Chapter 16

Employee Blogging

§ 16:1 Introduction

The world of blogs is expanding exponentially. A blog (short for “weblog”) is a website featuring regular entries of commentary, descriptions of events, or multimedia. Most blogs are maintained by individuals, and they generally address specific topics or serve as personal diaries. The blog search engine Technorati has indexed more than 133 million blog records since 2002, and marketing experts estimate that approximately 25 million Americans blog.1 Predictably, blogs have become an emerging issue to employers as their employees enter the “blogosphere” in increasing numbers.

Employee blogging raises a host of concerns for employers. Many bloggers discuss their jobs or careers, and blog posts about an employer may be public and available for long periods of time before that employer discovers them. How, then, can an employer safeguard against dissemination of trade secrets,.

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§ 16:2 Concerns with Employee Blogs

Employee bloggers opine on a range of topics, which may include their hobbies, travels, politics, and—not surprisingly—their jobs. For example, bloggers might use their journals to vent about their job assignments, their supervisors, or office policies and politics. The increase in employee blogging raises the following potential concerns:

(1) Reduced productivity if employees are blogging during company time (and using company resources);
(2) Leaking confidential information and/or trade secrets (either intentionally or inadvertently);
(3) Posting defamatory, offensive, or inappropriate comments that may subject an employer to liability; and
(4) Posting content that may have a disparaging effect on a company and its products, services, goodwill, or overall image (sometimes known as “cybersmearing”).

While violations of company policy or breaches of loyalty often present clear cases, a number of statutes and laws may provide some protection to employees who blog. This raises a general question: If an employer does not approve of the content of an employee’s blog, can the employer legally discipline the employee?

§ 16:3 Sources of Protection for Bloggers

§ 16:3.1 NLRA—Concerted Activity

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, prohibits an employer from interfering with union organization or with “concerted activity”—the ability of employees to discuss benefits, wages, and other terms
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and conditions of employment. The NLRA protects employees’ rights to communicate among themselves about these issues and bring them to the employer’s attention. These rights are protected both during work hours and while off duty. The language of section 7 applies to all employees in the workplace who are engaged in “concerted activity for mutual aid and protection,” not just those who are already involved with unions. See NLRB v. Wash. Aluminum, 370 U.S. 9 (1962) (interpreting section 7 and applying the law in a nonunion context). If an employer fires an employee for blogging about low wages, poor benefits, or long work hours, that employee may have a viable claim under section 7 of the NLRA.

However, attacks on an employer that are unrelated to employment conditions are not protected by the NLRA. If an employee attacks the employer generally, without reference to the terms and conditions of employment, the speech is not protected under the Act. See NLRB v. Local Union 1229 (Jefferson Standard), 346 U.S. 464, 476–77 (1953) (refusing to extend protection to speech that attacked the quality of an employer’s product, without more).

§ 16:3.2 Whistleblower and Retaliation Laws

Dozens of federal laws protect whistleblowers and shield workers from retaliation. Additionally, a number of states, including New York and California, provide protection for employees who report wrongdoing, internally or externally.

Generally, in order to invoke the protection of a whistleblower statute, the employee must first have made some report to a government agency. In other words, they must actually “blow the whistle.” Similarly, anti-retaliation laws protect employees who report wrongdoing (such as discrimination and harassment) through internal channels. Blogging about problems or violations of law, without more, may not be enough to be covered under this umbrella. However, because whistleblowers may blog as well, employers should be aware of the issue and maintain a policy about publication of company affairs on the Internet.

§ 16:3.3 Discrimination Laws

Should employers seek to investigate and reprimand employees for personal blogs that may be potentially injurious to the company’s good will or reputation, employers must be sure to conduct such investigations and take enforcement actions in a nondiscriminatory manner. Enforcement against employee blogs can lead to discriminatory enforcement claims. For example, Delta Air Lines terminated an employee who referred to herself as “Queen of the Sky” for posting sexually suggestive photographs of herself in a Delta
uniform. The employee then filed a sex-discrimination complaint against Delta with the Equal Employment Opportunity Commission and a multi-million dollar lawsuit against Delta, claiming that other employees, primarily men, have posted photographs of themselves in uniform on the Web without incident. The case is still pending. Simonetti v. Delta Airlines, Inc., No. 05-2321 (N.D. Ga. filed Sept. 7, 2005).

§ 16:3.4 State Privacy Protection and Off-Duty Conduct Laws

Some states, notably New York and California, have off-duty conduct statutes. These laws limit the ability of an employer to discipline or terminate an employee for engaging in lawful, off-duty political or recreational activity that does not present a conflict with the employer's business. The case law interpreting these statutes is limited, but blogging could conceivably fall under the umbrella of protected activities under certain circumstances.

In addition to New York and California, similar statutes have been enacted in Colorado, Connecticut, and North Dakota. This chapter focuses on the New York and California statutes, and addresses right-to-privacy issues under the California State Constitution.

[A] New York Labor Law

New York Labor Law prohibits discrimination against an employee for his or her participation in “legal recreational activities outside work hours.” N.Y. LAB. LAW § 201-d(2)(c). The statute defines “recreational activities” as “any lawful, leisure-time 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.” N.Y. LAB. LAW § 201-d(1)(b). These recreational activities must take place outside of working hours, off the employer’s premises, and without use of the employer’s property to qualify for protection. N.Y. LAB. LAW § 201-d(2)(c). The statute also protects an employee’s right to engage in legal political activities on the employee’s own time and without use of company property. N.Y. LAB. LAW § 201-d(2)(a).

[A][1] The Definition of “Recreational Activities”

Since the law was enacted in 1992, there have been very few decisions—and none on blogging—interpreting the scope of “recreational activities.” Early district court decisions construed the term fairly broadly, but subsequent
New York state appellate decisions and a decision by the Second Circuit have narrowed the statute’s reach.

In 1995, the Southern District ruled that cohabitation was a protected activity under section 201-d. Pasch v. Katz Media Corp., No. 94 CIV. 8554, 1995 WL 469710, at *3 (S.D.N.Y. Aug. 8, 1995). In *Pasch*, an employee alleged she was fired for maintaining a “personal relationship” and cohabiting with a company executive. Based on the legislative history of section 201-d, the district court took a position contrary to an earlier appellate division decision, State v. Wal-Mart Stores, 621 N.Y.S.2d 150 (N.Y. App. Div. 1995).

Three years later, the district court held that “friendships,” or non-romantic personal relationships, were also protected under section 201-d. Aquilone v. Repub. Bank of N.Y., No. 98 Civ. 5451, 1998 WL 872425, at *6 (S.D.N.Y. Dec. 15, 1998). The court cited the reasoning of *Pasch*, noting that the New York Court of Appeals had yet to rule on the issue. *Id.*

However, New York state courts have refused to take such a broad view of section 201-d, and a more recent Second Circuit case adopts this trend. The Third Department held in 1995 that cohabitation is not protected under the Labor Law—the decision later questioned by the Southern District, as noted above. Wal-Mart Stores, 621 N.Y.S.2d at 152. The court in *Wal-Mart* found that dating and other personal relationships are “entirely distinct from and, in fact, bear[ ] little resemblance to ‘recreational activity.’” *Id.* This reasoning has been adopted by appellate courts in the First and Second Departments. Hudson v. Goldman Sachs & Co., 725 N.Y.S.2d 318, 319 (N.Y. App. Div. 2001) (holding that, per *Wal-Mart*, romantic relationships are not protected under section 201-d); Bilquin v. Roman Catholic Church, 729 N.Y.S.2d 519 (N.Y. App. Div. 2001) (holding, contrary to *Pasch*, that cohabitation is not protected recreational activity). The Second Circuit weighed in on the issue in 2001 and held, contrary to *Pasch* and *Aquilone*, that romantic relationships are not protected activity. McCavitt v. Swiss Reinsurance Am. Corp., 237 F.3d 166, 167–68 (2d Cir. 2001) (noting fundamental differences between the nature of the listed activities and “romantic dating”).

The disputed issues to date have centered around personal relationships, not around activities resembling blogging. While recent decisions have taken a narrow view, it is likely that blogging fits more squarely into the definition of recreation, potentially as a “hobby.”

[A][2] **Limits on the Scope of “Recreation”**

The protection for recreational activity is limited: An employer may refuse to hire, discipline, or terminate an employee if the activity “creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest.” N.Y. Lab. Law § 201-d(3)(a).
The statute plainly leaves room for employers to argue that they can discipline an employee whose blog contains material that reveals trade secrets or otherwise disparages the employer.


The more difficult question is whether an employer can take action against an employee whose blog contains embarrassing material that is facially unrelated to the company. For example, could an employee rely on the Labor Law’s off-duty protection if the employee is fired due to sexually explicit material on the employee’s blog? An employer may argue that embarrassing material in the employee’s blog undermines some business interest, whether financial or something less tangible, such as the company’s goodwill or reputation. Whether such a blog falls under the Labor Law exception is likely to be evaluated on a case-by-case basis based on the specific factual circumstances.

[B] California Labor Law

California has a similar off-duty conduct statute. The law prohibits discharge or discrimination in employment based on “lawful conduct occurring during nonworking hours away from the employer’s premises” and allows California’s Labor Commissioner to pursue these claims on an employee’s behalf. CAL. LAB. CODE §§ 96(k), 98.6. However, California courts have construed these protections narrowly, limiting claims under section 96(k) to those alleging violation of constitutional rights. Also, notably, the California State Constitution protects the right to privacy, and unlike federal constitutional claims, that right may be enforced against private employers. Both of these considerations should affect the way employers investigate and respond to problems presented by employee blogging.

[B][1] The Scope of “Lawful Conduct” Under Section 96(k)

The language of section 96(k) appears broad, but has been applied narrowly by the courts. Indeed, California appellate courts have held that the statute creates no substantive rights, but instead allows the commissioner to pursue violations of existing civil rights. In order to state a claim under section 96(k) for termination or discrimination in violation of public policy,
the employee must allege violations of “recognized constitutional rights.”\(^2\)


In Barbee, the court addressed a wrongful termination claim under section 96(k). The plaintiff employee was terminated when it was discovered that he had continued to date a subordinate after the relationship had been discovered by management and ostensibly ended. Barbee claimed a violation of his right to privacy and termination in violation of section 96(k). The court found that, under these circumstances, no reasonable expectation of privacy existed, based on the following facts:

1. There was no established custom or community norm giving rise to a privacy right in such situations;
2. The employer had an interest in avoiding conflicts of interest; and
3. The company had a policy discouraging these relationships and requiring disclosure.

Further, because no violation of his constitutional privacy right existed, no claim could exist under section 96(k). Barbee, 113 Cal. App. at 532–33. The court performed this analysis in the context of private employment because the privacy guarantees of California’s Constitution apply to private actors. Hill v. Nat’l Collegiate Athletic Ass’n, 7 Cal. 4th 1, 20 (Cal. 1994).

In Grinzi, the employer terminated the employee, informing her that the cause was improper use of company email. The plaintiff employee alleged this was pretext and that the true reason was her involvement in an investment club the employer believed to be an illegal Ponzi scheme. The plaintiff claimed a violation of her First Amendment free speech rights under the federal constitution and section 96(k). The appellate court affirmed the trial court’s dismissal. Because the employer was a private entity, no cause of action for violation of free speech rights could be sustained absent state action, either through the First Amendment or the labor law. Grinzi, 120 Cal. App. 4th at 86.

Whether or not blogging may be protected under California’s “lawful conduct” statute turns on whether employee discipline or termination would impinge on constitutional rights. Perhaps the most obvious suspect, the right

\(^2\) It is important to note that certain civil rights provisions of the California Constitution apply to private action and, thus, to private employers—notably the right to privacy and protections against discrimination. These are discussed below.
to free speech, is not an issue for private employers. Unlike the protections for privacy in the California Constitution analyzed in *Barbee*, California’s protections for free speech require state action. See *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 26 Cal. 4th at 1013, 1031 (Sup. Ct. 2001). However, privacy rights are enforceable against private actors and could affect employer liability.

[B][2] **The Scope of Privacy Rights Under California Law**

As mentioned above and as stated in the *Hill* case, the right to privacy guaranteed in article 1, section 1 of the California Constitution is applicable against private actors. This may have implications for private employers, who could be subject to direct suit or a suit through the labor commissioner under section 96(k) for violations of the right to privacy.

A plaintiff alleging an invasion of privacy in violation of state constitutional right to privacy must establish each of the following:

1. a legally protected privacy interest;
2. a reasonable expectation of privacy in the circumstances; and
3. conduct by defendant constituting a serious invasion of privacy.

*Hill*, 7 Cal. 4th at 39–40. In cases of search and seizure, the state protection is “no broader than . . . the ‘privacy’ protected by the Fourth Amendment.”

A recent Ninth Circuit decision addressed employee privacy rights in electronic communications, in the context of text messaging on employer-provided electronic pagers. Here, the plaintiff was a member of the city’s police force. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 895 (9th Cir. 2008). The city provided alphanumeric pagers to the police force through Arch Wireless, and each pager had a monthly usage limit. If an employee went over the text limit, the employee would generally pay for the overages. An informal policy was in place under which (a) the employee could pay the overage without incident, or (b) the department could review the messages to determine the amount owed for personal use. While the department supervisor had referred orally to text messages as “email” subject to the city’s acceptable network use policy (which explicitly gave the city the right to search email and denied any expectation of privacy), text messaging in practice was handled by the informal policy, which was allegedly stated by a lieutenant as “if you don’t want us to read it, pay the overage fee.” *Id.* at 897.

After repeated overages, the supervisors ordered transcripts of the text messages from Arch Wireless, including Jeff Quon’s. The department discovered that many of Quon’s messages “were personal in nature, and were often sexually explicit.” *Id.* at 898. Quon brought suit, alleging violations of the
The Ninth Circuit found for Quon as a matter of law on the invasion of privacy claim. Noting California’s congruence with federal search-and-seizure protection, the court performed a Fourth Amendment analysis: whether Quon had a reasonable expectation of privacy in his text messages, and whether the search by the city was reasonable under the circumstances.

On these facts, the court held that there was a legitimate expectation of privacy in the text messages based on the informal policy followed by the department. While “address” information—such as the sender, recipient, date, and time—may not be subject to an expectation of privacy, the content of those messages generally is protected. Because the city’s official email policy allowing the employer unfettered access was not the “operational reality” in the department, the court held that Quon had a reasonable expectation of privacy in the content of his text messages. *Id.* at 906–08. Additionally, the court held that the full review of the text messages by the department was unreasonable—the messages could have been reviewed in a redacted format or otherwise manipulated to protect the content. Because less intrusive methods were feasible, the search violated Quon’s right to privacy. *Id.*

**[B][3]** Privacy Rights in the Context of Blogging

How is *Quon* relevant to employee blogging? First, under California law, a private employer may be held liable for violations of the state right to privacy. Thus, unless employers make it clear through well-defined technology policies that network and equipment use is subject to monitoring and search, an employee may arguably claim a privacy right in blog-related materials and activities that take place through the use of company technology. While publicly available blog postings would not be the subject of any privacy protection, stored or archived material on a work computer could potentially qualify. Additionally, employers should instruct those responsible for administering IT policy not to make any representations that those policies will not be enforced.

While communications that take place over a company network are not subject to a reasonable expectation of privacy, those that take place over outside networks—such as the one in Arch Wireless—may be. If a company laptop is used at home to post information on a personal blog and no company policy addresses employer access to the laptop, information on that laptop could be the subject of a privacy claim, depending on the circumstances.

Finally, many employers provide cell phones, BlackBerry devices, or other communications devices to their employees. Blogging in recent years has truly gone mobile. A web service called Twitter provides “microblogging” capabil-
ities—a blog updated solely by text message, anytime, anywhere. Combine the challenges of blogging with the facts presented by Quon, and one finds good cause to review acceptable use policies. Because technology has advanced, company policies must advance.

§ 16:4 Practice Pointers

To maximize the protection from possible negative effects from employee blogs, employers should adopt clear policies governing employee conduct and obligations and directly address the issue of harmful or embarrassing blogs. What blogging policy is appropriate varies depending on the culture and needs of the employer. However, most blogging policies should contain at least the following provisions:

1. Blogging may not be done on company time or with the use of company computers;
2. Bloggers must comply with all of the company’s policies, including, but not limited to, the code of conduct and the discrimination and harassment policies;
3. Blogs are individual interactions, not corporate communications, and employees must not represent or imply that they are expressing the opinion of the company. Bloggers are personally responsible for the contents of their blogs; and
4. Bloggers must never disclose any confidential or proprietary information of the company.

Employers should send a message to employees: Respect yourself, your coworkers, and your company. Employers must impress upon employees not to put anything on a blog that will embarrass, insult, demean, or damage the reputation of the company, its products and customers, or any of its employees. By establishing clear policies and keeping abreast of applicable law and its developments, problems with personal blogging can be minimized to the greatest extent possible.