORDON, 2012).¹⁴

The Maryland statute does include an anti-retaliation provision that prohibits an employer from refusing to hire, discharging, disciplining, or otherwise penalizing an employee who refused to disclose protected information.¹⁵ While if it had been combined with an effective enforcement provision, the anti-retaliation provision would offer employees significant protection, questions would still remain. For instance, how can an applicant or employee prove that the reason she was denied employment or fired was a refusal to provide a password or other protected means for accessing a personal account?

In contrast to the Maryland statute, as part of a pre-existing statute, the Illinois law provides for enforcement by the Illinois Department of Labor and by civil action (LYNNE BERNABEI & ALAN R. KABAT, 2012). Unlike the Maryland statute, however, the Illinois law contains no robust anti-retaliation provision prohibiting refusal to hire, discharge, or other discipline. A provision elsewhere in the act makes it a petty offense to retaliate against someone who complains or sues—for which a \$1,000 fine is the maximum punishment.¹⁶

Similar to the Maryland statute, the California law is completely silent as to what enforcement mechanism, if any, is available. The California statute states that the Labor Commissioner “is not required to investigate or determine any violation of this act.”¹⁷ Some point to a potential, albeit untested, enforcement mechanism by civil suit under California’s Private Attorneys General Act. Under that law, an employee could allege violations in a civil action. This remains to be tested in an actual suit (GINA HAGGERTY LINDELL & L. GEOFFREY LEE, 2012).¹⁸

¹⁴ As Philip L. Gordon states:

Notably, the Maryland law contains no enforcement provision. The law does not authorize applicants or employees to sue. The law does not even delegate authority to the Maryland Department of Labor, Licensing and Regulation, or any other government agency, to enforce it. It is possible that an employee terminated in violation of the law might have a claim for wrongful discharge in violation of public policy. However, because that claim typically applies only to discharge, it is unclear whether an employee who is disciplined short of discharge would have a claim. It also is uncertain whether an applicant who is denied employment in violation of the law would be able to assert a claim.

¹⁵ MD. CODE ANN., Labor and Employment § 3-712 (West 2012) (effective Oct. 1, 2012).

(c) An employer may not:

(1) discharge, discipline, or otherwise penalize or threaten to discharge, discipline, or otherwise penalize an employee for an employee’s refusal to disclose any information specified in subsection (b)(1) of this section; or
(2) fail or refuse to hire any applicant as a result of the applicant’s refusal to disclose any information specified in subsection (b)(1) of this section.

¹⁶ 730 ILL. COMP. STAT. ANN. 5/5-4.5-75 (West 2012).

¹⁷ The Act states, “Notwithstanding any other provision of law, the Labor Commissioner, who is Chief of the Division of Labor Standards Enforcement, is not required to investigate or determine any violation of this act.”

¹⁸ According to the authors:

The Legislature did not provide for any specific penalties for violating this new law. As such, existing law under the Labor Code Private Attorneys General Act would likely allow an aggrieved employee to file a civil lawsuit, to receive a specific penalty amount, and to obtain an attorney’s fee award.

Interestingly, the Department of Labor Standards Enforcement has disclaimed any desire or responsibility to investigate or enforce any alleged violations of this new law.

See CAL. LABOR CODE § 2698 (West 2012). The Private Attorneys General Act of 2004 provides:

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars (\$500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

(g) (1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney’s fees and costs. Nothing in this part shall operate to limit an

Also like the Maryland law, the California law includes an anti-retaliation provision prohibiting discharge, discipline, or other retaliatory action against an employee or applicant for refusing to comply with an employer's request for protected social-media information. The California law, even more explicitly than the Maryland law, by including a statement specifying that the law does not prohibit an employer from taking adverse action if otherwise permitted by law, raises the unresolved issue of what method will determine whether discipline or a refusal to hire resulted from the prohibited conduct or for some lawful reason.¹⁹

d. Remedies

Even with an enforcement mechanism, a law will generally be used only if it provides an adequate remedy. The Maryland statute does not specify remedies for violating the prohibition on requesting a password or other means of accessing a social-media account. Additionally, the remedy available to an applicant or employee who suffers adverse consequences for refusing to disclose her password is not specified. Again, court interpretation will be necessary to determine the applicable remedies.

In contrast, the Illinois statute specifies the available damages. Damages available in a civil action are actual damages, and, where the violation is willful and knowing, attorney's fees and costs. The availability of attorney's fees often makes pursuit of claims easier for plaintiff employees.

If an applicant or employee in California can bring a civil action under California's Private Attorneys General Act, then a court would assess penalties based upon the number of aggrieved employees. A prevailing plaintiff could also receive attorney's fees. (GINA HAGGERTY LINDELL & L. GEOFFREY LEE, 2012).

Employer requests for applicant passwords provided the impetus for the states to pass privacy protective statutes, of which those first passed by Maryland, Illinois, and California are exemplary. But the statutes in the states that have passed such legislation also regulate the same behavior with regard to employees.²⁰ What, if any, other mechanisms regulate privacy and employee use of social media during the employment relationship in these states? What about states that have not passed—and may never pass—such regulations? These laws are the topic of the next section.

3. During the Employment Relationship

Because there exists such a patchwork of potentially applicable laws, claims in the United States arise under various state and federal statutes, common law, and pursuant to collective bargaining agreements. This section begins with a discussion of cases arising under the federal Electronic Communications Privacy Act (ECPA), particularly under the Stored Communications Act (SCA), and follows with

employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

Id. See also *2012 California Labor and Employment Legislative Update*, JONES DAY (Oct. 2012), http://m.jonesday.com/2012_california_labor/ (last visited Jan. 24, 2013).

The new law contains no enforcement provision. Potentially, an employee terminated for refusing to provide access to a social media username or password could bring a claim for wrongful termination. Additionally, it is possible that a violation of the new statute could result in a claim for penalties under the California Labor Code Private Attorneys General Act ("PAGA"), Cal. Labor Code section 2698 et seq.

Id.

¹⁹ CAL. LABOR CODE § 980 (West 2012).

(e) An employer shall not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or applicant for not complying with a request or demand by the employer that violates this section. However, this section does not prohibit an employer from terminating or otherwise taking an adverse action against an employee or applicant if otherwise permitted by law.

Id. Often in the United States under discrimination statutes, courts will use what is termed a burden shifting paradigm where the employee must ultimately prove that the adverse action resulted from the protected conduct. Courts have borrowed this framework, which is rather confusing, for use in other employment contexts.

²⁰ The New Mexico statute may govern only applicants. S.B. 371, 51st Leg., 1st Sess. (N.M. 2013), available at <http://www.nmlegis.gov/Sessions/13%20Regular/bills/senate/SB0371.pdf>.

a review of state cases arising under state common law for invasion of privacy. It then turns to potential protections for public employees under the Fourth Amendment to the U.S. Constitution, and finally, discusses some cases decided in labor arbitration pursuant to a collective bargaining agreement.

a. ECPA

A few notable cases have arisen under the ECPA, particularly under Title II of the Act, the SCA. There is a strong argument that this statute should be interpreted to provide a high level of protection for employee privacy. Indeed, some courts have interpreted the statute to protect employees' password-protected social-media sites. The ECPA provides minimum statutory damages for each violation, including violations of the SCA, which provides for a minimum fine of \$1,000 or, if greater, actual damages.²¹

The ECPA is a complex and outdated statute that was passed in the 1980s,²² and its details are beyond the scope of this article. What is important to a discussion of social media and the employment relationship is that Title II, the SCA, prohibits intentional, unauthorized access to stored electronic communications. Several courts have held that an employee who provides a password to personal email or other online accounts in response to pressure from an employer has not truly given consent. Thus, the employer's access is not authorized.²³ A couple of courts have applied the same principle to password protected social-media sites. A related federal statute, the Computer Fraud and Abuse Act, similarly protects stored communications. No employee claims have been filed under that statute, however, presumably due to difficulties in proving the high level of required damages.

In 2009, two employees sued in a New Jersey federal district court after they were terminated for posts made in a MySpace chat group. The jury found the employer had unlawfully accessed the communications without user authorization. The court upheld the jury verdict. The employees had used their MySpace accounts and passwords to participate in an invitation-only chat group. A manager accessed the group after pressuring another employee to disclose her password. The court upheld an award of compensatory damages resulting from loss of work, as well as an award for punitive damages.²⁴ The result is especially interesting in an at-will employment context. Employment at will means an employer may normally terminate an employee for any reason or no reason at all, with some statutory and common law exceptions. Yet, in this case, a statute not particular to the employment relationship resulted in compensation for lost work.

Another case was decided in the Northern District of Illinois in 2011. In this case, an employee stored passwords to both her personal and work-related Facebook and Twitter accounts in a locked folder on the employer's server. While the employee was off work recovering from injuries sustained in a work-related accident, the employer accessed and used her personal accounts to promote its interior-design business. The court declined to grant summary judgment to the employer, finding that "there is undisputed evidence in the record that Defendants accessed [plaintiff's] personal Facebook account and accepted friend requests... [and] that Defendants posted seventeen Tweets to [plaintiff's] personal Twitter account... As such, there are disputed issues of material fact whether Defendants exceeded their authority in obtaining access to [plaintiff's] personal Twitter and Facebook accounts."²⁵

²¹ 18 U.S.C. § 2707(c) (West 2012).

²² Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510–2522 (West 2012).

²³ *Brahmana v. Lembo*, No. C-09-00106 RMW, 2009 WL 1424438, at *3 (N.D. Cal. May 20, 2009) (denying motion to dismiss ECPA claims for unlawfully intercepting and using employee's personal password); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 562 (S.D.N.Y. 2008) (an employee should have the opportunity to refuse or withdraw consent to monitoring); *Fischer v. Mt. Olive Lutheran Church, Inc.*, 207 F. Supp. 2d 914, 928 (W.D. Wis. 2002) (reasoning that unauthorized access includes reading an employee's emails on a password protected web-based account, hotmail); *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 655 (N.J. 2010) (holding attorney-client privilege protects emails sent on company issued laptop through personal, password-protected, web-based email account).

²⁴ *Pietrylo v. Hillstone Rest. Grp.*, No. 06-5754 (FSH), 2009 WL 3128420, at *5 (D.N.J. Sept. 25, 2009) (jury could infer employee was pressured into providing a password and as such did not authorize employer's use of online chat group). The employer was a restaurant. *Id.*

²⁵ *Maremont v. Susan Fredman Design Group, Ltd.*, No. 10 C 7811, 2011 WL 6101949 (N.D. Ill. Dec. 7, 2011).

While the aforementioned cases involved current employees, there is an argument that pressuring an applicant into providing a password for a social-media account would also result in unauthorized access. No case has yet tested this theory.

b. State Law and Invasion of Privacy Tort

As discussed in Section 2, many states have recently passed legislation protecting both applicants and employees from employer efforts to obtain social-media passwords. Most states also have enacted equivalents of the ECPA, including the SCA. Delaware and Connecticut require employers to notify employees that their electronic communications are being monitored. The requirement presumably extends to the monitoring of social-media activity.²⁶ Two other states, Michigan and Illinois, prohibit employers from gathering information on personal communications for inclusion in personnel records. This prohibition would, presumably, extend to gathering information about communications via social media.²⁷ Three states—New York, Colorado, and North Dakota—expressly protect lawful, off-duty conduct. In New York, protection extends only to recreational activity, a category that excludes dating, but presumably includes online activities such as blogging, chatting, or posting on Facebook.²⁸

In states that have not enacted such legislation, the most likely claim would involve a common-law tort claim for invasion of privacy, often termed intrusion on seclusion.²⁹

In the Illinois case involving the hospitalized interior designer, discussed in sub-section 3.a, in addition to the SCA claim, the plaintiff also brought an invasion-of-privacy claim. In Illinois, as in many other states, the claim requires a showing of: 1) unauthorized intrusion, that would be 2) highly offensive to a reasonable person, involving a 3) private matter, which, in many states, means a matter in which the plaintiff had a reasonable expectation of privacy, and 4) anguish and suffering. Because the plaintiff had 1,250 Twitter followers and numerous Facebook friends, and because she was promoting the employer design firm and linking to its page on her personal accounts, the court held that she had no reasonable expectation of privacy in her social-media accounts. The plaintiff did not try to keep the information private, and the information was not, in fact, private.³⁰

As a federal district court in New Jersey has noted, courts normally find no reasonable expectation of privacy in social-media accounts without privacy settings limiting access to a few people. Accounts open to public view will not be considered private. On the other end of the spectrum, communications made to only one person will be considered private. In the middle, where the account is not public but is open to more than one person, however, different courts may rule differently. On the facts presented, the court denied a motion to dismiss the plaintiff's claim for invasion of privacy. The plaintiff was a nurse, as well as president of her union local. (Often, it is a union representative who brings a claim. This is not only because employers may retaliate against union activity, but also because the union is funding the litigation, while other non-union represented employees may not be able to afford filing suit.) Another nurse, who was Facebook "friends" with the plaintiff, accessed her friend's account and allowed the employer to view

²⁶ Connecticut requires notice of any monitoring that is not direct observation. *See* CONN. GEN. STAT. ANN. § 31-48d (West 2012). Delaware covers monitoring of telephone, internet, and email. DEL. CODE ANN. tit. 19, § 705 (West 2012).

²⁷ 820 ILL. COMP. STAT. ANN. 40 / 9 (West 2012); MICH. COMP. LAWS ANN. § 423.508 (West 2012).

²⁸ COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2012) (just termination); N.Y. LAB. LAW § 201-d (McKinney 2012) (any type of adverse action); N.D. CENT. CODE § 14-02.4-03 (West 2011) (any type of adverse action or lawful off-duty conduct).

²⁹ There have been several successful claims. *See, e.g.,* Fischer v. Mt. Olive Lutheran Church, 207 F. Supp. 2d 914 (W.D. Wis. 2002) (Hotmail might be entitled to reasonable expectation of privacy and may have been highly offensive for employer to go onto employee's personal account and read his emails); Restuccia v. Burk, No. CA 952125, 1996 WL 1329386 (Mass. Super. Ct. Aug. 13, 1996) (finding that there could be a reasonable expectation of privacy in a business email where the employee was told he could use email account for personal communications and he had his own password, but without his knowledge, employer had a separate password; court denied summary judgment). There have also been unsuccessful claims. *See, e.g.,* Thygeson v. U.S. Bancorp, No. CV-03-467-ST, 2004 WL 2066746 (D. Or. 2004) (no reasonable expectation of privacy when employee downloads inappropriate content from personal email at work and stores it in folder marked personal at work, if employee did not restrict with password, and not highly offensive for employer to monitor by investigating Internet hits, but not content); Smyth v. Pillsbury Co., 914 F. Supp. 97 (E.D. Pa. 1996) (finding no expectation of privacy when employee communicate with supervisor over company email, even if employee was assured his email would not be intercepted by manager).

³⁰ Maremont v. Susan Fredman Design Group, Ltd., No. 10 C 7811, 2011 WL 6101949 (N.D. Ill. Dec. 7, 2011).

her posts. In one post, the plaintiff had criticized paramedics for saving the life of an octogenarian who had been shot at the Holocaust Museum in Washington, D.C. The hospital reported the post to various regulatory boards. The court reasoned that the plaintiff “may have had a reasonable expectation that her Facebook post would remain private, considering that she actively took steps to protect her Facebook page from public viewing.” The court noted that reasonableness and offensiveness are fact-specific inquiries, and that it was not evident how many Facebook “friends” the plaintiff had, or how many people could have viewed her post.³¹ Notably, the employer did not move to dismiss the ECPA claim, probably because the employee allegedly had been coerced, and there was thus no user consent to access the stored communications.

c. Public Employees

The U.S. Constitution protects individuals, including government employees, from certain government actions. The Fourth Amendment in particular protects against unlawful searches and seizures. This protection has long been interpreted to apply to employees’ privacy in items such as their private offices, desks, and locked cabinets.³²

In 2010, the U.S. Supreme Court decided a Fourth Amendment case involving an employer that searched an employee’s text messages sent on an employer-issued device.³³ The case received a great deal of publicity, and brought the issues of employer monitoring and employee privacy to prominence. The Court ruled that, even if there was a reasonable expectation of privacy in text messages sent on the employer-issued device, the search was for a reasonable purpose and was carried out by reasonable means. The Court declined to decide whether the employee, a SWAT Team officer, had a reasonable expectation of privacy in his messages, which pertained to a trust involving his wife and another officer, reasoning that rapid advances in technology warranted reserving the expectation of privacy issue for a later case. The Court did, however, imply in a separate analysis about the reasonableness of the intrusion that the plaintiff did not have a reasonable expectation of privacy. As to the reasonableness of the employer’s actions, the Court reasoned that the employer had a legitimate interest in determining the cause of excessive text messages for which the employer was being billed. Furthermore, the Court reasoned that reviewing the transcripts was an expedient and efficient way of meeting that objective. The Court further reasoned that the two-month scope of the review was also reasonable, especially in light of the employer’s policy, which notified employees that text messages were subject to audit. Another interesting aspect of this case is that while the plaintiff lost the Fourth Amendment claim at the Supreme Court level, the Ninth Circuit held that the third-party service provider had violated the SCA when it released the text messages to the employer without the employee’s consent. That aspect of the case stands as governing law, at least for now.

One article recently offered predictions for how courts are likely to treat social-media privacy under the Fourth Amendment (ALEXANDER NAITO, 2012). The article asserts that Fourth Amendment doctrine, which treats the disclosure of a communication to a third party as fatal to any reasonable expectation of privacy, leaves most social-media communications unprotected. At the same time, the article acknowledges that messages sent to one individual, via Facebook, for example, will likely be protected unless the recipient discloses them to an employer.³⁴ A more optimistic scenario for privacy advocates than that proposed in the article is that courts will adopt an approach that falls somewhere between the two extremes, finding a reasonable expectation of privacy in communications shared with a limited readership. This seems particularly likely where the communication is password protected or accessible by invitation only. Social-media communications shared with large numbers of people seem less likely to be protected because they are so easily shared and more easily accessed by an employer. The article expresses concern that the current focus on accessibility to physical workspace means an employee has no reasonable expectation of privacy in online communications, as long as the employer is physically

³¹ Ehling v. Monmouth-Ocean Hospital Service Corp., No. 2:11-cv-03305 (WJM), 2012 WL 1949668 (D.N.J. 2012).

³² O’Connor v. Ortega, 480 U.S. 709 (1987).

³³ City of Ontario v. Quon, 130 S. Ct. 2619 (2012).

³⁴ Cf. Romano v. Steelcase Inc., 907 N.Y.S.2d 650 (N.Y. App. Div. 2010) (discussing in discovery context how no reasonable expectation of privacy inheres in social media because a communication is not private once having reached a recipient and because terms of service do not guarantee privacy).

able to access its own equipment. Courts may, however, be more willing to easily analogize between physical space and virtual space. If a virtual space offers as much privacy as, say, a private office or desk, it also offers a reasonable expectation of privacy. The article also expresses concern that courts focus too much on whether an employer has notified workers of an intent to monitor, and not enough on whether an individual employee has taken reasonable steps—such as setting a password—to protect her privacy. While it is true that courts tend to focus on notice, it seems possible that policies in which employers reserve the right to monitor online activity will not vitiate the reasonable expectation of privacy in communications protected with personal passwords. Of course, if the employer is monitoring and obtaining personal communications without need for the password, and the employee is aware of the monitoring, then a reasonable expectation of privacy may not be found to exist.

A related non-privacy issue is whether First Amendment rights are violated when public employees are disciplined for opinions conveyed through social media. The United States generally provides strong protection for free speech, but that protection is curtailed in the employment context. An employee acting in an official capacity has no protection. If the employee is acting in an unofficial capacity, protection is afforded only where the statement is of public interest, and the need to make it outweighs the employer's interest in running an effective workplace. Many high-profile cases involve teachers who have been terminated for comments posted via social media. One author recently wrote an interesting piece suggesting that free-speech precedent should be overturned and interpreted to provide more protection for teachers posting via social media (MARY-ROSE PAPANDREA, 2012).

d. Arbitration

In the United States, unionization is generally at the plant or store level. Unions often negotiate for contract provisions that say an employee can be terminated only for just cause, which provides some privacy protections for the use of social media, particularly during off-duty hours. Arbitration decisions provide particular insight into the issue, since arbitrators are more likely than courts to delve into the details of a specific employee's situation. Arbitrators consider factors including the employee's mental health, length of employment, and interaction with other employees.

Generally, arbitrators will uphold employer rules prohibiting personal use of employer equipment for electronic communications when the policy is enforced and progressive disciplinary steps are followed. Most will permit personal use to be limited to an employee's break time. But as to an employee's off-duty life, arbitrators will generally find it beyond an employer's control unless a direct nexus to the employment justifies disciplinary measures (ARIANA R. LEVINSON, 2010).

Many arbitration decisions are unpublished, but a few published decisions address employee use of social media. One especially relevant case involved an employee's use of social media with his family outside work.³⁵ The employee was in the process of a divorce and worked at the same plant as his father-in-law. He sent his mother-in-law a profane Facebook message, saying that the mother-in-law would be judged by God and live in hell. The employee then sent a second message saying he would see the father-in-law at the plant. The employee had been incarcerated for 100 days on domestic-violence charges stemming from an incident involving his wife. The day after the employee returned to work, the father-in-law told the human resources department about the messages. As it happened, the employee had sent a third message, the day after sending the first two, apologizing for his previous statements and expressing an intention to turn his life around. He suffered from depression, anxiety, and insomnia, and was in therapy for eight months. The arbitrator decided that the first message had not been a threat. The second, while threatening, was not equivalent to an express threat of physical violence made during a confrontation at the plant. The arbitrator found the third message to have been a sincere apology. The in-laws had not been particularly troubled, had delayed informing the company, and contacted a prosecutor only at the company's suggestion. The arbitrator found that the off-duty conduct had not been sufficiently threatening to justify discharge, and imposed a 30-day suspension instead. The arbitrator further ordered that the employee be made whole for any additional losses.

³⁵ U.S. Steel Corp. v. Steelworkers, 130 Lab. Arb. Rep (BNA) 461 (2011) (Bethel, Arb.).

Another case not only involved privacy for off-work conduct, but also raised a hot topic in United States labor law—protected concerted activity. In this case, the arbitrator found just cause to terminate an employee for posts made in a closed Facebook group.³⁶ The four group members were co-workers but one shared a Facebook account with her husband. The husband relayed the communication, which eventually found its way to the employer. The grievant had made 10 of the 16 posts in the group, and had approved of a “racist” entry pertaining to a white manager. The arbitrator found that the conduct was not protected concerted activity, and that there was a sufficient nexus to work to justify discharge.

As to the privacy issue, the arbitrator recognized that another arbitrator reinstated another employee who had made only four posts.³⁷ But the grievant approved of two posts that constituted threats, and made numerous disparaging comments. The arbitrator thus found a sufficient nexus between the posts and employment to justify discharge. The case illustrated the ways in which boundaries between on- and off-duty conduct can become blurred. The grievant made all the posts from home or from her personal smart phone. While she asserted the posts from her phone were made during break, the arbitrator insinuated they were made during time she should have been working. In any event, the arbitrator reasoned that the posts undermined the working relationship with administration, co-workers, and parents. Thus, there was a sufficient nexus between the conduct and her employment.

As to the argument that the posts were protected concerted activity, the arbitrator reasoned first that the majority of the posts were not about terms and conditions of work at all. The arbitrator found only one comment was about work, and that post was about a supervisor arriving late and expecting the chat group members to be timely. The arbitrator reasoned the post was admittedly just griping and was not meant to induce action for mutual aid or protection. He held the employees were not acting together to address workplace concerns.

When employees are using social media in the way they would previously have conversed around the water cooler to discuss terms and conditions of employment, the National Labor Relations Act (NLRA) forbids the employer from taking negative action. This approach constitutes a straightforward application of the law governing protected concerted activity. Nevertheless, the National Labor Relations Board’s (NLRB) rulings have generated a lot of attention from the press because employers are wary that Facebook is a more public and more easily accessible forum than the water cooler. Moreover, the law often renders unlawful employer rules and policies that are overbroad in prohibiting the use of social media and that would deter a reasonable employee from engaging in protected activity for fear of violating the rule (ROBERT SPRAGUE, 2012). Generally, these claims would be brought to the NLRB, rather than an arbitrator, which would assess whether the conduct was concerted, either done as a group or as an outgrowth or impetus toward group activity; for mutual aid and protection, meaning conversation more than mere griping regarding terms or conditions of employment; and not so profane or disloyal as to lose the protection of the Act. Professor Bob Sprague recently reviewed approximately 100 charges filed with the NLRB, related to social-media use, and the thirty-six documents generated by the NLRB in these cases: twenty-one NLRB Office of the General Counsel Advice Memoranda, ten General Counsel reviews, four Administrative Law Judge decisions, and one Board decision. A related privacy issue that Professor Sprague recognizes the NLRB will likely have to address is that employers are prohibited by the NLRA from conducting surveillance of union activity.³⁸ Thus, an employer who tracks online organizing arguably has violated the NLRA. Since the Sprague review, the Board has issued another decision regarding the use of social media for protected concerted activity, which confirms that the standard analysis of protected concerted activity applies when employees are using social media.³⁹

³⁶ Vista Nuevas Head Start (AFSCME MI local), 129 Lab. Arb. Rep. (BNA) 1519 (2011) (VanDagens, Arb.).

³⁷ *Id.* That arbitrator found the posts were private, the husband had breached their privacy, and the employer was responsible for sharing the posts with co-workers and parents. The arbitrator in the summarized case does not directly address that argument for breach of privacy, other than to mention that the employer did not seek out the posts but was justified in acting once it found out about them. The arbitrator instead reasoned that because the plaintiff invited co-workers to post, and the posts would disrupt the environment of teamwork and acceptance of all people and cultures, discharge was warranted.

³⁸ *Id.* at 1009.

³⁹ Hispanics United of Buffalo, Inc., 359 NLRB No. 37 (2012).

Turning back to the arbitration cases, another privacy-related issue arises when someone other than the employee posts information that reflects negatively on the employee. In one case, a high school teacher's estranged wife posted nude photos of the teacher on MySpace. The decision does not indicate whether access was restricted, but it does not appear to have been because children were able to access the photos. The arbitrator upheld the termination because the teacher had not taken reasonable steps to maintain custody and control of obscene photos.⁴⁰

4. After the Employment Relationship

Discovery during litigation generally raises issues as to whether social-media communications are discoverable and, if so, to what extent. Many cases arise where an employer seeks to access a prior employee's social-media account. The Federal Rules of Civil Procedure permit discovery of any non-privileged information reasonably calculated to lead to relevant information.⁴¹ This is a very low bar, considering that the Federal Rules of Evidence define "relevance" as any information that makes a fact in controversy more or less likely.⁴² But the rules further provide that a discovery request must be made with reasonable particularity,⁴³ and must not be unduly burdensome.⁴⁴ The rule regarding requests for electronically stored information contains a similar requirement restricting unduly burdensome discovery.⁴⁵ Thus, some courts have disallowed wholesale discovery of social-media communications on these grounds. Whether generalized, applicable principles will develop via judicial precedent, and, if so, whether they will be codified, remains to be seen.

One case recently in the news presents the issue well. Home Depot is a large company and employer. It does some innovative things to foster good employment practices, such as anonymous hiring and promotion. Nevertheless, an employee sued the company, claiming she was terminated as a result of

⁴⁰ Warren City Bd. of Educ. v. Ohio Educ. Ass'n, 124 Lab. Arb. Rep. (BNA) 532 (2007) (Skulina, Arb.).

⁴¹ FED. R. CIV. P. 26(b). Discovery scope and limits:

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Id.

⁴² FED. R. EVID. 401. Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Id.

⁴³ See FED. R. CIV. P. 34. Rule 34(a) permits discovery of information in party's custody, control, or possession, but must describe with reasonable particularity—show reasonable notice of what called for and what not. *Id.* Rule 34(b) provides:

(1) *Contents of the Request.* The request:

- (A) must describe with reasonable particularity each item or category of items to be inspected

Id.

⁴⁴ FRCP 26(b)(2)(C) provides that [o]n motion or on its own, the court must limit the frequency or extent of discovery if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;...

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

⁴⁵ Rule 26(b)(2)(B) addresses "Specific Limitations on Electronically Stored Information." FED. R. CIV. P. 26. According to Rule 26(b)(2)(B):

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Id.

her gender and a disability and that the company had failed to accommodate her disability, a condition known as vertigo (DECLAN McCULLAGH, 2012).⁴⁶

The employer sought to discover four categories of social media:

- (1) Any profiles, postings or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) from social networking sites from October 2005 (the approximate date Plaintiff claims she first was discriminated against by Home Depot), through the present, that reveal, refer, or relate to any emotion, feeling, or mental state of Plaintiff, as well as communications by or from Plaintiff that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state;
- (2) Third-party communications to Plaintiff that place her own communications in context;
- (3) All social networking communications between Plaintiff and any current or former Home Depot employees, or which in any way refer [or] pertain to her employment at Home Depot or this lawsuit; or
- (4) Any pictures of Plaintiff taken during the relevant time period and posted on Plaintiff's profile or tagged or otherwise linked to her profile.

The court notes that, generally, discovery requests must be reasonably calculated to lead to the discovery of admissible evidence, and must describe the information requested with reasonable particularity. The court also noted that many cases involving social media require a threshold showing that the information sought is reasonably calculated to lead to the discovery of admissible evidence.

The court reasoned that the simple fact that the plaintiff had communicated was not relevant to her mental health—it was the content of the communications that mattered. The court found that the first and second requests had failed to meet the requirement for reasonable particularity because “any emotion” could cover anything from momentary frustration over the late arrival of a cable repairman to an emotional reaction to a movie or TV show. The court further reasoned that a request for photos covering a seven-year period was too broad. However, the court held that the request for communications with Home Depot employees was adequate to put plaintiff on notice as to what was requested, and ordered her to provide that information.

Another issue that sometimes arises is whether information stored in social media can be subpoenaed from a non-party service provider. One high-profile, non-employment case held that it cannot, because the SCA bars third-party providers from releasing information without the user's consent, and the SCA makes no exception for discovery (ROBERT L. ARRINGTON, AARON DUFFY & ELIZABETH RITA, 2012).⁴⁷ Commentators generally agree that the court correctly interpreted the SCA, and at least one other court has ruled accordingly (BRUCE E. BOYDEN, 2012). Yet, at least one state court in a non-employment case has ordered that a plaintiff authorize the third-party service provider to grant the defendant access.⁴⁸ And courts deciding employment cases may follow suit.

For instance, the magistrate judge in one employment case stated that, if necessary, he would order that the plaintiff authorize the service provider to produce records the plaintiff herself could not

⁴⁶ Mailhoit v. Home Depot U.S.A., Inc., No. CV 11-03892 DOC (SSx), 2012 WL 3939063 (C.D. Cal. Sept. 7, 2012).

⁴⁷ The authors note that the SCA prohibits subpoenaing third parties who host social networking sites, but that courts use Rule 34 of the Federal Rules of Civil Procedure to require plaintiffs to produce the social networking pages and archives of deleted information for inspection. *Id.* at 22–24 (citing *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010)). See also STEVEN S. GENSLER, *Special Rules for Social Media Discovery?*, 65 ARK. L. REV. 7, 26–27 (2012).

⁴⁸ *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. App. Div. 2010). The case was a personal injury case where publicly available social media indicated the plaintiff was not being honest about the extent of injuries. See *id.* In two other personal injury cases where publicly available social media indicated the plaintiff was not being honest about the extent of injuries, the court ordered the plaintiff to turn over user name and password to counsel. See *Largent v. Reed*, No. 2009-1823, 2011 WL 5632688 (Pa. Ct. Com. Pl. Nov. 8, 2011); *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285 (Pa. Ct. Com. Pl. Sept. 9, 2010). In one, *Largent*, the plaintiff attacked the request as overbroad, burdensome, and embarrassing, and the court limited access to thirty-five days. *Largent*, 2011 WL 5632688. The governing rules in these state cases may differ slightly from the federal rules of procedure.

produce.⁴⁹ The plaintiff, a white, Jewish female, filed a retaliation and discrimination suit against her employer. The employer served a subpoena upon LivePerson, a “web site that is a platform for online advice and professional consulting services,” including sessions with online psychics. The employer sought to obtain the plaintiff’s communications with LivePerson psychics, including excerpts of chat sessions she had forwarded to her work email account. In her communications with LivePerson, the plaintiff had discussed her “work performance, relationships with co-workers, views regarding her treatment by [defendant], emotional state before, during, and after her employment, efforts to mitigate damages, and personal beliefs about African-Americans.” LivePerson moved to quash the subpoena, arguing that the plaintiff could readily access and produce the requested materials. The plaintiff, however, had deleted many of the chat remarks and, thus, claimed she could not produce them in discovery.

The court did not resolve the issue of whether the SCA prohibited LivePerson from producing the information. The court reasoned that there were questions as to whether the information was electronically stored and as to whether the plaintiff consented to disclosure via the site’s initial terms of use. The court held that the plaintiff should create a new LivePerson account and request that LivePerson restore her deleted chats so that plaintiff could turn over copies of the chats to the defendant. Significantly, the magistrate also stated that it might order the plaintiff to authorize the release by LivePerson of any material she could not restore.

Professor Steven Gensler recently published an article arguing that no additional or specially tailored rules are necessary for the discovery of social media because existing rules adequately address the situation (STEVEN S. GENSLER, 2012). The article argues that a party would have to prove the relevance of the entire account to properly obtain an entire Facebook account. The article acknowledges that two courts, in three cases, have erroneously ordered access to an entire social-media site,⁵⁰ but believes that will not develop as the governing rule. The article also argues that courts err in requiring a showing of publicly available social-media information before permitting discovery of relevant private information. The article expects courts to use protective orders, such as in-camera filings, to protect privacy.

Indeed, the Federal Rules of Civil Procedure suggest that even private social-media activity should be discoverable, as long as it is reasonably calculated to lead to the discovery of relevant evidence and is unprotected by attorney-client or other privilege. There is an argument, of course, that the rules that governed in a time of letters are inadequate for an era in which great quantities of private information are potentially accessible. As a practical matter, the sheer volume of information may make discovery difficult, though the rules already contain exemptions for requests that are unduly burdensome. Perhaps for these reasons, a new privilege should be developed to protect social-media activity in the absence of a higher threshold than one “reasonably calculated to lead to admissible evidence.”

Alternatively, it might be argued that social-media information should remain private due to the unique nature of the employment relationship. Perhaps permitting discovery of social media in the employment context deters lawsuits and encourages discrimination and other bad conduct. However, such a result seems unlikely. To the extent that courts err by granting defendants access to entire social-media accounts, further rulemaking might be appropriate. Rules prohibiting access to entire social-media accounts would be particularly appropriate if courts were requiring particularized requests in certain types of cases, such as commercial suits, but not in others, such as employment suits.

5. Conclusion

Privacy protections for social-media use in the United States depend not only on whether one is an applicant, employee, or former employee, but also on a host of other considerations. Some predictive considerations do appear, however, from a review of the cases. Privacy in social media is unlikely when the communication is with the public, or a large group of people. Privacy in social

⁴⁹ *Glazer v. Fireman’s Fund Ins. Co.*, No. 11 Civ. 4374, 2012 WL 1197167 (S.D.N.Y. 2012).

⁵⁰ See also BRUCE E. BOYDEN, *Oversharing: Facebook Discovery and the Unbearable Sameness of Internet Law*, 65 ARK. L. REV. 39, 50 (2012) (noting these erroneous published cases are just the “tip of an unseen iceberg of unreported cases”).

media is more likely when the communication is with a limited set of people, and even more so when the communication is with an individual. Regardless of the audience, privacy is more likely to be protected when the social-media account is password protected. Privacy for social-media activity is less likely in the workplace than at home, and even less likely when employer equipment is used. Privacy protection is especially unlikely where the employer has notified the employee of its intent to monitor social-media use.

The most likely trajectory of reform involves the passage of more state laws similar to those in Maryland, Illinois, and California. If these future laws contain adequate provisions for enforcement, adequate remedies, and effective anti-retaliation provisions, they will arguably provide the highest level of protection for job applicants and employees of the available potential claims. Without those important provisions, the prevailing patchwork will remain. For those involved in post-employment litigation, rule reform does not appear likely. However, case law may develop rules that protect litigants from overly broad or unduly burdensome requests.

Arguably, the most sensible type of reform would be a comprehensive federal employment statute governing technology and privacy in the employment relationship (ARIANA R. LEVINSON, 2010). A comprehensive federal law could alleviate some of the uncertainty for employers and employees that results from the current patchwork of laws. Additionally, a law that addresses social media as well as other technological advances eliminates concerns about ill-thought out differences in treatment of equally invasive technologies.

Some academics have, of course, suggested other innovative alternate approaches targeted at social-media use. For instance, one recent article in the *American Business Law Journal* proposes that, because social media makes it difficult to segregate audiences, U.S. law should incorporate principles of situational privacy (PATRICIA SÁNCHEZ ABRIL, AVNER LEVIN, & ALISSA DEL REIGO, 2012). The authors propose creation of a right to designate as private certain areas within the workplace by tagging a photo “confidential” or by marking a folder “private.” They also propose a right to delete information, and a rule prohibiting reliance on personal or off-duty conduct as a basis for adverse action. Three states have already enacted legislation protecting the privacy of lawful, off-duty conduct. The other proposals are unlikely to become law, at least in the near future.

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Social Networking: New Challenges in the Modern Workplace*

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Received: 31 July 2013 / Accepted: 1 October 2013

Abstract: The past few years have witnessed an exponential growth in the use of social networking. Employees often share photos, write messages to friends or leave virtual ‘gifts’, which are sometimes related to their employment. Indeed, employers sometimes use information found on these sites to make pre-employment decisions or take disciplinary action. In this paper we wish to focus our attention on Spanish case law and to contrast the criteria employed in this law with that of other relevant countries such as Germany, France or the United Kingdom. The overall purpose of this article is to rethink the scope of labour law and to examine how industrial relations are affected by employee’s personal conduct.

Keywords: Privacy, secrecy of communications, social networking, workplace.

1. Introduction

The past few years have witnessed an exponential growth in the use of social networking. Employees often share photos, write messages to friends or leave virtual ‘gifts’, which are sometimes related to their employment (and which often defame their employers or play practical jokes on them).

While social networks may create difficulties for employers, they may also have an adverse impact upon employees. Indeed, employers sometimes use information found on these sites to make pre-employment decisions or take disciplinary action.

In this paper we wish to focus our attention on Spanish case law and to contrast the criteria employed in this law with that of other relevant countries such as Germany, France or the United Kingdom. Our main objective is to identify the important issues that help to resolve cases where employees have been sanctioned for posting negative comments about their employers.

Some large companies already have guidelines in place which govern the use of various means of communication. Typically, these codes of conduct regulate the personal use of computers and Internet and also include clauses that warn workers of possible employer control in these areas. It will be interesting to see if the courts consider these clauses to be valid or not.

Another of our goals is to analyze the data protection law to see whether or not it contains specific measures for individuals who post personal information on social networking sites. Moreover, we try to identify to what extent employers may use employees’ personal data which has been stored on social networks (or transmitted over them). It is important to know whether such situations fall within the employees’ right to freedom of expression.

One question that needs to be addressed is whether case law regarding e-mail and text messaging is equally applicable to the use of Facebook accounts. In Spain, both the Supreme Court and the Con-

*This paper is a reworking of the communication presented at The Labour Law Research Network Inaugural Conference held in Barcelona in June 2013.

stitutional Court have handed down a ruling on this issue where an employee posts emails or uses the computer for personal matters at the workplace.

Finally, the overall purpose of this short paper is to rethink the scope of labour law and to examine how industrial relations are affected by employee's personal conduct. Up until the present, the main challenge in labour law has been the construction of fundamental rights in the workplace. Since the 1980's, in particular, the Spanish Constitutional Court has paid attention to the specific and non-specific fundamental rights of employees. Nowadays, however, the real issue is whether the personal behavior of employees has any bearing upon workplace relations.

2. How increased use of social networks has led to further labour law

While there are only a few cases regarding the use of social network in the workplace, we have managed to find a representative sample. In passing, it needs to be noted that there is no unified jurisprudence regarding the use of social networks and that the only consolidated criteria has to do with the monitoring of electronic devices in the workplace. The analysis of this matter will be structured in two parts. First, we will consider the problems arising from employee usage of company property for social networks. Secondly, we will address the remaining assumptions and describe the worker's personal sphere and the use of social networks outside the workplace and work time.

2.1. The usage of company-owned computers, phones and Internet for personal reasons

Both Spanish doctrine and courts have argued rigorously about the right of employees to use company-owned computers, phones and Internet for personal reasons. While the Supreme Court has ruled on relevant cases regarding employee privacy, there have been few cases concerning the right to secrecy of communications in the workplace¹. In a recent ruling, the Spanish Constitutional Court (decision 241/2012, December 17, 2012) decided whether the employer had the right to monitor employee electronic communications.

In this particular case, two employees had installed a program named "Trillian" –in breach of company policy– on a work computer in order to criticize and insult their supervisor, colleagues and customers. This case has several interesting features; firstly, that the employees were expressly forbidden from installing the program; secondly, that the computer could be used by any employee and did not have a password; and thirdly, the way in which the company discovered the breach. In this last regard, it was an employee who discovered the conversations by chance. Two months later, the company called a meeting between two employees and four managers in which some of the conversations were read and the content of the rest were summarized. The employees subsequently admitted the facts and were verbally disciplined. However, one of the employees then sued for violation of privacy (article 18.1 of the Spanish Constitution) and secrecy of communications (article 18.3 of the Spanish Constitution).

In the STC 241/2012, the Constitutional Court ruled in favour of the company. The Court held that the employee had no reasonable expectation of privacy in her on-line communications and defended a more limited use of the proportionality principle in the resolution of conflict between fundamental rights. The dissenting opinion by Judge Valdés Dal-Ré emphasizes that "this is a case which, in my opinion, represents a step backwards in relation to the constitutional doctrine or means a perspective of labour relations which (...) is different from the consolidated model".

A) Key aspects of the new constitutional doctrine

Although the employee in this case laid claim to two fundamental rights, most of the Court's decision argumentation focuses on the secrecy of communications. This is confirmed in the opening

¹ Judgment of Constitutional Court, November 29, 1984 (114/1984), which supported as evidence in dismissal process the recording of a conversation with another person that provided the employing entity.

enumeration of article 18.3 of the Spanish Constitution which is concerned “particularly (of) postal, telegraphic and telephonic communications”. It is also worth noting that the article protects both traditional and new means of communications.

Another significant aspect of the new constitutional doctrine is that it states that the company may monitor employee communications in the workplace. Following this reasoning, the Constitutional Court highlights the main criteria that establish the limits of employees’ fundamental rights.

B) The balance between employee privacy and employer interests

The Spanish Constitutional Court rules that every employer may limit the personal usage of email and other forms of computer and online communications in the workplace. At the same time, however, the Court rulings seek a balance between employee privacy and employer interests. This last one serves to ensure that employers continue to observe management functions and to prohibit employees from using company-owned computers, phones and Internet for personal reasons.

Legal support for these rulings’ may be found in article 20 of the Workers Statute in which the employee accepts the employment contract and thus consents to employer notification limiting the use of electronic devices. The employer thus obtains employee consent at the time of signing the employment contract (BACIGALUPO, 2013).

The law is flexible regarding employer policy on electronic communication in the workplace. While the Spanish Constitutional Court enumerates laws, instructions and codes of conduct, it must be noted that the Court does not refer to the possibility of collective bargaining. Collective bargaining is therefore not excluded and could be used to negotiate this issue. Indeed there are relevant examples that demonstrate this point and the same argument may be seen in the dissenting opinion of Judge Valdés Dal-Ré when he mentions “the possible regulations decided by the employer or the collective bargaining regarding the usage of electronic communications”.

The Court does not resolve whether the company is obliged to check that every employee has been informed of the policy. In this respect, mention must be made of the Supreme Court’s decision of March 8, 2011. Here the company alleged that it had informed employees of the rules concerning the usage of electronic communication by giving them a manual. However, this claim was not proven and the employer’s use of surveillance was considered illegal. On October 6, the Supreme Court considered a case where a letter was posted to employees –and signed by them– and in which they were instructed not to use electronic devices (computer, mobile phone, Internet) for personal interest. In contrast to the previous case, the Court found the letter to be legal.

C) Rules and elements in the protection of fundamental rights

The Constitutional Court made one of the most important contributions to debate when it observed that surveillance does not always affect fundamental rights and that some forms of surveillance are not illegal. In such cases, therefore, the principle of proportionality does not apply (the STC 241/2012 is a good example of this).

a) When there is no conflict between rights

There will be situations in which there is no conflict between employee privacy and employer interests. According to constitutional doctrine, a relevant aspect of these cases is whether there is a policy regarding employee usage of information technologies which clarifies whether employees are allowed to use devices for personal reasons.

The context of rules concerning in-company usage of information technology

In the aforementioned case (STC 241/2012) the company had deliberately prohibited employees from installing programs on their computers. The employees, however, used an instant messaging sys-

tem that they had installed on a work computer in breach of company policy. The Court thus reasoned that there was no expectation of privacy.

A similar argument may be observed in the doctrine of the Supreme Court. In a judgment handed down on September 26, 2007, the Supreme Court stated that the policies of the workplace are relevant in deciding whether there is an expectation of privacy². Employers accordingly have a legitimate right to check how their computers are used by employees and surveillance is thus legal if the company previously establishes the rules of use and gives prior notice to employees on the issue. If the company has prohibited employees from using electronic devices for non-work related purposes, the monitoring will be legal³.

One of the most important elements in this argument is that the computer had been specifically provided for public use among the employees (all employees were therefore able to access the company hard drive without needing a username or password). In such conditions, the court ruled, there can be no expectation of privacy. Under constitutional doctrine, privacy is defined as keeping one's personal information private or limiting other people's access to this information. This fundamental right has an objective content – “what, according to the prevailing social norms is usually considered as separate or alien to the legitimate interest of the other” –and a subjective content– “everything that a person decides to exclude from the knowledge of the other”. Also relevant is whether the employee decides to limit the extent of protection given to privacy (Judgment of Supreme Court October 6, 2011). This is a theory defended by a sector of doctrine (DESDENTADO/MUÑOZ 2012: 180-182); when the company has prohibited personal usage, employees know they could be monitored and would accept this. Privacy is thus given less protection.

Returning to the original case under discussion, the Constitutional Court refused to accept that the right to privacy had been violated because it considered that the employees' actions reduced their own protection. In contrast, the dissenting opinion regarded this situation as being similar to that of a mail box containing sealed letters that belong to different people and which no one is authorized to open: that is, just as it is forbidden to open or read other people's mail when it is home delivered or distributed in the office through a system of personal but open ‘pidgeon holes’ (even with a perfectly feasible excuse), one is not allowed to open email files or messages, even when it is possible to access unprotected files on a shared computer. We might refute this example with that of a postcard: whoever sends a postcard, instead of a sealed letter, knows that secrets cannot be hidden from sight. Similarly, when an individual uses a computer under the control of another party –one which has banned personal use and which has power of control– then this individual knows that he/she does not have a guarantee of confidentiality⁴.

In sum, the monitoring in this case did not violate the privacy or secrecy of communications because the company had carried out the activity after obtaining employee consent. This consent was presumed when the two employees knew of the company policy. Implied consent may be achieved when an employer gives prior notice to his employees that electronic communications are monitored.

Rejection of the general application of the principle of proportionality as a means of evaluating Fundamental Rights

According to a general formulation, the principle of proportionality may be applied to conflicts between fundamental rights. This is based on three types of test: first, if the application of the measure is able to achieve the objective (judgment of suitability); second, if it is necessary and that there is no other measure which is less aggressive (judgment of strict necessity); third, if it is balanced and obtains more advantages than disadvantages for the general interest (judgment of strict proportionality) (Mercader/GARCÍA-PERROTE, 2003: 257-264).

² RJ 2007\7514.

³ The doctrine was established in the following judgments [March 8 2011 (RJ 2011\102184) and October 6 2011 (RJ 2011\7699)]. In the first case, the Supreme Court decided that the monitoring was not legal because the company had not set a policy regarding this issue. Neither the company had given notice employee about the monitoring. In the second case, the court declared the hidden monitoring legal because the company had prohibited employees from using electronic devices for non-work related purposes. According to the Supreme Court, if the prohibition is clear and strong, the employee should understand the possibility of control.

⁴ Judgment of Supreme Court October 6, 2011.

It is also significant that the Constitutional Court does not state an opinion regarding the principle of proportionality. However, the Court of First Instance (Court of Seville, June 13, 2005⁵ and High Court of Justice of Andalucía of 10 February, 2006⁶) held that the employee had she had no reasonable expectation of privacy based on the principle of proportionality despite the fact that she had laid claim to this principle⁷.

Up until the present, the Constitutional Court has reasoned according to this principle particularly in cases regarding employee privacy (such as in, the well-known cases SSTC 186/2000, July 10 and 98/2000, April 10, which examined the conflict between privacy and hidden surveillance in the supermarket and the casino). Moreover, as we discussed in a previous paper, there has been a general application of the principle of proportionality in cases where there was no conflict between employer interests and the fundamental rights of employee (such as privacy or secrecy of communications). In addition, the general application of this principle could possibly produce different results in similar cases- a company that did not violate employee privacy in one case, could be found to have been violated it in another. Our proposal is thus based on first checking to see if there is a conflict between the rights and only then applying the principle of proportionality (DESDENTADO/MUÑOZ 2012: 20).

The new case (STC 241/2012) avoids applying the principle to every case and establishes the basis for a new approach. The Constitutional Court has assumed the doctrine of Supreme Court in the matter of privacy and has adapted it to the secrecy of communications. The analysis is the same: if the company has prohibited employees from engaging in personal use of computers in the workplace, that company is entitled to monitor for this use. Here, there is no conflict between fundamental rights of employee and the principle of proportionality does not apply. At the same time, it is not necessary to inform the employee about this⁸.

Irrelevance of the means of communication

It must be noted that the means of communication used by the employee are irrelevant. While this case is about on-line conversation. It does not mean that there is less protection of privacy with regard to electronic devices.

The Constitutional Court based its position on the nature of the communications used and the context of the company policy. The Court did not say that the secrecy of communications were not protected or less-protected when the communications are electronic. This conclusion could be said to apply equally to conflict over privacy resulting from the monitoring of personal files located in the company's computers.

b) When there is a conflict between rights

There are cases of conflict between fundamental rights. One example is when the company does not set the rules of personal usage. Another may be when the company allows the usage of devices for personal reasons and then monitors the computers. The most conflictive case occurs when the secrecy of communications affects unions; here the proportionality principle needs to be applied.

If the company does not set rules, it is not entitled to engage in monitoring. When the company has not regulated the use of information technology, we argued that the employer loses the ability to control the usage, which would not make possible even special occasional checks. In addition, we pointed out that this conclusion seemed excessive and the issue could be raised if in some cases such as for example with regard to the company email, ensuring the confidentiality of communications is relative, as is shown by a criminal ruling⁹. First, a computer in the workplace is not the most appropriate channel

⁵ The first case stated: "the measure met the proportionality test. First, it is suitable because searching the files is necessary to determine it. Second, it is necessary because there is not another less aggressive measure. Third, it is balanced because it produces more benefits than damages to the general interest. Moreover, it has not affected the expectation of privacy of employees".

⁶ In the same way the High Court of Justice of Andalucía resolved this conflict.

⁷ The employee alleged that it was not necessary to open the files. It was enough to check the installation of program. Thus, the company had violated her privacy and secrecy of communications.

⁸ It must be noted that the Constitutional Court pointed out that the absence of information to the affected workers and the works council was a matter of ordinary legality and added that the prior notification of the filming would have hidden private effectiveness from the reach of surveillance (STC 186/2000).

⁹ For example, the Judgment of High Court of the Madrid October 29, 2010, ARP\2011\259. This concerns a crime against

for transmitting secrets, especially when there is lack of set rules for personal use of computers; expectation based on the absence of prohibition does not mean the company is not exercising control. While the employee can expect that harmless use will not create disciplinary problems and that he will not be subjected to routine checks, it is not reasonable to think that the computer will not ever be monitored for emergency purposes (blockages by mass mailings, harassment via email, information filtering of companies, urgent need to address customer communications in cases of the absence of the worker ...). The expectation of confidentiality is not so great.

In the opinion of the Constitutional Court, it is relevant if the company has allowed employees to use electronic devices for personal reasons because in these cases there is an expectation of privacy. This is particularly relevant where there is a conflict between the fundamental right of employee (privacy/ secrecy of communications) or the union (privacy/ secrecy of communications and the privacy of Trade Union Freedom) and the employer interests (article 38 Constitution). The criteria of the Court is thus based on limiting employer interests but “the degrees of limitation to examine employers’ measures of monitoring depends on the conditions of use and instructions given by the employer”.

2.2. The usage of social networking outside of the workplace and working hours

The second part of this paper focuses on the usage of social networking outside of the workplace and working hours. Analysis of case law shows that events occur not only during the working hours or in the workplace but also outside working hours and the workplace. The study highlights the growth of this problematic situation that has no specific regulation in the Spanish case.

The following cases are typical of events that occur during working hours and in the workplace:

- An employee working as nurse and midwife was fired after taking a photo of a baby and then publishing it on a social network¹⁰.
- A nurse was fired after disclosing clinical information in a blog that posted images and reports obtained from the radiological examinations carried out in the company¹¹.
- Some company sales personnel published photographs taken in the workplace in social networks where they could be seen dressed in the company uniform and lying on an office table, where documentation of the company could be seen, as well as an opened safe and bundles of banknotes¹².

Some typical events occurring out of working hours and the workplace are as follows:

- Criticism of the company on a social network or blog¹³.
- Publication of a video which parodies a company boss in a well-known scene from a film, attributing insults and homophobic comments about the staff to him¹⁴.

the consumer market and in the same, hidden control is supported for computer programmers who were fired for having picked and endorsed without authorization platform, e-learning courses and content of the company for which services were lent, with the intent to sell them on their own. Although not verifying the existence of rules of usage of computers, the Court appreciates exceptional element is satisfied in this case in that the computer was a fundamental and essential tool for employees and control developed by the employer has particular relevance in the case. The appreciation of this key element is the analysis carried out by the Court to presume that employees had to have had the knowledge that their activity (by computer) was to be kept under constant review by the directors of the company and for this reason employees should restrict the maximum computer usage for personal and private purposes, so it could almost be argued that personal capacity utilization was implicitly a waiver of his privacy that at most would be limited to those emails from the server particularly those who, by the way not agreed upon, and the files that were identified as belonging to individuals and which had a purely personal content.

¹⁰ Judgment of High Court of the Galicia February 20, 2012, AS 657.

¹¹ Judgment of High Court of the Valencia February 8, 2011, JUR\2011\161437.

¹² Judgment of High Court of the Andalucía, Granada, November 10, 2011, JUR\2012\41677.

¹³ JUDGMENT OF HIGH COURT OF THE CATALONIA MAY 16, 2007 (AS 2400), JULY 17, 2009 (AS 1881), MARCH 24, 2010 (AS 2012) AND JUDGMENT OF HIGH COURT OF THE MADRID MAY 25, 2011 (JUR\2011\237900).

¹⁴ Judgment of High Court of the Galicia February 23, 2012, JUR\2012\108833.

- Identity theft of staff in superior positions by creating a fake profiles and publication of insulting expressions about them¹⁵.
- An employee who was in a situation of temporary disability published comments and photos of parties and consumption of alcohol¹⁶.

According to our classification, in the first and second of these situations the employer is not entitled to monitor the employee network because the employee has not used the company-owned computer or Internet. However, analysis of case law shows that even in these cases it is possible to consider events in a work context. This may be the case when the employee uses the social network to disclose confidential information or to post offensive comments about the boss.

It is clear that employees' usage of social networking outside of the workplace pertains to their personal life. The employer, however, may access this information if it is generally accessible on-line via a social networking site. Case law deals with events that may be discovered by anyone without a password; in such cases the courts state that the employer is entitled to this information.

Employers are thus allowed to collect or process data obtained from social networking sites whenever the purpose of the social network is linked to work and this information is relevant. In this paper we have identified some cases where the court ruled against the employer because the information obtained was insignificant and the employee's error was easily rectified. This was the case of the employee who took a photo of a baby and then published it on a social network (and who was subsequently fired from his job as nurse and midwife). In this case, the employer had informed the family involved and blown the events out of proportion.

It must be noted that it is not relevant that the company has established a policy about the usage of networking and informed its employees of this policy. The courts did not pay attention to this issue because they dealt with the personal sphere. In addition, most cases have shown that there was no company policy regarding this use. The employer is not allowed to prohibit employees from posting photos or comments on the social network.

The courts have declared that the breach-alleged by the employer in the letter of termination has been demonstrated. The decision to terminate employment was based on the comments, photos and videos posted on the social networking. While it needs to be acknowledged that there is still no leading case on this issue, the cases examined demonstrate that disciplinary actions by employers are on the rise. The judicial criteria used to justify dismissals are described below.

First, with regard to the data published on the social networking, it is a relevant issue that the users are capable of easily identifying the name of the company or supervisors. If the users of the social network are not able to identify the name of the company or the supervisors, the employee conduct is then protected.

The second is when information posted on social networking causes serious damage to the company, employees or stakeholders. This damage is related to the company image or security; no one can be ignorant of the fact that negative comments posted on the social network regarding a company or employer could result in a loss of customers or benefits to the company. It is true that the employee has the right to freedom of expression but there are limits to this right.

Third, the courts have also considered the time taken by the employee in preparing the comments, videos or images and in transmitting them. This appears to be a relevant aspect because it demonstrates bad faith on the part of the employee.

In addition to the criteria listed above, it is important to consider the employee's position in the company. It is generally accepted that work relationships are defined by the level of trust among the parties involved. When, for example, the worker is a manager of a supermarket, his level of responsibility may require behavior which is of a higher standard than that of other employees who have less responsibility. If the worker violates trust placed in him by posting pictures on the social network, he may not only affect the image of the company but also his own safety.

¹⁵ Judgment of Court number 1 of Cartagena (Murcia), July 6, 2011, AS 1167.

¹⁶ Judgment of High Court of the Madrid January 23, 2012, JUR\2012\106651.

It should be emphasized that the use of social networking by employees is similar to other actions connected to the workplace. In our analysis of this issue, we have observed that it is almost the same thing to talk about freedom of expression and its limits. There is only one difference; an employee might make negative comments about a boss to a friend but it is another matter altogether when the employee publishes photos and comments on the social network and thus amplifies this action.

In light of these decisions, it appears that even if employees post comments from their own computer outside their working time, their employer is entitled to take disciplinary action against them. Obviously, the cases analyzed refer to information that was accessible by anyone. In any case, the employer would not be entitled to access social networks that have passwords and would not be entitled to simulate a profile in order to be invited by the worker to the social network.

It seems clear that the rules concerning disciplinary sanctions should be reformed. We propose that these rules should include the issue of social networking and in particular the possibility of requiring the employee to delete a blog or information held on the social network related to the company. We believe that this may avoid future disciplinary decisions based on the use of social networks that can cause damage to businesses. In Spain, the employers and employees would be responsible for negotiating such clauses in collective agreements. As with other countries such as France, in cases where the offense is not very serious, Spanish judges should consider declaring the dismissal to be unfair and sanction the worker by requiring them to erase all information relating to the company from their blog or social network (MARTIN, 2011)¹⁷.

None of the cases analyzed dealt with the issue of hiring. It is generally accepted that social media provides an easy and inexpensive way for employers to gather information about job applicants to see if they will fit well into the workplace or will do a good job. In Spain, there are no regulations governing this issue. Germany, by way of contrast, is developing standards for information posted. In Germany a standard is being developed for information posted on social networks by job candidates so that companies are limited in the use they make of this information when it has no professional interest (LOCKLEAR, 2012). This solution is not applicable to the Spanish case without legislative reform. According to judicial criteria described above, the solution would be to permit the employer to monitor information which is available on social networks and which is freely accessible.

We have not identified cases addressing other situations such as employer pressure to obtain employee's passwords or the use of a third party to access the employee's social network. Obviously both situations should be rejected in order to protect employee privacy.

3. Conclusion

In Spain, the absence of legal criteria has meant that the industrial relations tribunals have played a dominant role in defining the scope of protection of privacy both within and outside of the workplace. While the subject of social networks and their work-related implications is still very new, a representative set of rulings are beginning to appear.

The Supreme Court's doctrine regarding the monitoring of computer has been of particular relevance. According to a solid criterion maintained since 2007, monitoring is legal if the employer has established a policy and has informed employees of this policy.

However, until recently the issue of monitoring of communications had not been decided and there were serious doubts about it. Most doctrine had rejected this monitoring because the constitutional protection of privacy was very strong. The new constitutional doctrine is extremely controversial be-

¹⁷ In a Judgment of 16 October 2006, the Court of Paris held that a former employee of a multinational company must delete from her blog all the slanderous and defamatory words that she had posted about her former employer and pay damages. The former employee had created a blog where she claimed that when coming back from her maternity leave she had been unlawfully terminated by her employer. She claimed that she had been discriminated against because of her pregnancy. On her blog, she had posted internal mail from the company, communications with the labour authorities, her termination letter and insulting comments about her former colleagues and employer.

cause it extends the criteria of Supreme Court to monitoring of communications. It is clear, therefore, that the company is entitled to monitor employee usage of electronic devices.

The key difference in this approach is to distinguish two kinds of situations. In the first of these, there will be complaints about monitoring of employees where there is no conflict between employee privacy and employer interests. This is because the company has established a policy relating to the use of information technology in the company. Furthermore, it will mean that the proportionality principle will not be applied to solve such conflict. In the second of these, there will be situations where there is a conflict between rights and the application of proportionality principle will be necessary.

More problematic is the control of social networks outside the workplace and working hours. To address this question, we have advocated the application of some of the criteria already established to control the use of company owned computers, phone, Internet or e-mail. We would apply here the theory of protective barriers that workers themselves employ when posting videos, comments, pictures on social networks. When access to the social network is restricted, workers themselves do not need to surrender their own privacy.

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Comparing Denmark and Spain: Two different kinds of ALMP decentralization*

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Received: 10 June 2013 / Accepted: 1 October 2013

Abstract: In this paper, we review the recent Danish and Spanish economic situation to underline the effects of the economic crisis in each country. We then present the different kinds of employment policy decentralization pursued by each country, revealing that, in spite of their great differences, they are not so far apart in some aspects. Finally, we clarify the main ideas underlying the Danish flexicurity model in order to find those elements that may result useful for Spain, taking its special features into account and showing how some recent changes makes the Danish case less interesting for Spanish necessities. We stress the possibilities of the local level as a point in common to develop active policies focused on enhancing human capital.

Keywords: Flexicurity, Employment Policies, Denmark, Spain.

1. Introduction

The current economic crisis has had a strong impact on the principal economies around the world. Europe has not been an exception and Europeans are living its effects, especially in employment. Spain is one of the countries where this impact has been stronger.

In order to find a solution for its unemployment problems, the Spanish Government is pursuing a variety of reforms. One of these is related to the improvement of employment services and active labour market policies. After labour market reform and pension reform, the modernization of employment policies is an essential part of the Spanish plan to manage the post-crisis period.

The Danish flexicurity model has been a point of reference, even before crisis, not only because of its influence in EU employment strategies, but because it has some especially interesting features for Spain's situation.

In this paper, we review the recent Danish and Spanish economic situation to underline the effects of the economic crisis in each country. We then present the different kinds of employment policy decentralization pursued by each country, revealing that, in spite of their great differences, they are not so far apart in some aspects. Finally, we clarify the main ideas underlying the Danish flexicurity model in order to find those elements that may result useful for Spain, taking its special features into account

*This paper is based on research developed in the “Centre for Labour Market Research” (CARMA) at Aalborg University (Denmark). In this sense, the suggestions and help of Thomas Bredgaard were especially useful. I am very grateful to professor Per Kongshøj Madsen, whose collaboration, help and suggestions have been essential in getting to know the Danish flexicurity model deeply and the reality of Denmark's labour market. . This paper forms part of the research project “Evaluación sustantiva de las reformas laborales: una nueva metodología interdisciplinar” (DER2012-33178), financed by Spanish Ministry of Economy and Competitiveness.

and showing how some recent changes makes the Danish case less interesting for Spanish necessities. We stress the possibilities of the local level as a point in common to develop active policies focused on enhancing human capital.

2. Some data about Danish and Spanish Economies. Current situation of their Labour Markets

A large number of international researches have focused on the Danish and Spanish economies. In the first case, because it is an example of flexicurity model, a hybrid between the liberal and Nordic welfare states (MADSEN, 2005). The success of its results for employment, but also for other important macroeconomic indicators as inflation, GDP growth or the employment rate, has attracted the interest of other countries and, specially, the EU, which has seen in the Danish case a model of how to make compatible a strong welfare state and international competitiveness.

On the other hand, before the international economic crisis, Spain was also considered to be an example of success. Its GDP growth rate was one of the highest in Europe, above 3%, enabling Spain to surpass average European GDP for first time in its history. Spain's GDP per capita was higher than Italy's in 2007. Also, the unemployment rate, traditionally high in this Mediterranean country, fell back to the European average, around the 8%. All these factors permitted many to speak about "the Spanish miracle".

Figure 1. GDP Growth Rate.



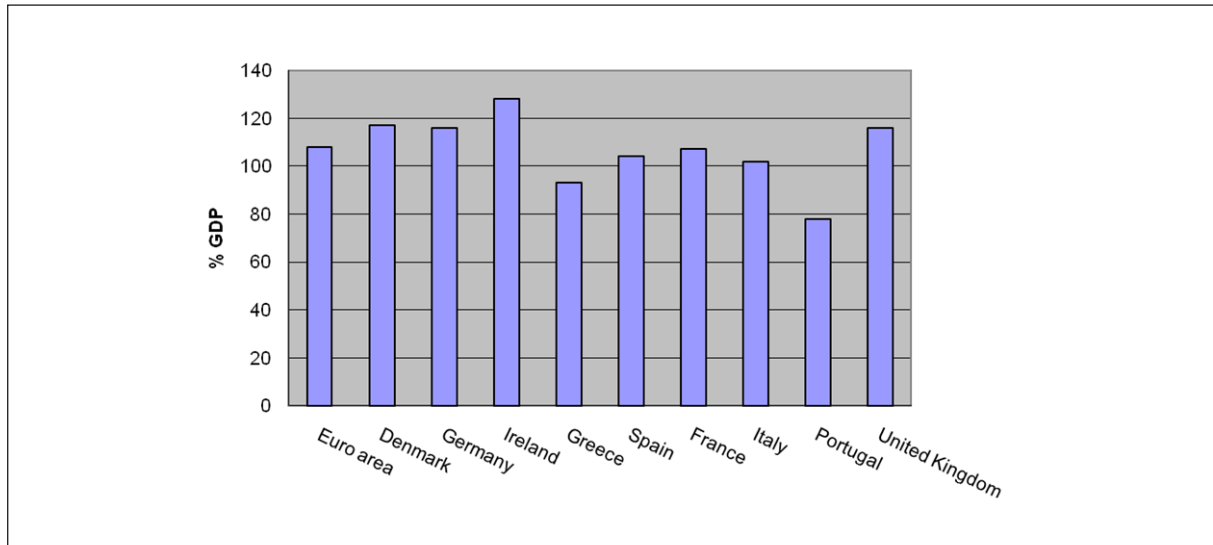
Data: Eurostat.

Figure 1 shows the GDP growth rate of our two countries before the crisis. Spain grew more than the rest of European countries during the entire period. Denmark also registered good growth rates, especially from 2003 and increased its GDP more than the European average in 2005 and 2006. The result of this growth is shown in Figure 2; as mentioned, Spanish GDP was over the European average and the Italian result, and closer to the GDP levels of France and the Euro area before the crisis (2007).

Finally, Table 1 lists some of the most important macroeconomic variables of these two countries compared with the European level before the crisis (2006).

	Denmark	EU 27	Spain
Unemployment	3.9%	8.2%	8.5%
Employment	77.4%	64.5%	64.8%
Inflation	1.9%	2.3%	3.6%

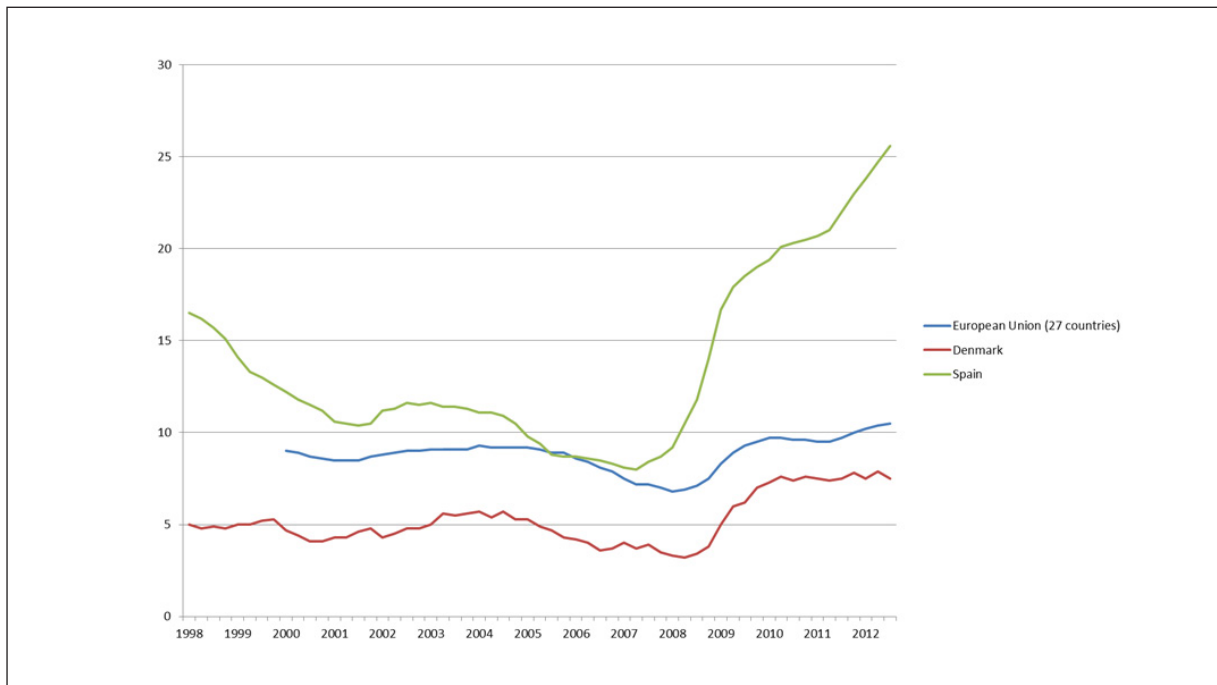
Figure 2. GDP per capita in PPS.



Data: Eurostat.

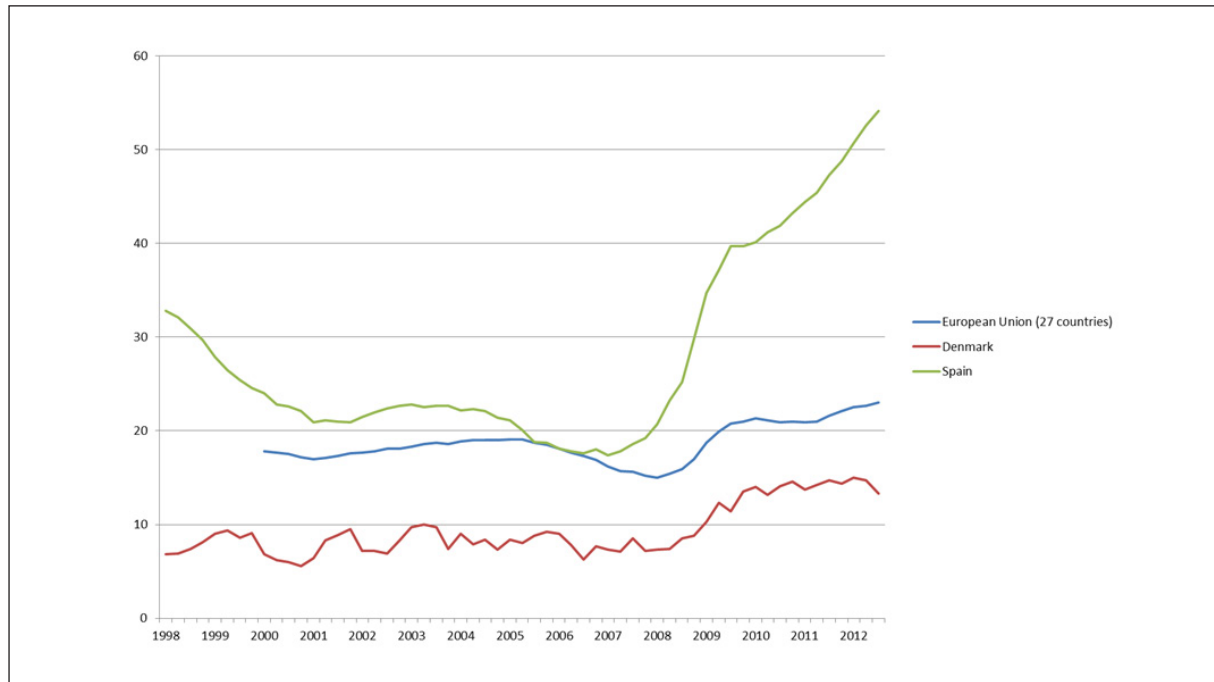
The economic crisis has put an end to this period of success. Especially dramatic has been the increase in the Spanish unemployment rate that passed from 8% to 25%. This is probably the most important effect of the current crisis for the Spanish economy. Whereas all countries are suffering the economic depression in the employment, in the Spanish case the impact is notably high.

Figure 3. Unemployment rate.



Data: Eurostat.

If these data are disaggregated, we can see that the panorama is particularly difficult for young people, who have seen their unemployment rate go up to more than 50%. Moreover, if we follow the trend, we can see that from the third trimester of 2008, youth unemployment has increased faster than the general rate.

Figure 4. Youth unemployment rate.

Data: Eurostat.

The Spanish Government is trying to respond to this extraordinary situation with two different kinds of instruments applied in two different fields. On the one hand, from the economic point of view, after a first period in which a countercyclical policy was adopted that saw the deficit increase to 11% of GDP, the target today is to reduce this big deficit. In order to achieve this goal, all kinds of taxes, especially, an added value tax, have been increased and a painful reduction of government expenditures implemented. The Government prevision is that the Spanish deficit will be reduced from 7% to 4.5% in 2013 and 2.8% in 2014 (The European Stability and Growth Pact establishes a limit of 3% of GDP); in contrast, European Commission forecasts reduction to only 6% and 6.4%, respectively.

However, our attention is focused on labour and social policy. In this area, some measures have already been taken, while others are going to be implemented. In the first group, labour reforms must be underlined; the second group is formed by pension reform and employment services modernization.

This strategy, which reflects the Spanish government's conviction that creating employment requires not only economic measures, but also employment policies as an indispensable complement, has apparently been stopped by the new Government, which is more focused on reducing the deficit.

Concerning employment policies, there were until recently some explicit signals of a Spanish determination to improve employment services:

“An appropriate response to new challenges means to be capable of creating new jobs, giving new competences, greater adaptation capacity and mobility to our labour force [...]. Future entails more flexibility and mobility in professional careers. Public Employment Services is going to play an essential role in this new dynamic, in which there will be a bigger number of employment transitions thought the professional life. Actually they are the instruments to get easier those transitions, through properly measures of prospecting, orientation, activation and traineeship. Therefore, Public Employment Services activity is important, both crisis periods and expansion times, to accompany and promote the changes related to access and improve of employment and make easier the continuous adaptation of employees to the new productive model towards to this new model we want to advance” (ROJO TORRECILLA, 2010 –author’s translation–).

Flexibility, security, transitions, and activation are concepts that will mark the future Spanish employment policies. After a first period, in 1980's and 1990's, characterized by the necessity of giving more flexibility to a highly regulated labour market, today it is necessary to pay attention, not only to flexibility in a more competitive international economy, but also to employment policy and, especially, to active employment policies and social protection.

Spaniards have seen the good and the bad face of a more flexible labour market. On the one hand, Spain was capable of creating more than one third of total employment in Europe. On the other hand, in the worst period of the financial crisis, it destroyed the same percentage of total employment as the rest of the EU. Flexibility is a double-edged weapon if it is not accompanied by other instruments that strengthen the security of industrial relations. It is necessary to “combine flexibility and security by establishing institutionalized ‘bridges’ at critical junctures in individuals working lives” (SCHMID, G., SCHÖMANN, K.; 2006).

In this new strategy, employment services will have to play a central role. But what is the current situation of Spanish employment services? What can we learn from the Danish experience? Is there any point in common?

3. Denmark and Spain: Two different kinds of decentralization

Denmark and Spain both share two levels of decentralization, regional and local. However, Spain has more than 46 million inhabitants whereas the Danish population is about 5.5 million, making the weight of each administrative level very different. Moreover, the complexity of non-central administration is higher in Spain.

Denmark, after the 2007 Municipal Reform, is divided in five regions. Their populations vary from 1,645,825 inhabitants in the biggest one (Hovedstaden) to 578,839 in the smallest (Nordjylland). Spain is formed by seventeen Regions or Autonomous Communities (*Comunidades Autónomas*). The most populated is Andalucía with 8,353,843 people, while the least populated is La Rioja, with 321,702. Fifteen of the seventeen Spanish Regions have more than one million inhabitants.

The local level in Denmark is formed by 98 municipalities (*kommuner*). In Spain, however, this level is composed by two different entities: Provincial Deputations (*Diputaciones provinciales*), called *Cabildos Insulares* in the archipelagos, and municipalities (*Ayuntamientos*). The first two entities are coextensive with the province, an intermediate institution between regions and municipalities and are used in regions with more than one province as an auxiliary level to coordinate municipalities and help them in matters that require a bigger size or cooperation among municipalities. On the other hand, the number of Spanish municipalities was 8,116 in 2010.

This great number of municipalities situates Spain as a small size of municipalities-country (median 1,400), while Denmark’s municipalities are a medium size example (median, 55,000) (MOURITSEN, 2008). However, if we consider that more than 52% of the Spanish population lives in municipalities with more than 50,000 inhabitants (40%, if we focus on municipalities with more than 100,000) and the demographic size of the Spanish regions (described above), it is possible to say that the Danish regional level is closer to the Spanish local than the regional one, at least from a demographic point of view (¹).

Whereas both countries have adopted a decentralization process for their employment policies, Denmark’s case is focused at the local level (at least, since 2007), while Spain has preferred that regions manage employment policy. In other words, Denmark is a case of “municipalisation”; Spain, an example of “regionalization” (MOSLEY, 2009).

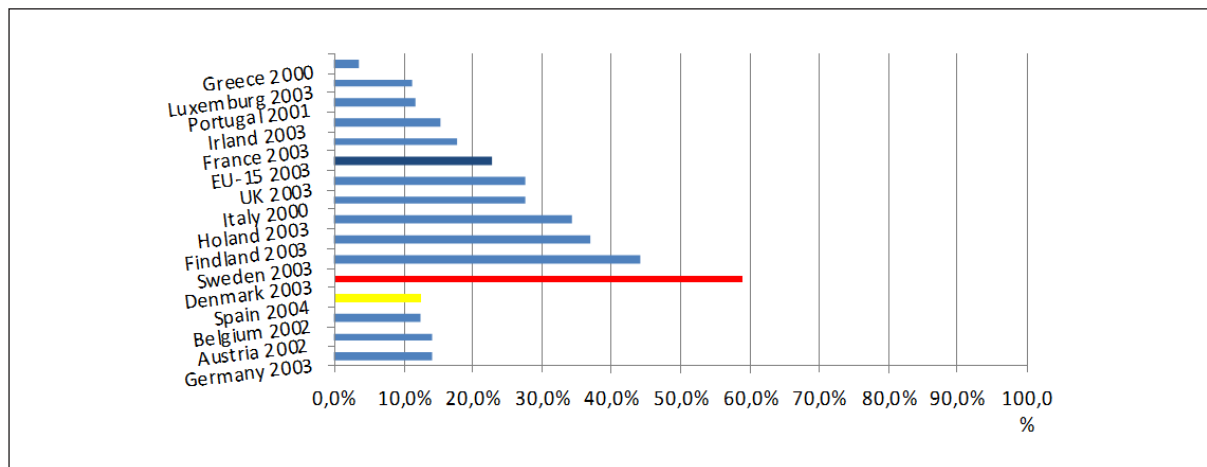
Most active policies were transferred to the Autonomous Communities beginning in 1996 and, today all Communities have their own employment services (the last one was the Basque Employment Service, created by the Budget Law 2/2009 for the Basque Country). The Public State Employment Service (*Servicio Público de Empleo Estatal*), forming INEM, (*Instituto Nacional de Empleo*) the National Institute of Employment, remains exclusively responsible for the administration of unemployment benefits as a part of the Social Security system.

On the other hand, in the Danish case, it is possible to identify two main moments of decentralization: in 1994, the reform focused on the regionalization of active employment policies (MADSEN, 1996); from 2001 and, especially, from 2007, a remarkable process of higher municipalisation of these kinds of employment policies has occurred.

¹ However, this is a general description. Some Spanish regions or provinces that have few inhabitants, can be compared to Danish regions.

These differences regarding the management of employment policies and, in general, about the weight that the local level has in each country, have financial consequences. According to data offered by the Spanish Federation of Municipalities and Provinces (FEMP – Federación Española de Municipios y Provincias), Spain is one of the European countries with the lowest municipal expenditures, well below the European average (UE-15-2003).

Figure 5. Relative weight local public sector (% local expenditure/total expenditure).

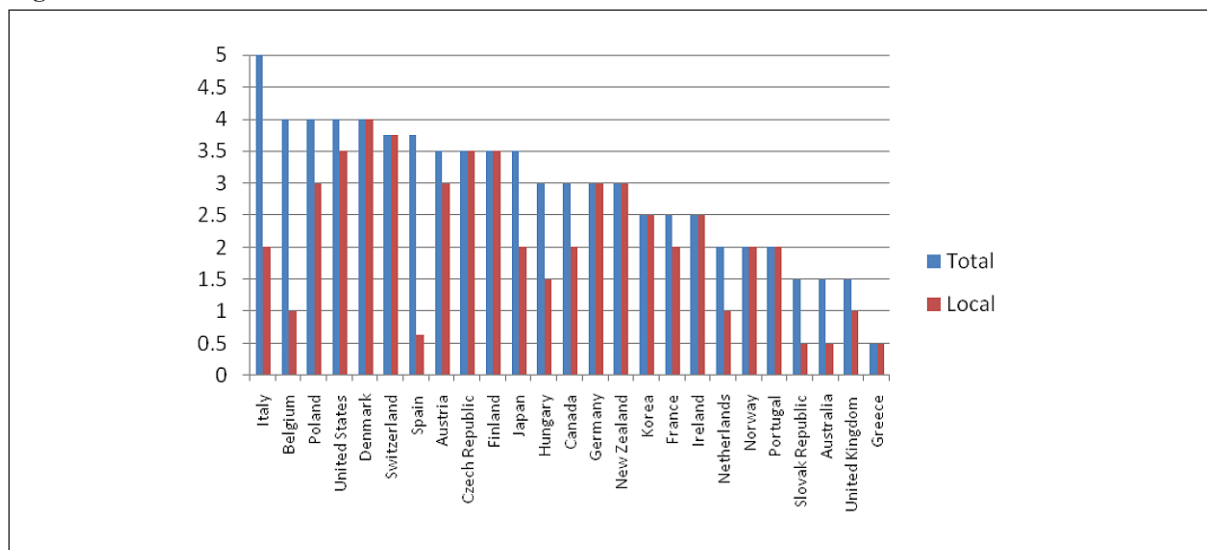


Source: FEMP.

Moreover, if we look at the income side, it is easy to see that Danish municipalities have greater financial autonomy. In Denmark, after the 2007 reform, taxes accounted for 57.3% of total revenues, and fees and charges 18.7%, whereas grants from the central government made up only 22.8 % (MOURITSEN, 2008). In the Spanish case, grants are the greater part of revenue, with 34.13% of the total, followed by taxes, around 32% of total income, while fees and charges are 9.69%.

These data do not mean that Spain is not a decentralized country, but they do show that this decentralization is much more focused on the regional level and to a much lesser degree on the municipalities. This is showed in comparative international research that has tried to explain the degree of decentralization among different OECD countries, taking four variables: budget flexibility, programmed flexibility, eligibility criteria and performance goals (OECD, 2007)

Figure 6.



Source: OECD (2007).

This political and financial structure determines the possibilities for the development of employment policies by municipalities. In terms of defining policies, there are two possibilities. One approach is a three-side agreement between the State, Regions and municipalities. Another path is the development of a pact between an Autonomous Community and municipalities; however, this latter approach depends on the Region's willingness to implement reforms and does not permit the implementation of the same policies all over the country at once.

At the same time, levels of financial support from other administrations determine the number of activities pursued by local employment services and their quality. Both are frequently conditioned by the entity that offers the financing. In other words, as we are going to see, Spanish municipalities do not enjoy a great deal of autonomy to arrange their own employment policies; they are determined by the State and the Regions through the grants that they provide in order to finance employment policies at the municipal level.

Currently, according to the process of decentralization described above, Spanish municipalities do not have any competencies regarding active labour employment policies. The overall distribution of authority for employment policies in Spain is thus as follows: passive policies belong to the State, active policies are in the Regions' hands, whereas municipalities have only a subsidiary roll since their activity depends on the others.

Both the State and the Autonomous Communities finance active employment policies. Nevertheless, there is now a strong trend to transfer some of these resources to other entities and organisms, and even to the private sector. Municipalities are also recipients of these transfers, although these programs are usually co-financed as a compromise of co-responsibility and in spite of the absence of competences.

As a result, around 25% of total of financial resources destined to active employment policies are currently managed by municipalities. This also means that about 7% of total investment in active employment policies is supported by local budgets. "Considering that this is a voluntary service and that municipal budgets are only 14% of total expenditures of all Public Administrations, this degree of financial effort dedicated toward a function assumed without formal competences must be considered extraordinary" (FEMP, 2005, 172 –author's translation-).

Spanish Municipalities have clearly made themselves an important player in the general trend towards an increment of expenditures in active employment policies. From 2002 to 2007, Spain has increased ALMP expenditures by more than 11% of GDP. Spain is still far from Denmark, Holland or Sweden, but above Germany and Italy and close to France.

Table 2. Government Spending as a Percentage of GDP in 2007.

	ALMP					Passive Policies	Total	Unemployment Rate
	Learning and Training	PES	Incentives	Other	Total			
Spain	0.15	0.13	0.32	0.2	0.8	1.45	2.25	8.3
Italy	0.18	0.09	0.15	0.04	0.46	0.71	1.17	6.1
France	0.27	0.22	0.13	0.3	0.92	1.24	2.16	8.4
Germany	0.28	0.27	0.06	0.16	0.77	1.63	2.4	8.4
Netherlands	0.1	0.41	0	0.58	1.09	1.39	2.48	3.2
Denmark	0.33	0.28	0.13	0.57	1.31	1.5	2.81	3.8
Sweden	0.2	0.21	0.48	0.23	1.12	0.66	1.78	6.1
U.K.	0.02	0.28	0.01	0.01	0.32	0.16	0.48	5.3
U.S.A.	0.04	0.03	0	0.06	0.13	0.31	0.44	4.6

Source: Pérez del Prado, D. (2010).

More specifically, we can see that the level of expenditure in passive policies is not low and, indeed, it is situated at the highest level, together with Denmark. On the active policy side, it is also pos-

sible to see that the main item is related to incentives, whereas the lowest one is dedicated to covert Public Employment Services expenses. This is another argument in favor of developing this specific area of Spanish employment policies, as it is clear that Spain has a high deficit in this area compared with the other European countries (except Italy, which has an even lower expenditure). Finally, the percentage dedicated to training is also low, what is related to the situation of the employment services, showing that this is another area that needs stronger support.

These are precisely the two main areas of expenditures in active employment policies in Denmark that are most directly linked to the structure of employment policies in this country.

On the one hand, passive policies, unemployment benefits, are based on a division between those unemployed that are members of an unemployment insurance fund and those who are uninsured (MADSEN, 2009).

This division is also a characteristic for active policies, as we are going to see below. In the first case, the insurance system is based on the so-called Ghent system (CLASEN & VIEBROCK, 2008), consisting of 31 insurance funds recognised by the State. The current version of the system dates back to the last large reform of the unemployment benefits system in 1970, when the state took over responsibility for financing the extra costs of unemployment benefits caused by increases in unemployment. The members of the unemployment insurance fund are therefore only obliged to pay a fixed membership contribution, independent of the actual level of unemployment (²)

The uninsured group is formed by unemployed people who have exhausted their right to unemployment benefits or are not members of any insurance fund because of their own decision or because they do not meet the membership conditions. These people must apply for cash benefits administered by municipalities.

On the other hand, this two-tiered system also applies to active labour market policies. Traditionally, when it comes to active programmes, the municipalities handled the group of uninsured unemployed, while the insured unemployed were in the public employment system administered by the central government. However, recent changes have transformed this model of administration active labour policies, as we are going to see in the following section.

4. The Latest trends in the Danish Model of Flexicurity. What can Spain learn from the Danish Experience?

Denmark's employment policies are a fundamental part of the so-called "model of flexicurity", "a third road between a flexible labour market on the one hand and security and welfare for its citizens on the other" (MADSEN, 2009). Specifically, this model is characterized by a well-functioning relationship between unemployment insurance, employment protection and active labour market policies.

One of the most famous descriptions of this model is its representation as a "golden triangle" (MADSEN, 2006):

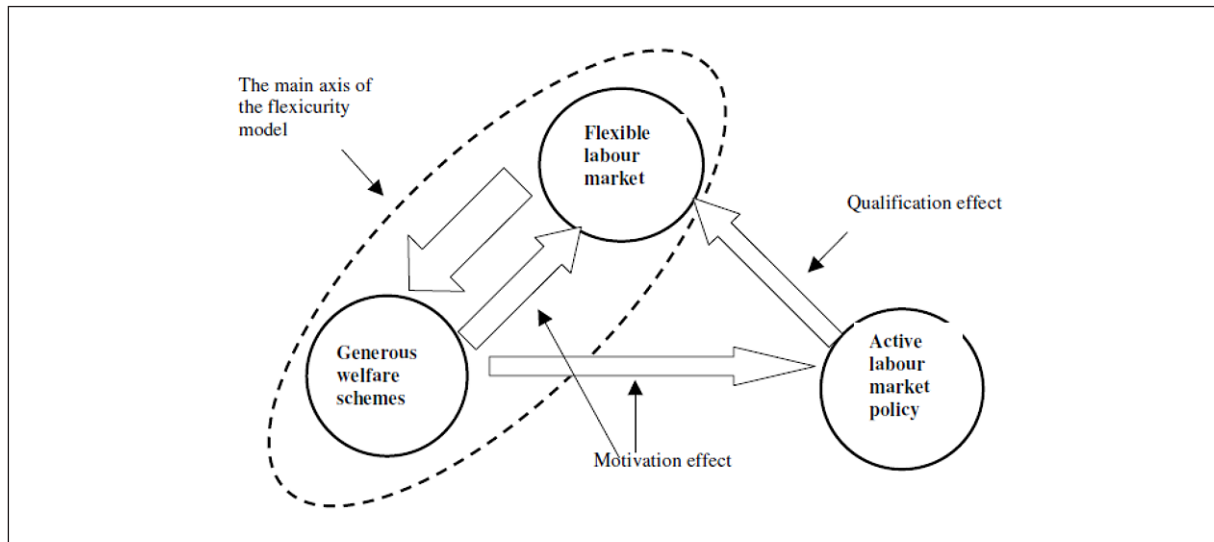
According to this image, the success of the Danish flexicurity model is based on three main elements situated in each vertex of the figure. The pillars of this model are thus a flexible labour market, a generous welfare scheme and active labour market policies.

The flexibility of the Danish labour market is not new; rather it is a "traditional" characteristic of the system that emerged from the so-called "September Compromise" in 1899. This agreement between employers and trade unions meant that the former have the right to manage their own affairs, meaning the right to hire (and fire) the number of workers that they deemed necessary, while the latter are recognized as the legitimate representatives of workers.

This makes the system more flexible and adaptable to constant changes of international and competitive markets, especially for the small and medium sized enterprises that, as in Spain, are the most common type of firms in the Danish businessworld. However, Danish flexicurity has adopted one spe-

² This contribution varies depending on the insurance fund. For 2010, the lowest is 4,368 DKK, while the highest is situated in 5,484 DKK. Weighted Average of contributions (contributions and administrative costs) for the six biggest insurance funds in number of members for 2010 is 5,113.30 DKK (around 686 €). Source: Danish Ministry of Employment.

Figure 7.



Source: Madsen (2006).

cific kind of flexibility –external or numerical flexibility–, as indicated by high levels of worker flows in and out of employment and unemployment.

From the beginning of democracy in 1978, Spain has also tried to make its labour market more flexible. While some of labour reforms have referred to internal flexibility (the 1994 reform and, in part, the more recent labour reforms of 2010 and 2012), it is true that external flexibility is more developed. The strategy to achieve this purpose was not a general reduction of protection through lower severance payments, but rather through the generalisation of fixed-term contracts, especially from 1984. As a result, Spain continues to have one of the highest rates of temporary employment, close to 30%.

Returning to the Danish case, the second vertex is related to a generous system of income support for the unemployed. This is also characteristic of a Nordic welfare state and it becomes Denmark, considering the prior feature, in a hybrid between a liberal state and a classic Scandinavian welfare state (MADSEN, 2006). We have already seen this in section II.

Thirdly, it is necessary to mention the importance of active labour market policies that, in present form, date from the labour market reform of 1994. As we mention above, they are based on a two-period benefit system, with an initial passive and a subsequent activation period. This does not mean that there are not active measures in the first period, but rather that they are compulsory in the second. On the other hand, it is important to underline that the system places a strong emphasis on “rights and duties”, that is, the unemployed have the right to receive an individual “job plan” that details the activities to be undertaken to get back into the employment, but also the duty to pursue this plan.

This last element is crucial because it enables us to distinguish the Danish model from other kind of “workfare” models. It is obvious that if one of the main elements of this model is the “activation”, Danish flexicurity must be considered a workfare system, in the sense that both of them share some disciplinary elements that are linked with the obligation of work. However, the great difference in the Danish version of workfare is that in Denmark, “the unemployed have rights” (JØRGENSEN, 2002).

Two different strategies can thus be identified to incentive the unemployed to return to the labour market. The first is mainly based on disciplinary elements and, because of that, is related to the pure form of workfare. The second emphasises education and training as the best tools for helping the unemployed to re-enter in the labour market. This is the path followed by Denmark.

In other words, the original flexicurity system was focused on social integration rather than social disciplining (BREDGAARD et al. 2003). This latter approach defines the problem of unemployment as an economic problem in which some citizens lack incentives to “make work pay” because of the generosity of the welfare state. Reintegration into the labour market is ensured by demanding work in return for benefits, stressing individual obligations for economic self-sufficiency and applying sanctions in cases

of non-compliance. Social integration, on the other hand, defines the unemployment problem as a result of a deficit in qualifications or competencies. In this case, training has a double task: it improves the unemployed's qualifications and matches them with market requirements.

In short, "the labour market policy strongly emphasizes training and education of the employed as well as the unemployed, not only to cover an immediate demand of labour power, but also as a more long-term strategy because the general qualifications for the labour force have a dynamic effect on the trade composition, and thus also on flexibility and in establishing different types of trades. So: improve skills rather than increase mobility and flexibility. Training and education rather than work in return for benefits!" (JØRGENSEN, 2002)

Precisely this feature is the most interesting for Spain given its current circumstances: on the one hand, in spite of the fact that Spain's unemployment benefits are less generous than the Danish, we have already seen that the data shows a quite generous system with a strong expenditure in passive policies; on the other, one of the main Spanish problems is, precisely, the lack of qualification of certain groups of unemployed. According to the National Statistics Institute (*Instituto Nacional de Estadística, INE*), data for the first semester of 2010 show that more than 80% of Spanish unemployed have a level of studies below primary studies.

Given these circumstances, it is easy to understand why Spain must be interested in, not only activation, but also in improving its employment policies in education and training. Moreover, participation in vocational training "underpins a flexible labour market by increasing the employability of the labour force, i.e. improving their numerical and functional flexibility" (BREDGAARD, 2010a).

Regarding these issues, it is very common to speak about the "qualification effect" which, together with "motivation effect", is a critical element of the golden triangle. The qualification effect is the normal product of a model that is strongly committed to qualification. As a result of training received, the unemployed improve their possibilities for finding a job. Motivation effect refers to the fact that the unemployed look for a job more actively in the period immediately before participating in mandatory activation. Some studies not only show a strong motivation effect in active labour market policies, but, also, that taking these effect into account facilitates evaluation of the qualification effect (ROSHOLM & SVARER, 2008; GEERDSEN, P. L. 2006).

In the Danish case, the implementation of the 1994 reform also meant decentralization towards the regional level. In this sense, it increased the importance of the so-called regional labour market councils, giving the social partners strong influence over the administration of the public employment service. That is, prior to 2007, the social partners served not just as advisors but rather had executive competencies in labour market policies. This was, therefore, another main characteristic of Danish labour market policies (JØRGENSEN, 2002)

This is another interesting element for a hypothetical reform in Spain. There is no executive role for the social partners in the management of employment policies at the regional level, much less at the local one. In other words, they do not have any executive competencies nor can they manage any part of the budget. Their tasks are frequently advisory, as the law usually provides that they given the right to express their opinions in affairs that are related to the labour market or social policy. It is important to be clear that this is a consultative role only, as the Government or Administration is not obliged to follow trade union or employer suggestions.

Nevertheless, trade unions and municipalities usually have close relationships, which facilitates the establishment of different kind of collaborations, frequently connected with the development of training courses. There are also some private actors that develop activities related to employment and that involve trade unions and employers. This is the case of the labour foundations, formed and supported by social partners and that develop different kind of programs, some of which are related to employment (MERCADER et al., 2010). However, these experiences are not situated within the Spanish employment system and do not constitute a stable and regular unit of collaboration with the employment services; rather, they are quite autonomous and have other kinds of purposes besides employment-related issues.

The special configuration of Danish labour market and employment policies, partly a product of their institutional history, makes it impossible to export Denmark's flexicurity model to other countries

directly for at least three different reasons (BREDGAARD, 2010a): lack of social dialogue and mutual trust, difficulties related to transition towards external flexibility and financial implications.

As we have already seen, social dialogue is one of the most important pillars of the Danish flexicurity model. The current configuration of labour market policies, employment policies and benefit systems depends on or are related to the social partners. More specifically, the model has one of its bases in a corporatist system of collective bargaining that is linked directly to the cooperation and mutual trust between the social partners and between the social partners and the Government.

Secondly, the transition from an overly regulated labour market like that in Spain to one characterized by external flexibility presents some difficulties. One of the hardest of these is related to those employed (employed workers and trade unions) who strongly resist changes because they would lose their privileged status (insiders) with respect to others who are living with job insecurity (outsiders).

Finally, it is obvious that generous unemployment benefits require strong financial resources and this means that citizens must be determined to pay a level of taxes that supports the system.

However, for the Spanish case, the impossibility of importing the entire Danish model does not mean that, it is impossible to choose some elements that may be adopted. If Spain wants to improve its employment services following the OECD's suggestions regarding decentralization, it could deepen its current regional system or even undertake a "second decentralization" to the local level. In this latter case, Denmark is without doubt a point of reference, not only because its current situation is focused at that level, but because, as we have already explained, Danish demographic circumstances mean that its regions are more like larger Spanish municipalities.

The participation of the social partners, with executive competencies, in employment policies is another aspect in which Spain may also be interested. The social partners are the actors who know best the employment situation in their specific areas of activity and, as a result, their knowledge and experience may be quite useful in the development of new employment strategies, especially at the local level.

Finally, if Spain wants to advance, not only in terms of flexibility, but also in terms of this security, this will require strengthening its benefit system with higher quantities for shorter periods, combining unemployment benefits with social assistance and establishing connections between active and passive labour market policies. Moreover, better employment services must be accompanied by better programs, that is, an active labour market policies scheme focused on education and training, which is one of the Spanish biggest deficits.

However, the Danish flexicurity model that we have described to this point is not exactly the current model in Denmark. From the late 1990's some reforms have tried to push the model closer to a work-first approach. This means that Danish policymaker have increasingly prioritized the motivation effect rather than the qualification effect, implying that employment policies have gradually shifted from a model focused on human capital to another based on work-first.

This is evident in legislation; however, it was harder to incorporate those changes into the employment services' daily functioning. In 2002, the labour market reform entitled "More people into employment" was the first step towards a more profound work first approach. "The new government intended to 'close down the activation industry' (especially the purportedly inefficient municipal activation projects and expensive education and training schemes). Rather than supposedly 'long-term, inefficient and expensive' activation programs the objective was to reintegrate the unemployed as quickly as possible in the open labour market" (BREDGAARD & LARSEN, 2009)

These reforms included not only policy changes but also organizational changes. These seem to have been decisive for the effective implementation of the reform.

In spite of policy makers' desires, the first reforms did not achieve their intended effects in the employment services. In other words, there was an implementation gap. As some studies showed (BREDGAARD et al. 2003: 4), despite the reforms, municipalities continued to work along the lines of the human capital and social integration approach. This result has been explained by two different variables. On the one hand, policy indicators showed a preference for programs oriented towards the self-motivation of the unemployed, requalification and specific social attention for target groups. On the other hand, organizational indicators showed that municipalities considered activation to be a "pure" public service and only 3% of them had used contracting-out; local governments retained high autonomy in the

implementation of activation policies, mainly because of the lack of a standardization of these kind of policies and the resistance of street level case-workers to breaking down performance measures to the individual level. In general, this implementation gap was explained by the high levels of local autonomy and different perceptions of the problem on the part of the implementing agents and the government.

In order to get over these difficulties, not substantial, but organizational reform took place. Firstly, the Danish Government decided to introduce a local government reform, that meant the abolition of counties (regional level), transferring their competencies to the central government, and an increase in local government size by reducing the number of municipalities. Then, the Government proposed the establishment of job centers in each municipality, whose main task would be the return, as quickly as possible, of the unemployed to the labour market. These job centers had to be organized as an independent municipal agency responsible for job reintegration; however, responsibility for financing, that is, benefit administration, would remain in insurance funds (insured unemployed) and in local government (uninsured unemployed) hands. In other words, the project sought a unification of employment systems (employment services and social assistance), but not benefit administration or the financing system.

In spite of the fact that the Government achieved an agreement to implement this reform partially (the new municipal employment system was only to be tested in 14 pilot centres out of a total of 91), with its total rollout pending the results of an evaluation that was going to take place in 2010, it was finally decided to municipalize all employment services from the 1st of August 2009, even though the evaluation was still ongoing (LARSEN, 2009).

There were several other important changes in this reform. First, in spite of the fact that the social partners are still represented in the national, regional and local employment councils, they have lost their active role in setting employment policies and are now relegated to a supervisory and advisory role. Second, the reform has also meant that the public financing of the insurance system is now based in municipalities. This funding model gives municipalities an economic incentive to provide activation services for people on unemployment insurance but it may also be a guarantee that the municipal cash balance will not be drained with rapid fluctuations in unemployment. This change is being evaluated over 2012 and 2013 (BREDGAARD, 2010b).

Some studies have suggested that, there are other goals in the Danish reforms beyond the officially stated intentions of ensuring equal treatment for the insured and uninsured unemployed and improving coordination and integration of employment services (LARSEN, 2009):

Firstly, one non-explicit intention was to gain strategic control over the municipal implementation of employment and social policies and to push implementation towards work-first. In other words, the Government wanted to reduce the implementation gaps discussed above. This seems paradoxical, as it appears the government sought to decentralize competencies for municipalities while at the same time trying to gain control over local governments. The result is a new mode of government in employment policy called “centralized decentralization” (BREDGAARD & LARSEN, 2009) that tries to gain strategic control over local autonomy and front-line workers while shielding the minister from blame for a notoriously unpopular policy area by apparent delegation of responsibility to the local level.

Secondly, and as we have already explained, the role of social partner organizations has been reduced significantly. Moreover, changes in the financial structure of assisting insured unemployed may also weaken the trade unions if municipalities seek to advance their competencies in the field of insurance funds (LARSEN, 2009).

As a result of all these organizational changes, an update of a study developed in 2001 shows that local employment services are today more inclined to emphasize a work-first approach (BREDGAARD & LARSEN, 2008, LARSEN 2009, BREDGAARD, 2010b). In general, all indicators of work-first (demands/sanctions, work-test and compliance with labour market needs) are now considered more important while indicators of human capital or social integration (improving skills, training, individual consideration and quality of life), are considered less important as compared to 2001. The result is that the majority of municipal job centres today prioritize finding clients a job as quickly as possible over improving employability in the long run or satisfying individual requirements or needs related to social assistance.

In short, “the designers of the formal policy reform, therefore, seem to have succeeded. The perceptions and strategies of the municipalities have changed” (LARSEN, 2009). Some of the factors that

explain this new result are the strengthening of supervision, benchmarking and output and outcome measurement of implementation by the central government; the establishment of specific and clear goals that must be achieved by municipalities and penalties (the possibility of contracting out) if those goals are not met; the standardization of procedures that limit the autonomy of local workers (with a growth of bureaucratization that means less time for the unemployed) and the strict distinction between the job centre, focused on getting people into work, and the benefit and social policy department, in spite of complaining from the municipalities.

For Spain, these new trends in the Danish flexicurity model are less attractive than the prior system. Special characteristics of the Spanish labour market that we have already explained require a model that promotes human capital so, as Denmark moves away from this paradigm, it becomes less interesting as a model for elements that may be useful to improve the Spanish employment services. In this sense, the Danes' decision to reduce the number and variety of active labour policies and limit the participation of the social partners eliminates an important element of innovation and makes the Danish model less interesting as an international point of reference.

However, it is possible to obtain an interesting lesson from this last trend for the Spanish case: the importance of the organizational or instrumental scheme to improvements in the implementation of employment policies. Spain has a stated goal of improving its employment services. Therefore, in this sense, what Spain can learn from the Danish experience is not only lessons about substantive reform, but also the organizational structure capable of ensuring the implementation of the principles and goals of this new system. If Spain decides to turn its employment services in the direction of more and better active policies focused on human capital, policymakers must take into account what is the best structure for carrying this out. And, in this respect, as the Danish experience demonstrates, the local level can play an essential role.

5. Conclusions

In this paper, we have shown how the Danish variety of flexicurity, focused on human capital and social integration, has the best elements to be adopted for Spanish labour market, especially if their development is produced by a decentralization of employment policies to the local level. In spite of the fact that it is not possible to import wholesale any national model, we have underlined those elements that would be most useful given current Spanish circumstances.

Recent trends in Denmark are moving the country's flexicurity model away from its classic features and bringing it closer to a work-first approach. These new characteristics are less relevant for Spanish needs and as Denmark moves away from its longstanding flexicurity paradigm, it becomes less interesting as a source of elements that may be useful for improving outcomes in the Spanish employment services.

However, the instruments used to develop the recent Danish reforms demonstrate that a specific reform needs, not only substantial policy changes, but also instrumental or organizational modification. This must be taken into account by Spain in order to improve its employment services and active labour market policies.

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