

LABOR & EMPLOYMENT

ALM

Addressing blogging by employees

Employers should set and widely disseminate reasonable policies.

By William A. Clineburg Jr.
and Peter N. Hall

SPECIAL TO THE NATIONAL LAW JOURNAL

HAVING LEARNED about the indelibility of e-mail and the issues that that creates, employers are now facing the emergence of a new public forum in cyberspace—the Web log or “blog.” What employers are learning is that bloggers are even less discreet than e-mailers and are even more inclined to vent their frustrations with work.

While employee-bloggers may enjoy some legal protections, they can also create substantial legal issues for their employers. For these reasons, employers are developing policies on blogging practices designed to forestall those legal issues, while at the same time being acceptable to employees.

Before addressing those issues, though, an introductory note. The term “blog” is used throughout this article to mean not only Web logs, but all other similar methods of expressing one’s views in cyberspace, such as personal Web pages, message boards and e-mail groups. The term “bloggers” is limited to employees who maintain blogs on their personal computers outside of working hours. Employees who blog through their employers’ computers or during working hours have likely misused company property, subjecting them to discipline without regard to the content of the blog posting. This article therefore focuses on employees who blog outside of work.

Blogs are no longer a self-indulgence of the tech-savvy. A study by the Pew Internet and American Life Project shows that there are more than 8 million blogs published by Americans alone. These blogs have a readership of 32 million, which represents a 58% increase from 2003 to 2004. See Lee Rainie,

William A. Clineburg Jr. is a partner, and Peter N. Hall is an associate, in the labor and employment practice group at Atlanta’s King & Spalding.

“The state of blogging,” www.pewinternet.org/pdfs/PIP_blogging_data.pdf (January 2005).

The initial reaction of many employers upon learning about an objectionable blog is to terminate the blogger-employee. Delta Airlines terminated Ellen Simonetti for posting suggestive pictures of herself in her flight attendant uniform on her blog. See <http://queenofsky.journalspace.com> (now called *Diary of a Fired Flight Attendant*). Google Inc. fired Mark Jen for being critical of the company on his blog, <http://blog.plaxoed.com>. Another blogger was fired by an English bookstore, Waterstone’s, for bringing the company into disrepute by, among other things, referring to his employer as “Bastardstone’s.” See www.woolamalo.org.uk/2005/01/those-who-profess-to-favor-freedom-and.htm.

Initially, some bloggers believed that a clever nom de plume would protect their anonymity. But Rachel Mosteller, a.k.a. Sarcastic Journalist, was fired by the Durham, N.C., *Herald-Sun* after complaining about special recognition received by her co-workers for “doing their job.”

Amy Joyce, “Free Expression Can Be Costly When Bloggers Bad-Mouth Jobs,” *Wash. Post*, Feb. 11, 2005, available at www.washingtonpost.com/ac2/wp-dyn/A15511-2005Feb10?language=printer. Heather Hamilton, a.k.a. Dooce, was fired from her Web design job for postings on her blog, www.dooce.com, giving rise to the phrase “getting dooced” to describe the termination of a blogger. See www.urbandictionary.com/define.php?term=dooce.

Reactions and concerns

The initial reaction of a blogger who has been terminated is to claim there was no notice that his or her employer either did not permit or would attempt to regulate blogging. Even more surprised

was the employee who was fired even after taking down his site in response to his employer’s warning. See, e.g., Steve Olafson, “A Reporter Is Fired for Writing a Weblog,” *Nieman Reports* (Fall 2003), www.nieman.harvard.edu/reports/03-3NRfall/91-92V57N3.pdf.

Employers’ strong reactions to blogging are frequently warranted, given the issues that blogging can raise. First, employers are concerned about the potential disclosure of trade secrets or other proprietary information. Under the Uniform Trade Secrets Act (UTSA), the disclosure of a trade secret in an employee’s blog would qualify as misappropriation. See, e.g., UTSA § 1(2) (defining “misap-

Issues include potential violation of IP or securities laws.

propriation” as, among other things, disclosure of a trade secret without consent by a person who had a duty to maintain its secrecy or limit its disclosure). While the disclosure of proprietary information that is not a trade secret may not be prohibited by statute, its publication may violate a written nondisclosure agreement signed by the employee, thus justifying termination.

Second, employers are also concerned about the work-for-hire doctrine under copyright law. 17 U.S.C. 201(b) (2004). The intellectual property rights in employee works of authorship prepared within the scope of employment belong to the employer. The contents of an employee’s blog may fall within the work-for-hire doctrine if it is the kind of work the employee is employed to perform; the work is performed substantially within authorized work hours and space; and the work was performed, at least in part, to serve the employer. See *City of Newark v. Beasley*, 883 F. Supp. 3, 7 (D.N.J. 1995) (quoting Restatement (Second) of Agency § 228 (1958)).

The *Houston Chronicle* faced this issue when one

of its reporters, Olafson, began publishing articles he had written in a blog he called the *Brazosport News* under the pseudonym of Banjo Jones. See Nieman Reports, *supra*. Banjo reported, albeit in a different voice, on many of the same events that fell within Olafson's professional bailiwick. The *Houston Chronicle* was concerned, at least in part, that Banjo's free publication diluted its intellectual property rights in Olafson's work.

Third, reporting companies may have concerns under the securities laws if a blogger discusses nonpublic corporate information or rumors on a blog. A securities issuer may be subject to suit by a shareholder under Rule 10b-5 if a blogger discloses material nonpublic information at a time when the stock price is fluctuating. Bloggers can also pique the Securities and Exchange Commission's (SEC) interest by disclosing certain information before the company makes a required formal report. For example, an employee may blog about a rumor, which happens to be true, that the company's chief executive officer has been terminated by the board of directors. Normally, the company would have to file a form 8-K with the SEC within four days of this event. If the company files its 8-K two weeks later, and the employee's blog comes to the attention of the SEC in the interim, the SEC may investigate the delay.

Last, employers may also face potential liability for defamation if a blogger-employee publishes defamatory statements. Under the Restatement (Second) of Agency, § 254 (1958), a principal is subject to respondeat superior liability for defamation "by a servant or other agent if the agent was authorized, or if, as to the person to whom he made the statement, he was apparently authorized to make it." Thus, the fact that the employee is not authorized to make defamatory statements may provide no protection to the employer if the blogger was apparently authorized. This could arise if a well-meaning employee defames a competitor's products or services on a blog that identifies his or her employer.

Termination issues

While bloggers can create numerous problems for their employers, terminating an employee for blogging may not be the appropriate, or even legal, response. In an employment at-will state, of course, an employer who learns that an employee maintains a blog can terminate the employee, regardless (or because) of the content of the blog. But

employee-bloggers are not entirely without protection. Unfortunately, the protection that immediately suggests itself to most bloggers—the First Amendment—is in actuality no protection at all for most of them. Employees of state and federal governments may be protected by the First Amendment if they are opining on a matter of public concern. But private-sector employees do not enjoy the same protection.

Bloggers may qualify for whistleblower protection under some statutes, such as the Sarbanes-Oxley Act. Sarbanes-Oxley Act, § 806; 29 C.F.R.1980.102 (2004). But to be a "whistleblower" under the Sarbanes-Oxley regulations, a blogger's report of wrongdoing must be made to certain authorities, including supervisory authorities within the company. Specifically, a company may not "discharge, demote,

suspend, threaten, harass or in any other manner discriminate" against an employee who provides information or assists in an investigation if the information or assistance is provided to, among others, "[a] person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)." 29 C.F.R. 1980.102(b). A blogger who uses an official company blogosphere may be able to claim whistleblower status if the company monitors postings for evidence of misconduct relating to securities fraud. *Id.* at 1980.102(b)(1). The policy governing the company blogosphere, therefore, should spell out how an allegation of company impropriety will be handled.

Bloggers may claim protection by anti-discrimination laws if the contents of their blogs reveal their protected characteristics. For example, a blogger who discusses his conversion to Islam may allege his subsequent termination was due to his religious beliefs in violation of Title VII. 42 U.S.C. 2000e-2. Similarly, a blogger who discloses his or her homosexual or lesbian preference and is later terminated may assert a sexual preference claim in some jurisdictions. See, e.g., New York City Human Rights Law, § 8-107 (2004). The National Labor Relations Act's protection of employees who discuss the terms, conditions or benefits of employment with other employees has already been extended to e-mail communications, *Timekeeping Systems Inc.*, 323 N.L.R.B. 244 (1997), so it is likely to be applied to blogs.

Apart from the legal limitations, there are practical reasons for terminating or disciplining only those

bloggers who violate a widely disseminated, reasonable policy. A precipitous termination may not only affect employee morale, it may also lead to a public boycott. For example, after the employee-blogger was terminated by Waterstone's, several boycott threats were posted on the site. A "major healthcare organization" asserted, "I will certainly advise that our organization take our purchasing elsewhere." Another poster noted that he "will no longer be shopping at Waterstones." See www.woolamalo.org.uk/2005/01/those-who-profess-to-favor-freedom-and.htm. While some terminated bloggers take a somewhat philosophical approach to their termination, many readers have expressed anger with the blogger's former employer. See, e.g., www.dooce.com; <http://blog.plaxoed.com>.

To reduce exposure to these serious legal issues, employers are adopting well-drafted, reasonable policies that expressly deal with blogging and similar online publishing activities. In their Internet, e-mail and now blogging policies, employers are spelling out employees' responsibilities with respect to trade secrets and other proprietary information, while prohibiting content that negatively reflects on the company, customers or employees. Any content that is harassing, sexually explicit, discriminatory, derogatory, threatening, embarrassing or intimidating is strictly prohibited. Employees are also being banned from using the company's logo, service mark, slogans or other intellectual property. While a disclaimer is helpful, employers should not rely on a disclaimer to distance itself from an employee's blog.

As indicated, an alternative to a policy that regulates individual blogs is to establish an employer blogosphere. This approach may encourage best practices among employees; increase word-of-mouth advertising as customers add their comments to blog postings; and permit the employer to exercise pre-emptive control over blog postings, as opposed to dealing with negative or inappropriate comments after the fact. While a company blogosphere will not pre-empt employees' private blogs, it will provide a structured environment for blogging with well-known and generally accepted ground rules.

While employers will never silence the most vocal bloggers, even by terminating their employment, a well-designed, reasonable policy will provide important protections to the employer and notice to the employees and the public. **NLJ**

This article is reprinted with permission from the June 6, 2005 edition of THE NATIONAL LAW JOURNAL. © 2005 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact American Lawyer Media, Reprint Department at 800-888-8300 x6111. #005-06-05-0011

An alternative is to set up an employer blogosphere.