



## EMPLOYMENT LAW

BY JEFFREY S. KLEIN AND NICHOLAS J. PAPPAS

### *When Private Sector Employer Fires Worker for Blogging*

There are currently 63.2 million blogs<sup>1</sup> in existence and 175,000 new blogs are created every day.<sup>2</sup> These numbers, of course, include blogs by employees, a fact which poses both legal and practical difficulties for employers.

Even if employees do not blog on company time and, thus, do not cost their employers any lost productivity, employees may leak trade secrets, information about as-yet unreleased products, defame their employer, coworkers or clients, or post harassing or otherwise inappropriate content on their personal blogs.

Accordingly, as blogs continue to rise in popularity, there have been several prominent instances where employees have used their blogs to comment publicly about their employers.<sup>3</sup>

Employers certainly may seek to prevent an employee from blogging during work hours. But what are an employer's rights if the employee blogs off duty?

Private sector employers generally have broad discretion to discipline or terminate the employment of at-will employees. Employees, however, have begun to argue that their blogging activities are legally protected under a number of theories. As the law in this area is still evolving, employers should pause for a moment to consider carefully how they address and respond to employee blogging relating to workplace issues.

In this article, we will analyze several employment laws that employees may argue apply when a private sector employer seeks to discipline or terminate the employment of employees due to blogging activities.<sup>4</sup>

#### Off-Duty Statutes

In New York, an employer may not discharge, discriminate against, or refuse to hire employees because of their participation in "legal recreational activities" off the employer's premises during nonworking hours unless the activity "creates a material conflict of interest related to the employer's trade secrets, proprietary information



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or other proprietary or business interest." N.Y. Lab. Law §201d(2)(a)(c), (3)(a). The statute defines "recreational activities" as including "any lawful, leisure activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material." Although very few courts have interpreted this statute (and none have applied it to blogging), courts that have analyzed the statute have declined to give "recreational activities" an expansive interpretation. See, e.g., *McCavit v. Swiss Reinsurance America Co.*, 237 F3d 166 (2d Cir. 2001) (holding that dating is not a "recreational activity" protected by the New York legal recreational activities statute).

Employees can be expected to argue that blogs that may be offensive or embarrassing to the employer are lawful recreational activities under the law. Employers, however, can be expected to press for a narrow interpretation of the law that recognizes the employer's right to manage its business and protect its reputation and confidential information.

#### Anti-Retaliation Provisions

Depending on the content of the blog, employers may need to consider the antiretaliation provisions of federal and state employment laws before taking adverse action against an employee blogger. Title VII, for instance, prohibits an employer from retaliating against an employee because the employee has "opposed" any unlawful discriminatory practice. 42 USCS §2000e-3(a). While there are no cases applying Title VII to blogging, courts have held that Title VII's opposition clause "protects informal protests of discriminatory employment practices," *Sumner v. United States Postal Service*,

899 F2d 203 (2d Cir. 1990), and the EEOC has identified complaining to newspapers as an example of "opposing" conduct that is protected by Title VII. EEOC Compliance Manual, available at <http://www.eeoc.gov/policy/docs/retal.html>. See also *Bazile v. City of New York*, 215 FSupp2d 354 (SDNY 2002) (stating that "a person's dealings with a newspaper reporter could conceivably qualify as 'opposing any practice made an unlawful employment practice by Title VII.'"). Employees may attempt to argue that this principle should be extended to protect complaints on a blog about an employer's allegedly discriminatory practices.

The Sarbanes-Oxley Act of 2002 (SOX) protects employees of publicly traded companies who report conduct by the employer that the employees reasonably believe constitutes a violation of §§1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission (SEC), or any provision of federal law relating to fraud against shareholders. SOX §806A; 18 USC §1514A.

To gain protection under the statute, however, an employee must first report the unlawful conduct to a supervisor, a federal regulatory or law enforcement agency, or a member of Congress. *Id.* An employer faced with a retaliation claim under SOX based on a complaint about the employer's practices made on a blog may have a number of arguments as to why a blog posting by itself does not constitute "protected activity" under SOX. For example, the employer may argue that the blog is not specifically addressed to any of the statutorily prescribed individuals or entities to whom an employee must complain to gain protection under the statute.<sup>5</sup> Similarly, the content of the blog would need to specifically relate to acts of fraud by the employer against the company's shareholders in order to qualify as "protected activity." See Jeffrey S. Klein & Nicholas J. Pappas, "Defining 'Whistleblower' Under the Sarbanes-Oxley Act," NYLJ at p. 3, Aug. 7, 2006.

A number of states also have enacted whistleblower statutes applicable to private employers, which employers may wish to consider in analyzing whether employee blogging constitutes legally protected activity.<sup>6</sup>

#### National Labor Relations Act

Employers also should consider whether the content of an employee's blog is protected by the National Labor Relations Act (the NLRA) before

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taking adverse action against the employee. If the blog represents an effort to organize a union or relates to a labor dispute between the employer and its employees, an employee may argue that any discipline to the employee blogger because of the content of the blog would be an unfair labor practice.

For example, in *Konop v. Hawaiian Airlines, Inc.*, 302 F3d 868 (9th Cir. 2002), cert. denied, 537 US 1193 (2003), the U.S. Court of Appeals for the Ninth Circuit found that Hawaiian Airlines's discipline of a pilot who "vigorously criticized" the airline's management and labor concessions sought by the airline on his personal Web site constituted protected union organizing activity. The court rejected Hawaiian's arguments that the pilot lost this protection because his comments contained "malicious, defamatory and insulting material known to be false." *Id.*, at 883. Instead, the court held that the pilot's statements either were "rhetorical hyperbole," opinions, or false statements that lacked the required actual malice needed to make them defamatory. *Id.* According to the court, "federal law gives a union license to use intemperate, abusive or insulting language without fear of restraint of hostility." *Id.*

The protection afforded by the NLRA is not absolute and employees who engage in disloyal behavior or disparage the employer's customers or business activities are not protected by the NLRA. See *NLRB v. Local Union No. 1229, I.B.E.W. (Jefferson Standard)*, 346 US 464, 477-78 (1953). For instance, in *Endicott Interconnect Techs. v. N.L.R.B.*, 453 F3d 532 (D.C. Cir. 2006), the U.S. Court of Appeals for the District of Columbia Circuit reversed the decision of the National Labor Relations Board (NLRB) that an employee's discharge for his Internet posting protesting recent layoffs constituted an unfair labor practice, finding instead that the employee's posting was so detrimentally disloyal that his discharge did not violate the NLRA. In that case, the employee posted on a newspaper's Internet forum that his employer's recent layoff of 200 employees was causing the business to be "tanked." *Id.* at 535. The court found that the employee's comments "constituted 'a sharp, public, disparaging attack upon the quality of the company's product and its business policies' at a 'critical time' for the company," and were therefore unprotected by the NLRA. *Id.* at 537.

Employers wishing to proscribe blogging by employees using the employer's computers or computer network by limiting use of the company's technology to company business should consider whether some blogging activity may be considered "solicitation" of fellow employees for union related purposes under the NLRA. In 1998, the general counsel for the NLRB issued an opinion concluding that an employer's policy prohibiting all nonbusiness use of e-mail by its employees was overly broad and thus unlawful. *Pratt & Whitney*, 1998 WL 1112978 (NLRBGC). The opinion found that the employer's computer network constituted a "work area" and that e-mail was akin to solicitation, which must be permitted in all work areas in the absence of an overriding employer interest, because it is "interactive in nature" and, in contrast to a flyer, it "allows the reader to talk back." *Id.* While there are no cases or opinions applying such reasoning to blogs, employers may expect employees to argue that blogs containing

union-related messages constitute solicitation by likening blogs to e-mail.

## Enforcement

Employers may further anticipate that employees will argue that they may assert claims on a theory of discriminatory enforcement against employee bloggers. For example, in a recent case, a female flight attendant was fired from Delta Air Lines after the airline became aware of her blog, which included "inappropriate" photographs of her in her Delta uniform. The flight attendant subsequently filed suit against Delta alleging, among other things, sex discrimination because Delta allegedly failed to discipline male employees who maintained blogs containing similar content. See *Simonetti v. Delta Air Line Inc.*, Case No. 1:05-CV-2321, complaint filed (N.D. Ga. Sept. 7, 2005).<sup>7</sup> Avoiding such claims may be challenging for employers, who may not be aware of every blog maintained by an employee. However, if an employer decides to take action against an employee blogger based on the content of the blog, the employer may wish to ascertain whether or not it is imposing similar discipline on all similarly situated employees with blogs with similar content published on their blogs.

## Anonymous Bloggers

Employers wishing to take disciplinary action against employee bloggers based on the content of the blog or enforce antiblogging policies face added difficulties when employees blog anonymously or pseudonymously.<sup>8</sup> Courts have held that a company seeking to compel an Internet service provider to disclose the identity of a person acting anonymously or pseudonymously online whom the company alleges has caused harm to the company, must satisfy a four-part test. The company must attempt to notify the unidentified parties of the proceedings, specifically identify the allegedly harmful behavior, set forth a prima facie cause of action against the unidentified parties, and demonstrate that a balancing of the First Amendment right to anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure warrant disclosure. See *Dendrite Int'l, Inc. v. John Doe No. 3*, 775 A2d 756 (N.J. Super. Ct. App. Div. 2001).

For example, in *Immunomedics, Inc. v. Jean Doe*, 775 A2d 773 (N.J. Super. Ct. App. Div. 2001), the court required an Internet service provider to disclose the identity of an anonymous blogger where Immunomedics, the plaintiff-employer, identified the blogger as an employee and the content of the blog violated the Immunomedics's policies and confidentiality agreements to which all employees were subject.

In that case, an anonymous Internet user describing herself as a "worried employee" posted confidential information about Immunomedics on an online forum about the company. Immunomedics asserted that it had sustained injury and that the poster should be held liable under theories of breach of contract and breach of duty of loyalty based on her violation of the company's confidentiality agreement and several provisions of its employee handbook.

The court held that because the postings identified the poster as an employee and because Immunomedics required all employees to execute confidentiality agreements, which the content of the postings clearly

violated, the Internet service provider was required to respond to Immunomedics's subpoena and disclose the identity of the anonymous poster. The court focused its holding on the clear breach of the confidentiality agreement as authority for compelling disclosure and reasoned that Jean Doe should not be granted "an advantageous position" simply because she chose to breach her agreements anonymously and online.

## Business Considerations

Of course, the mere fact that an employer has a legal right to take action against an employee blogger does not mean that the employer should. Aside from the legal consequences of terminating an employee's employment for blogging activity, employers need to be prepared for the public relations ramifications from such terminations. In *Bynog v. SL Green Realty Corp.*, the court refused to enjoin a terminated concierge in a Manhattan apartment building from blogging about the events surrounding the termination of her employment. 2005 U.S. Dist. LEXIS 34617 (SDNY 2005). In addition, several employees who have been discharged for their blogs have become celebrities as a result, with book deals and national media appearances. See Rob Griffin, "Blog Your Way to Fame and Fortune: Bloggers Not Only Write Whatever They Want, They Also Make Money, Independent Save and Spend," Nov. 25, 2006. Some employers may find a blog-related firing carries more potential for adverse publicity than the blog itself, and may therefore choose not to discipline employees bloggers even when doing so would be legally permissible.



1. The term "blog" is short for "weblog." A blog, according to Merriam-Webster's Online Dictionary, is "a Web site that contains an online personal journal with reflections, comments and often hyperlinks provided by the writer."

2. Source: Technorati, a blog search engine: <http://technorati.com/about/>.

3. Widely reported blog-related firings have allegedly occurred at Harvard University, Delta Air Lines, Google, Microsoft, Wells Fargo, and Starbucks, among others. See Kate M. Jackson, "Mixing Blogging with Work Can Lead to Unemployment," Boston Globe, July 3, 2005, at G1. In addition, a recent study by ProofPoint Inc., a messaging security company, found that nearly one in five companies (17.3 percent) has disciplined an employee for violating blog or message board policies in the last year and 7.1 percent of companies have fired an employee for those reasons. Rochelle Stewart, "Careful Sending," Boston Herald, available at <http://news.bostonherald.com/blogs/onlineLiving/?p=197>.

4. Public sector employers must additionally consider the First Amendment before taking any action against employees who blog outside of work.

5. Similarly, §11 of the Occupational Safety and Health Act protects individuals who report complaints of public safety or health concerns, but specifies that the reports must be made to an administrative agency, a superior, or Congress. See Occupational Safety and Health Act of 1970, §11(c), 29 USC §660 (2000); Occupational Safety and Health Administration, "Whistleblowers Investigations Manual," 7-1 (2003) available at [http://www.osha.gov/OshDoc/Directive\\_pdf/DIS\\_0-0\\_9.pdf](http://www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf).

6. See, e.g., N.J. Stat. Ann. §34:19-3. Like SOX, New Jersey's whistleblower statute requires that an employee complain "to a supervisor or to a public body." *Id.*

7. On Sept. 27, 2005, Delta responded by filing a notice of automatic stay because the airline is in Chapter 11 bankruptcy.

8. The Electronic Frontier Foundation advises employees who wish to blog about work to blog anonymously to avoid discipline by their employers. "How to Blog Safely (About Work or Anything Else)," available at <http://www EFF.org/Privacy/Anonymity/blog-anonymously.php>