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To Blog or Not to Blog

Some employees see them as the perfect way to vent frustration. But are personal Web logs protected by the First Amendment? Not exactly.

BY CHERE B. ESTRIN

The Internet. E-mail. Webcams. And now—drum roll please—blogging. This current evolution of technology has caused the world's workplace to fire employees for actions never before heard of, much less thought about.

Take, for instance, the Delta Air Lines flight attendant who claims she was fired over pictures she posted on her personal Web log, or blog, that she says the airline deemed "inappropriate." The blogger, who called herself "Queen of Sky," told BBC News that she was suspended indefinitely without pay after posting pictures of herself in somewhat provocative poses—and in uniform—on her blog.

Friendster, an online social networking site, canned an employee last summer for her online musings, as "Troutgirl," about the company. Those comments were somewhat negative, but primarily about the speed of software launches, not specifically about company decisions. And a Microsoft contractor lost his gig after posting on his blog "eclecticism" photos of Apple computers arriving at the software giant's Redmond, Wash., headquarters. Apparently, there's a rule against revealing traffic through the mail and copy center on the Redmond campus. Lordy, lordy, lordy.

IN-HOUSE COUNSEL

BLOGGING ON THE JOB

Employee blogging is on the rise, sparking increasing clashes between workers and management over the line between appropriate and inappropriate commentary. While blogging can be used by companies as an inexpensive, successful marketing campaign, there are blogs that aren't as well-meaning. In recent months, Apple Computer has launched legal attacks against operators of at least three Internet sites—not run by Apple employees—that allegedly posted or linked to information that the Cupertino, Calif., maker of the iPod portable music player claims is proprietary.

In one blog I reviewed, Cliff Palefsky, a San Francisco employment lawyer, stated there's a false sense that employers can't punish their workers for voicing personal opinions—on their blogs or anywhere else.

"People mistakenly believe that the First Amendment protects them in the workplace, which is generally not the case," he wrote. Even people in the legal field can make that mistake. Paralegals, secretaries, support staff, and administrators have not necessarily studied the First Amendment, and frankly, for most attorneys, it was a class in law school a long time ago.

But as the Electronic Frontier Foundation points out: "While your right to free speech is protected by the First Amendment, this protection does not shield you from the consequences of what you say. The First Amendment protects speech from being censored by the government; it does not regulate what private parties (such as most employers) do."

It seems as though blogging would be the perfect vehicle to vent your frustrations and get some peer support. But hold on there, fella! If you are at all considering creating a blog, you need to hold blogging in the same regard as speaking to the media or violating client confidentiality. It just may not be all that apparent, even for lawyers, that confidentiality can be breached in blogs just as was recognized about the possible perils of e-mail a few years ago

The legal world has already set a precedent for blabbing with a Web site called "Greedy Associates" that allows associates, primarily from major firms, to share anonymous salary information and opinions about the quality of law practice and life in their firms. While the Web site allows writers to post anonymously, it also appears to be some kind of hate festivity with childlike barbs aimed at each other. (So much for the consequences of stress in a law firm.)

However, here's something all employees should keep in mind: When you blog something, it becomes open to the world. If you are about to write something you would not want repeated to your supervisor, you probably should not blog it. Even anonymous comments might be troublesome, like this recent

post by "merle" to Greedy Associates: "Clausen Miller in NY is not a 'Big Firm' firm. It's a little firm in big firm clothing. Starting salary is probably half what the real firms pay, and the bonuses aren't a big deal. The hours are not too bad though."

Because the world of blogging is pretty new, many firms and companies may not have strategies in place for employees who mention their firm or corporate legal department in a blog. If you have doubts about a certain workplace issue on your blog, it's very simple: Don't write it. And for heaven's sake, if you write about a case or matter you are working on, you should have your fingers permanently glued together. Blogging presents serious pitfalls for legal professionals because inappropriate comments posted on the Web can be both far-reaching and difficult to erase when they're picked up on another's blog.

I've witnessed how blogs can clog up billable time. Apparently, some employees feel it is their inherent right to contribute to blogs on their employer's time. According to the *Blog Herald*, as of April 2005, the best guesstimate of the number of blogs is more than 50 million worldwide. Instead of thinking that these employees are knowledgeable, I get just the opposite impression: I wonder how much work they do, if any, all day long.

In many states, employees who don't have a contract, including most attorneys and paralegals, are considered "at will," which means they can quit at any time and for any reason. Conversely, employers have the right to fire them at any time and for any reason, except for well-known exceptions like race, age, or gender.

Whether a supervisor discovers an underling ridiculing his recent weight gain at the company elevator bank, at a local bar after work, or on the worker's personal blog doesn't matter. In any of these instances, the boss can turn around and say, "I don't think you are a fit on our team. Why don't you work for someone else?" and legitimately get away with it.

But revealing internal secrets about your company or law firm in public is now and has always been a foolish thing to do. Many law firms and corporate legal departments already forbid employees to talk to journalists about work matters, and the blog is the most efficient way of informing the world how you feel. Don't look for the journalistic ethic of protecting sources to apply here. It is unlikely that bloggers will want to offer the same protection. Companies and law firms are not democracies: freedom of speech might be your natural right, but so is a company's freedom to show you the door.

As anyone who has worked on violation-of-trade-secret cases knows, once the cat is out of the bag and the information has been disclosed, it can't be undisclosed. Your job, as a legal professional, is most definitely at risk if you step over the line. Come on—it's really much better to err on the side of conservatively disseminating innocuous information than violating confidentiality while using raging fingers.

Employment litigation these days is rampant. If you find a blog that is revealing confidential information, you might want to confide in a supervisor or other employee whom you can trust. There's the key question: If release of confidential information violates trade secrets and you knew about it but did nothing, are you a passive participant? Just as policies developed in recent years regarding confidentiality, relationships between employer and employee, e-mail, and more, firms and in-house departments will ultimately reach the point of developing a policy for blogging.

But as Anil Dash, vice president of the company behind the popular blog software TypePad told the Associated Press, those publicized firings have not been over blogging per se. They all appear to have occurred because of other company violations done through blogging. So, be sure you know and follow your firm's or company's general employment guidelines, including protection of confidential information. And for heaven's sake, use common sense!

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