



OUTSIDE COUNSEL

BY JEFFREY M. SCHLOSSBERG AND KIMBERLY B. MALERBA

Employer Regulation of Blogging

On Sept. 7, 2005, a former Delta Air Lines flight attendant filed a federal sexual discrimination lawsuit claiming that she was suspended then fired because of material she posted on her personal blog.

Should one of your clients call to discuss this case or to report that one of its employees posted a derogatory message about the company on a blog and to ask you about the company's options, how will you respond?

With blogs quickly becoming as prevalent as e-mail, there are two things you must make sure you know: what a blog is and what are the legal restrictions on blogging.

Definition

A blog, short for web log, is an Internet-based bulletin board where anyone and everyone can post their personal ramblings about any topic they desire.¹ With popular culture's widespread use of the Internet, the Web has become virtually as popular in American homes as the telephone.² "[T]he stereotypical 'blogger' [is] sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way."³

While originally blogs were used by the technically savvy, blogs are now being used by the masses as a type of electronic diary where people can post their thoughts on everything from politics and life in general, to comments (sometimes unfavorable) about your client's business. The difference between a blog and a diary, however, is that anyone with access to the Internet can read, copy, e-mail or print the blog entries.

While there are many issues with which an



Jeffrey M. Schlossberg Kimberly B. Malerba

employer must be familiar in order to avoid the hazards described in this article, employers should be aware that there are potential benefits to be gained from blogging, particularly where there is proper monitoring by the employer and a well-drafted blogging policy in place. Blogs have the potential to benefit a company's reputation and create excitement or anticipation about new developments at a company. Consequently, a well-drafted blogging policy, which protects the employer's interests but does not stifle creativity, may be the best approach in this new world of blogging.

Potential Pitfalls

Blogs have become so common in our society that employers cannot afford to ignore the potential pitfalls and problems that blogging may present to their businesses. In the May 2, 2005 edition of *Business Week*, blogs were described as "simply the most explosive outbreak in the information world since the Internet itself."⁴ In fact, *Business Week* reported that there are "some 9 million blogs out there, with 40,000 new ones popping up each day." With this enormous daily increase in bloggers, it is a safe bet that even if businesses have remained safe from attacks by bloggers thus far, it is only a matter of time until their employees or former employees begin blogging about their businesses.

Among the reasons that blogging has caught on so quickly is that it is cheap and easily

accessible. Anyone with access to an Internet connection can set up his or her own blog in a matter of minutes by opening an account with an online blog service. Blogging has become a forum for many (potentially among them your client's employees) to complain about their bosses and comment on work life in general.

The type of open dialogue found on a blog between an employee and the world presents a vast array of concerns that employers must consider in connection with evaluating how to handle an employee blogger.⁵ Because the Internet and blogging are largely unregulated and easily accessible, many individuals view a blog as a viable medium for venting their frustrations about their employer and coworkers. Of greatest concern may be the threat to an employer's proprietary information or trade secrets. Disgruntled employees may choose to disclose confidential information as a means of retribution. And, even if the employer identifies a disgruntled employee and limits his or her blogging, the employer must also consider the nondisgruntled employee. Indeed, a satisfied employee who casually creates blog entries may also naively disclose information that the employer considers proprietary.

Case law dictates that a company must vigilantly protect its trade secrets from public disclosure to prevent loss of trade secret status.⁶ If employees are permitted to blog and publicly discuss company products and processes, is an employer compromising trade secret status by being less than vigilant?

In addition, an employee denied a promotion or a salary increase easily can log on to the Internet and post (truthful or untruthful) negative information about the company. Such negative blogging entries about the way the company handles its employees could result in injury to the company's reputation; even if the entries do not cause immediate losses in revenue, there may be long-term implications if the negative publicity caused by the blogging causes customers and vendors to question the

Jeffrey M. Schlossberg is of counsel in the employment law group at *Ruskin Moscou Faltischek in Uniondale, N.Y.* **Kimberly B. Malerba** is an associate at the firm.

company's ethics or business practices.

For example, a newly hired employee at Google was fired for complaining in a blog that the company's benefits were less generous than his former employer's (Microsoft). Google was highly criticized on various blogs for overreacting. In the *Delta* case, the employee was not disgruntled when she posted images of herself in uniform on the Internet. The company suspended, then fired, her for posting "inappropriate photographs" on the Web. The plaintiff's contention that the company treated men differently led her to file her federal complaint alleging sexual discrimination seeking compensatory and punitive damages.

Aside from the prospect of juries awarding damages, employee blogging entries have caused significant losses following the disclosure of negative product information. For example, in 2004, numerous blog entries reported that a bicycle lock made by a company called Kryptonite could be "picked" with a Bic pen. The negative impact on that company's business was felt quickly and was devastating. As a result of the negative exposure, Kryptonite was forced to announce a free product exchange at an estimated cost of \$10 million.

Additionally, employers may find themselves facing claims of defamation resulting from statements by employees about customers or competitors if the statements appear to be emanating from or supported by the employer. Further, if an employee discloses publicly potential fraudulent behavior of a public company, is that sufficient to protect that employee under the Sarbanes-Oxley whistleblower provisions?

Guiding Law

There is currently a dearth of case law specifically addressing blogging. However, given the ever-rising popularity of this form of communication, issues relating to bloggers, the legality of their actions and the implications for employers will likely take a more prominent place in the courts in the not too distant future (as evidenced by the lawsuit just filed against Delta). What guidance do you give your client now?

As a starting point, in New York, employees of private companies are generally "at-will" employees and they can therefore be disciplined or fired for any reason or no reason so long as it is not otherwise unlawful; for example, based on a discriminatory motive.⁷ Therefore, if an employer wishes to curtail or end an employee's blogging, the employer may lawfully fire or otherwise discipline the employee.⁸ However, as with other employment decisions, a prudent way

to avoid claims of discrimination and accusations that an action was taken arbitrarily is to have a written policy in place.

Notwithstanding the absence of cases involving blogging, counsel may be guided by developments involving e-mail and Internet use generally. In the e-mail arena, which involves issues similar to blogging, courts have found that employees do not have an "expectation of privacy" in their e-mails at work, especially where there exists a policy placing employees on notice.⁹ In addition, New York's limited right to privacy does not prohibit an employer from accessing employee e-mail.¹⁰ Thus, where an employer establishes an appropriate blogging policy, employees likely would have no expectation of privacy in blogging—particularly because the information is on the Internet where it is free for the world to observe.

Accordingly, because at-will employee bloggers have no protection for their blogging activities and no reasonable expectation of privacy, your client should clearly and unequivocally create a policy placing employees on notice that their improper activity could lead to termination. A clear-cut policy uniformly applied will help minimize claims of discrimination. Indeed, part of the Delta flight attendant's contention is that the company did not have a formal policy stating what conduct was prohibited.

Finally, a published and enforced policy could provide a viable defense against third-party claims that a company failed to take reasonable steps to prevent the offending statements from being made.

Implementing a Policy

As noted above, an employer lawfully may fire an at-will employee as a result of inappropriate behavior in connection with blogging activity. However, to ensure that such termination is viewed as nondiscriminatory, it is advisable for employers to adopt a company policy regarding blogging that employees understand and that is enforced.¹¹ Of the many benefits to having a blogging policy, chief among them is putting employees on notice that they have no expectation of privacy in connection with such electronic messages.

A blogging policy should contain language warning employees that a violation of the policy could lead to discipline up to and including termination. Further, the policy should inform employees that they may not communicate any material that violates the privacy rights of another employee, a client or of the company itself. Employees should also be advised that they

cannot disclose any trade secrets or other proprietary, sensitive, confidential or financial information about the company. It is also essential that a blogging policy direct that any entries be unequivocally personal and state that they are not written by or on behalf of the company.

Conclusion

While there are some potential benefits to be gained from positive blogging, the best way to avoid the potential hazards that accompany blogging is to have a well-drafted policy in place that protects the employer's interests and clearly delineates guidelines for employees to follow. If employers heed this advice carefully, employers can enter the blogosphere with their eyes wide open.



1. The Web site dictionary.reference.com, defines a blog as an "online diary; a personal chronological log of thoughts published on a Web page."

2. Stephanie Armour, "Warning: Your clever little blog could get you fired," USA TODAY June 15, 2005 p. B-1 ("Blogs are proliferating as fast as a computer virus. According to a report this year by public relations firm Edelman and Intelliseek, a provider of business-intelligence solutions, about 20,000 new blogs are created daily, and an estimated 10 million U.S. blogs will exist by the end of 2005.")

3. *In re Grand Jury Subpoena, Judith Miller*, 397 F3d 964 (DC Cir), cert den sub nom, *Miller v. U.S.*, 125 SCt 2977 (2005).

4. Stephen Baker and Heather Green, "Blogs will change your business," BUSINESS WEEK, May 2, 2005 at p. 57.

5. Addressing the general problem of lost efficiency due to time spent blogging at work is beyond the scope of this article.

6. *Ashland Mgmt. Inc. v. Janien*, 82 NY2d 395, 407 (1993).

7. Statutes such as Title VII of the Civil Rights Act of 1964, the Age Discrimination Employment Act, the Americans with Disabilities Act, the New York Human Rights Law and the New York City Administrative Code prohibit discriminating against an employee based, inter alia, on race, color, religion, sex, national origin, age, and disability.

8. Public employees may have a greater degree of protection for their blogging activities, depending on the circumstances, as their speech may be considered "of public concern." *Pickering v. Board of Education of Township High School District 205*, 391 US 563 (1968).

9. *Biby v. Board of Regents*, 2005 WL 2000925 at *5 (8th Cir Aug. 22, 2005). See also, *Garity v. John Hancock Mutual Life Ins. Co.*, 2002 WL 974676 at *2 (D. Mass May 7, 2002) (employer's legitimate business interest in protecting employees from workplace harassment trumps purported privacy interest).

10. *Chimarev v. TD Waterhouse Investor Services, Inc.*, 280 FSupp2d 208, 216 (SDNY 2003), aff'd, 2004 WL 1013320 (2d Cir. May 6, 2004).

11. Many major employers are utilizing blogging guidelines to preempt potential problems. See Armour, *supra*.

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