EMPLOYEES GO CYBER: The Problem of Internet "Blogging"

Barry M. Willoughby and William W. Bowser

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Disgruntled employees, like the public at large, are increasingly turning to Cyberspace as a way to vent their frustrations. Whether workplace dissatisfaction is real or perceived, online communication provides employees with a wide audience at little or no cost. Having a workplace blogging policy, while not a cure all, is an important first step to protecting your company.

What Is A Blog Anyway?

A blog, short for "web log," is an Internet application containing periodic postings. Blogs are accessible to anyone with access to the Internet and often allow visitors to leave public comments. They're easy to access and free to use, and they can reach a potentially unlimited audience, which may include your employees, customers, and competitors. It is estimated that there are over 60 million blogs and that the number of blogs doubles every six months.

While the number of blogs is exploding, most employers have failed to take steps to shield themselves from potential liability by developing a clear blogging policy. A recent national study indicates that only 15 percent of employers have specific policies regarding blogging. Nevertheless, blogs by your present and former employees pose workplace risks, including the following.

*Breach of confidentiality***.** A blogger may reveal confidential information about the company, including trade secrets. For example, a blogger may, with or without thinking about the implications, reveal details of a new product that's under development. Or an accounting department blogger complaining about having to work an all-nighter on a big stock deal may inadvertently be revealing insider information.

Defamation. The freewheeling culture of blogging may encourage people to say things online that could defame their employer, management, co-workers, customers, or competitors.

*Harassing or otherwise offensive content***.** Imagine an employee with a disability who is accommodated with a modified work schedule in compliance with the Americans with Disabilities Act. The employer has properly responded to inquiries about the arrangement by saying only that the company is handling the individual's situation in accordance with federal law. A blogger complains that the "slacker" is being allowed to come and go as he pleases while the rest of the department suffers for it and speculates about the person's possible medical condition.

Or imagine a blogger spreading completely speculative rumors that a recently promoted colleague got the job by performing sexual favors for the boss. Conversation that shouldn't go unaddressed in the workplace can be extremely difficult to curb when it occurs anonymously in cyberspace.

Inappropriate content. Such content can range from postings that are disrespectful to your company to those that are completely unrelated to employment but may still reflect on you.

Barry M. Willoughby

William W. Bowser

Are Bloggers Protected?

The "employment at will" doctrine would seem to insulate an employer from liability for discharging or otherwise disciplining employees who post disparaging comments about their employers or co-workers, or who otherwise post inappropriate material. While most employees think they have a "First Amendment right" of free speech to blog as the please, only public employees actually have constitutional protection because of the "state action" requirement.

Employers have therefore terminated employees for postings the company deemed inappropriate. There is even a term for terminating an employee for posting comments on his or her website. It's called "Doocing," based on an employer's discharge of an employee for writing about her co-workers on a website called "Dooce.com." Employees have been "dooced" for anything from making offensive remarks to posting provocative photographs of themselves.

Still, private employers face potential claims for disciplining bloggers. In the wake of Enron, many states have passed private sector whistle-blower protection acts. For example, the New Jersey Conscientious Employee Protection Act, N.J. Stat. § 34:19-1, et seq., provides that an employer may not retaliate against an employee for disclosing or threatening to disclose conduct that the employee "reasonably" believes is illegal. Delaware has a similar law. 19 Del. C. § 1701, et seq. An employee who is terminated for discussing his or her belief on a blog that the employer is engaged in illegal conduct may be protected.

Likewise, under the National Labor Relations Act, both union and non-union employees who engage in "concerted activities" are protected from discipline. 29 U.S.C. § 157. Discussions about "wages, hours, or terms or conditions of employment" are statutorily protected. For example, an employer may not discipline employees for blogging about the company's pay scale or vacation policy. See *Timekeeping System, Inc*., 323 NLRB 244, 247-49 (1997). (email discussions with co-workers regarding proposed vacation policy constituted protected activity).

Many states have also enacted statutes that prohibit the employer from discharging or disciplining an employee who engages in "lawful off-duty conduct." See, e.g., N.C. Gen. Stmt. § 95-28.2. N.D.C.C. § 14-02.4-03. Cal. Lab. Code §§ 96(k), 1101, and 1102. Many of these laws were originally designed as concealed "smokers rights" statutes to prohibit employers from firing or refusing to hire smokers. Nevertheless, by their terms, they protect employees from discipline from off-duty conduct that is lawful. Such statutes could certainly be used by discharged employees to challenge a dismissal for a posting made while they were "off duty."

The Problem Of The Anonymous Blogger

Anonymous bloggers, of course, pose a special challenge. To gain access to the identities of those who post defamatory comments or who reveal confidential information or trade secrets, companies have turned to the courts and issued subpoenas to Internet providers for the web address of the blogger. The company initiates an action against John or Jane Doe defendants. A subpoena is then issued to Internet service providers seeking the web addresses and identities of the blogger.

Two recent decisions, however, suggest that employers may find the courts unexpectedly protective of bloggers' identities. For example, in *John Doe No. 1 v. Cahill,* 884 A.2d 451 (Del. 2005), the Delaware Supreme Court reversed a lower court ruling finding that the victim of the defamatory remarks need only make a showing of "good faith" to enforce a subpoena compelling the disclosure of the blogger's identity. The Delaware Supreme Court opted for a higher standard requiring the party seeking the blogger's identity to post a notice on the same message board where the offensive posting was made notifying the blogger that he or she is the subject of a subpoena. Once that requirement is met, the party seeking to enforce the subpoena must satisfy the Court on a "summary judgment standard" that a third party would understand that the posting was defamatory.

In *Grady v. Superior Court of Santa Clara County (Apple Computer)*, 139 Cal. App. 4th 1423 (Cal. Ct. App. 2006), the California Sixth Appellate District also reversed a trial level court's decision directing web service providers to disclose the identities of individuals, presumably employees, who gave confidential information about products under development to an "online magazine." The Court found that the federal Stored Communications Act, 18 U.S.C. §§ 2701-2712, prohibited enforcement of the subpoena as did the state "Reporter's Privilege" law. Employers are, therefore, likely to encounter significant legal obstacles to obtain a court order to enforce a subpoena issued to an Internet provider for the purpose of identifying a blogger, even when the blogger has engaged in seemingly outrageous conduct.

The Employer's Best Defense: A Blogging Policy

It's important that employers include blogging in their Internet or electronic communications policy. The policy should prohibit disparaging the company or its employees, customers, or competitors either by name or implication. As with other policies, it should be communicated to employees when they're hired and periodically thereafter. It also should also caution them that they must avoid creating the impression that the views expressed on a blog are anything more than personal opinions.

Following are some points to consider in establishing a corporate blogging policy:

1. Notify employees that blogging during work time is prohibited and limit blogging that interferes with workplace commitments.

2. Remind employees that in blogging, as in other activities, they must respect the company's confidentiality and proprietary information. Employees should be reminded of the confidentiality provision in the employee handbook and, if they're required to sign confidentiality agreements, of their commitments under those agreements.

3. Employees who have questions about the blogging guidelines should direct their questions to a designated company official who will serve as the authority on the policy and on helping employees understand how it applies to their situations.

4. As with all communications, persons communicating through blogs are expected to treat the company and it employees, customers, and competitors with respect.

5. Notify employees that certain topics are not to be disclosed for confidentiality or legal compliance reasons, and employees are expected to honor those requests.

6. Advise employees that harassing comments or discriminatory attacks, or offensive and defamatory statements about co-workers are prohibited.

7. Advise employees that they must honor copyright laws.

8. Inform employees that they are subject to discipline including discharge for violation of the company policy.

The benefit of a blogging policy is that it puts employees on notice of the standards of conduct that apply to blog postings. If the employer learns that an employee has violated the policy, the situation can be addressed through the normal disciplinary process. Before imposing discipline, however, remember that state laws differ and certain types of communications may be protected under state and federal law. Employers should consult counsel before taking disciplinary action based on a blog posting.

Barry M. Willoughby *is a Partner and Chair of the Employment Law Section of Young Conaway Stargatt & Taylor, LLP and* ***William W. Bowser*** *is a Partner in the Employment Law and Litigation and Trial Practice Section of the firm.*

Please email the authors at bwilloughby@ycst.com or wbowser@ycst.com with questions about this article.