

THE PRIVACY OF DEATH: AN EMERGENT JURISPRUDENCE AND LEGAL REBUKE
TO MEDIA EXPLOITATION AND A VOYEURISTIC CULTURE

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I. INTRODUCTION

A. *The Blogging Phenomenon*

Blogs (short for weblogs) have revolutionized the Internet by allowing the non-technically inclined to easily update online content.¹ Conventional website creation previously required expertise with Hyper Text Mctnwr Language (“HTML”) or HTML editing software. While the HTML process consumes a great deal of time in editing and design, blogging software allows an individual to enter new log entries on a website with the click of a button.² Not surprisingly, the advent of blogs has resulted in a phenomenon that cannot be ignored. The question is no longer whether the public will blog, but to what extent.³ Blogging, like e-mail, has become another method for efficient public communication.

As is often the case with new technologies, many businesses fear blogging because of its potential for misuse. Blogs draw suspicion for the same reasons they have become so wildly popular—ease of use and instant content updates. Traditionally, companies have controlled customer communication through advertising, press releases, and financial reports. With a blog, an employee can make unauthorized representations about her company that can reach millions of people. A fearful CEO could easily visualize an employee releasing company trade secrets or criticizing company decisions through blogs.

As a result, some companies have disciplined employees harshly to set an example. Widespread are reports of employee terminations due to blogging, under circumstances ranging from obvious lack of employee

1. *See infra* Part II.

2. *See id.*

3. *See id.*

discretion to questionable employer paranoia. For example, a Delta Airlines flight attendant was fired for posting suggestive photographs of herself in her Delta uniform on her personal blog.⁴ The Automobile Club of Southern California (“Auto Club”) fired 27 employees for posting comments about the weight and sexual orientation of fellow employees on a popular social networking website.⁵ Additionally, a computer programmer was fired after blogging about his past addictions to nicotine, alcohol, and marijuana.⁶

A few companies, however, have begun to encourage employee blogging. Companies such as Sony and Microsoft are using blogs as a marketing tool to interact with their customers.⁷ Even corporate executives such as General Motors Vice Chairman Bob Lutz are blogging.⁸ These companies want their employees to build a relationship with their customers through blogging.

B. The Problems

Blogging presents a technological and legal nightmare for companies. How does a company control blogging when the technology’s purpose is instant data delivery to a potentially unlimited audience? Moreover, to what extent does the company limit blogging in recognition of the technology’s massive marketing potential? Companies also may fear liability when they encourage their employees to blog.

As those who have been fired for blogging can attest, blogging presents problems for employees as well. How should blogging employees protect themselves from employer retribution? Should employees post anonymously to prevent employers from finding their blogs at all?

This comment explores the relevant legal issues presented by these problems and proposes a solution. Part II provides a brief history of the

4. Diary of a Fired Flight Attendant, <http://queenofsky.journalspace.com> (last visited Sept. 10, 2005).

5. Associated Press, *Auto Club Fires 27 Workers Over Blog Posts*, MSNBC.COM, Aug. 6, 2005, <http://www.msnbc.msn.com/id/8845731> [hereinafter *Auto Club*].

6. Although Mark Pilgrim, the author of a popular Web programming site, no longer used drugs, his manager demanded that he take down his personal blog. Pilgrim offered to compromise by unlinking his blog from the programming site, but his manager refused the offer. When Pilgrim posted his resume on his blog in anticipation of being fired, his manager used the posting as a reason to fire Pilgrim. See Paul. S. Gutman, *Say What?: Blogging and Employment Law in Conflict*, 27 COLUM. J.L. & ARTS 145, 148–49 (2003).

7. See Jason Krause, *To Blog or Not to Blog*, A.B.A. J. E-REPORT, May 6, 2005, 4 No. 18 A.B.A. J. E-Report 5 (Westlaw).

8. See generally Auto Industry News from the GM FastLane Blog and Bob Lutz, <http://fastlane.gmblogs.com> (last visited Sept. 27, 2005).

blogging phenomenon. Part III sets the stage for each side's legal position in the blogging war with discussions of the at-will presumption in employment law and the First Amendment. Part IV analyzes the legality as well as the practicality of anonymous blogging. Part V proposes employer blogging policies as solutions to the problem. Finally, Part VI concludes by advocating that courts should adopt policies that further the use of this new and important technology rather than inhibiting their growth.

II. THE EVOLUTION OF BLOGGING

Blogs have proliferated because they can be easily created and maintained. To the average user, a blog may not appear any different than a website. In fact, blogging is in essence merely another method of publishing a website. Blogging software simplifies publication by sacrificing customizability in favor of speed.⁹ A blog typically looks like a journal, with entries stored in chronological order.¹⁰ A writer simply enters text into a web page, and the blogging software updates the blogs at the push of a button.¹¹ Blogging software also allows interaction by allowing readers to post their comments on the blog.¹²

Although no one would describe the technical leap from conventional Web publishing to blogging as revolutionary, the resulting change in the way people use websites has been nothing short of dramatic. Technorati, a search engine devoted to blogs, reports that it tracks 26.2 million blogs.¹³ Compare that with a reported 8 million blogs in March 14, 2005.¹⁴ Technorati further reports that 70,000 new blogs are created each day.¹⁵ Surveys report that between 2% and 7% of Internet users have created their own blogs.¹⁶

9. The software packages range from Blogger (<http://www.blogger.com/start>), a free and simple tool that practically anyone can set up, to Moveable Type (<http://www.sixapart.com/movabletype>), a more expensive and sophisticated package that requires some technical ability.

10. Gary O'Connor & Stephanie Tai, *Legal and Appellate Weblogs: What They Are, Why You Should Read Them, and Why You Should Consider Starting Your Own*, 5 J. APP. PRAC. & PROCESS 205, 206 (2003).

11. Susannah Gardner, *Time to Check: Are You Using the Right Blogging Tool?*, ONLINE JOURNALISM REVIEW (July 14, 2005), <http://www.ojr.org/ojr/stories/050714gardner>.

12. *Id.*

13. Technorati, <http://www.technorati.com> (last visited Jan. 23, 2006).

14. See Alan R. Nye, *Blog Wars: A Long Time Ago in an Internet Far, Far Away . . .*, 20 ME. B.J. 102, 103 (2005).

15. Technorati: About Us, <http://www.technorati.com/about> (last visited Feb. 11, 2006).

16. See AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, CONTENT CREATION ONLINE 3 (2004), http://www.pewinternet.org/pdfs/PIP_Content_Creation_

As a result of this growth, blogs have become important communication tools. E-mail provides a fast way to send messages, but does not organize that information well, as e-mails are stored and retrieved separately. Further, e-mails tend to get buried within each other. In contrast, blogs represent a fast and accessible form of communication that can consolidate and organize information into a single page. A reader can read one blog's entries chronologically without having to sort through numerous unrelated e-mails.

Bloggng has also broken into the corporate culture. Many companies are beginning to embrace blogging, despite its dangers. For example, Sun Microsystems ("Sun") has about "2,000 employees blog[ging], including its President and Chief Operating Officer, Jonathan Swartz."¹⁷ Sun, Microsoft, and General Motors "all have officially sanctioned corporate blogs for employees to write about products and strategy."¹⁸ Further, these and other companies are releasing official policies addressing employee blogging to help control any potential misuse.¹⁹

Even in the legal profession, the use of blogs by judges and attorneys has been encouraged.²⁰ Blogs may be used to discuss a specific area of law or a particular method of analysis.²¹ Lawyers can exchange ideas as well as expand their network of contacts.²²

While legal problems have not stopped the blogging explosion, they remain prevalent. Groups such as the Electronic Frontier Foundation ("EFF"), which focus on bloggers and freedom of expression on the Internet, are a testament to the blogging explosion and resulting legal concerns.²³ Such groups provide comprehensive legal insights into issues ranging from defamation to employment law.²⁴

Report.pdf.

17. Reuters, *As Blogging Grows, Companies Eye Legal Pitfalls*, SIFY NEWS, Aug. 28, 2005, <http://sify.com/news/fullstory.php?id=13927172>.

18. *Id.*

19. See Blawgzine, *Corporate Blogging and the Law: Common Sense and Plain-English Policies Help Employees Avoid Being Dooceed*, <http://www.blawgzine.com/?p=37> (July 31, 2005 3:55 PM) (on file with author).

20. O'Connor, *supra* note 10, at 205.

21. *Id.* at 209–211.

22. *Id.* at 209–10.

23. See Electronic Frontier Foundation, *EFF: Legal Guide for Bloggers*, EFF.org, Nov. 18, 2005, <http://www.eff.org/bloggers/lg> [hereinafter *EFF: Legal Guide*]; Center for Democracy and Technology, *Mission and Principles*, <http://www.cdt.org/mission> (last visited Sept. 10, 2005) [hereinafter CDT Mission].

24. See *EFF: Legal Guide*, *supra* note 23; CDT Mission, *supra* note 23.

III. BLOGGERS AND EMPLOYMENT LAW

A. *The At-Will Presumption*

All states except for Montana retain the “at-will” presumption of employment.²⁵ Either the employee or employer may terminate the relationship at any time “for any reason or even no reason at all.”²⁶ The only exceptions to this presumption are “a collective bargaining agreement, a contractual provision, or a statutorily-conferred right which reduces the likelihood of abusive or wrongful discharge.”²⁷ Consequently, absent any of the aforementioned exceptions, there is nothing to prevent an employer from discharging an employee for simply having a blog, regardless of the blog’s content.²⁸

However, modern courts are changing the at-will presumption,²⁹ utilizing contract law to find that employers may limit, through express or implied contracts, their ability to discharge employees.³⁰ An implied contract can “prevent employers from having it both ways: from fostering an expectation of job security among employees while escaping legal accountability when that expectation is disappointed.”³¹ Courts have found implied contracts when employee handbooks make assurances to employees and through professional codes of ethics.³² Courts have also found exceptions to the at-will doctrine through the implied obligation of good faith and fair dealing.³³ Established precedent in this area of employment law explains, at least in part, some employers’ reluctance to create official policies for blogging.

Most states now recognize certain public policy exceptions to the at-

25. Gutman, *supra* note 6, at 156.

26. *Shope v. Gucci Am., Inc.*, 14 P.3d 1049, 1064 (Haw. 2000) (quoting *Parnar v. Americana Hotels, Inc.*, 652 P.2d 626, 628 (Haw. 1982)) (“By the beginning of the twentieth century, the employer’s right to discharge ‘for good cause, for no cause or even for cause morally wrong’ was absolute.”).

27. *Id.*

28. *See* Gutman, *supra* note 6, at 156.

29. *See generally* Michael A. DiSabatino, *Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R. 4TH 544, 548–49 (1982) (discussing when an employee terminable at-will has a cause of action against her employer for wrongful discharge based on recent state and federal cases).

30. Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment At-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583, 1590–92 (1994).

31. Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does it Matter?*, 77 N.Y.U. L. REV. 6, 19 (2002).

32. Pennington, *supra* note 30, at 1590–92.

33. *Id.* at 1592–93 (“This exception has not enjoyed wide application.”).

will presumption.³⁴ Public policy exceptions, such as those applied in whistleblower cases,³⁵ may provide protection to employees when their blogs expose an illegal activity of an employer.³⁶ However, bloggers should not expect courts to utilize public policy exceptions to protect them. Since the late nineteenth century, the common law has focused on the principle of the freedom to contract in governing employment.³⁷ Courts have expressed concern about protecting employers from a fear of expensive litigation every time employers make personnel decisions.³⁸ Thus, courts will not likely restrict the at-will doctrine given the risk of impeding business.

B. The First Amendment

Bloggers raise First Amendment defenses when they are dismissed by their employers for blogging. However, the First Amendment does not protect employees from private employers.³⁹ The Framers intended the First Amendment to protect individual rights from government intrusion—not from intrusion by private entities.⁴⁰

Despite academic views that the right to privacy should extend to private employees, private employee rights are not likely to change.⁴¹ The right to privacy, as it relates to private employees, stands in stark contradiction to the policies of freedom of contract and promotion of business as explained above.

C. A Bleak Outlook for Bloggers

Bloggers should beware—employers can, and have, discharged employees at-will for blogging.⁴² Even the EFF, which carefully monitors this area of the law, has not found a case “where an employer illegally fired an employee for blogging activity.”⁴³ Furthermore, nothing prevents an

34. *Id.* at 1594 n.64.

35. *See id.* at 1604.

36. Gutman, *supra* note 6, at 161.

37. Pennington, *supra* note 30, at 1585.

38. *See* *Rozier v. St. Mary’s Hosp.*, 411 N.E.2d 50, 53–54 (Ill. App. Ct. 1980).

39. S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 829 (1998).

40. *Id.* at 828–30.

41. *See id.* at 830–31.

42. *See* Gutman, *supra* note 6, at 147–48 (describing the case of Steve Olafson, whose blogging resulted in the termination of his employment with a reputable newspaper).

43. Krause, *supra* note 7.

employer from not hiring a potential employee because of his blog.⁴⁴ Thus, bloggers should exercise the same, if not greater, decorum and restraint online as they would on the telephone or through e-mail, because their professional careers may be at stake.

IV. RIGHT TO ANONYMITY

A. *Anonymity as a Defense to Employers*

So how can employees protect themselves from employer retribution? The EFF advises bloggers to blog anonymously.⁴⁵ The EFF also advises password-protecting the blog, incorporating technical tools to prevent the blogger from being traced via their Internet address, and removing the blog from search engines such as Google.⁴⁶

But is posting anonymously really the answer? Can a blogger post anything anonymously without fear of repercussion? Even the EFF warns that blogging anonymously is not as easy as one might think.⁴⁷ Often, revealing general details can reveal the blogger's place of employment, if not identity.⁴⁸ Thus, although the EFF does not spell out the law regarding the legal limits of blogging anonymously, it emphasizes that the anonymous blogger must still blog in a "work-safe way" to avoid repercussions.⁴⁹

B. *The Legal Limits to Anonymous Blogging*

Although the First Amendment does not protect bloggers from saying whatever they want without risking termination from employment, the Supreme Court has held that there is a First Amendment right to freedom of expression on the Internet⁵⁰ and anonymity.⁵¹ In *McIntyre v. Ohio Elections Commission*, the Court held that an Ohio statutory prohibition

44. See Gutman, *supra* note 6, at 152 n.50.

45. Electronic Frontier Foundation, *How to Blog Safely (About Work or Anything Else)*, EFF.ORG, May 31, 2005, <http://www.eff.org/Privacy/Anonymity/blog-anonymously.php> ("The best way to blog and still preserve some privacy is to do it anonymously.").

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Reno v. ACLU*, 521 U.S. 844, 885 (1997) ("The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.").

51. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995).

against distribution of anonymous campaign literature violated the First Amendment.⁵² The Court found that expressing oneself anonymously is grounded within our constitutional and historical tradition.⁵³ That tradition includes using anonymity in situations where speakers fear retaliation or the speaker's reputation may unfairly prejudice the message.⁵⁴

Although courts grant a high level of protection to anonymous speech,⁵⁵ such protection is not absolute.⁵⁶ The right to anonymity often conflicts with both government and private interests.⁵⁷ This conflict has led courts and commentators to question to what extent anonymity is protected.⁵⁸ While recognizing that anonymous speech deserves great protection, courts also recognize that the Internet can facilitate tortious acts, such as defamation, copyright infringement, and trademark infringement.⁵⁹ Thus, courts must balance the need for redressing these grievances with the right to anonymous speech.⁶⁰

The anonymity issue often arises when plaintiffs serve subpoenas on Internet service providers (ISPs), such as America Online and Yahoo!, seeking identification of anonymous posters on the ISPs' message boards.⁶¹ Scholars have argued that corporations are using subpoenas and corresponding civil complaints to scare bloggers from posting negative comments that they allege affect the corporation's stock performance.⁶²

52. *See id.* at 356–57.

53. *Id.* at 341–42.

54. *Id.*

55. *See Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 765–66 (N.J. Super. Ct. App. Div. 2001) (recognizing that New Jersey's Constitution provides greater free-speech protection than the federal Constitution does).

56. Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405, 421 (2003).

57. *See, e.g.*, *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 182–85 (1999) (striking down a Colorado statute requiring petition circulators to wear identification badges while upholding the statutory requirement for petitioners to submit identification affidavits because of the state's interest in policing law-breaking petitioners.); *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000) (ordering an Internet service provider to reveal the identity of an anonymous poster who had established a good faith claim of defamation.).

58. Ekstrand, *supra* note 56, at 413–14.

59. *Id.*; *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *cf. Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (recognizing that the right of free speech is limited in certain cases, such as those involving profane and libelous speech).

60. *See Columbia Ins. Co.*, 185 F.R.D. at 578.

61. *See, e.g.*, Ekstrand, *supra* note 56, at 418–19.

62. *Id.* at 415. At least twenty states have specific laws protecting anonymous users against these "Strategic Lawsuits Against Public Participation" or anti-SLAPP laws. *Id.* at 416. These anti-SLAPP laws may give a great deal of power to anonymous posters seeking to bar subpoenas seeking their identities. *See* MARK GOLDOWITZ & ELIZABETH PRITZKER, CALIFORNIA ANTI-

ISPs often, although not always, allow anonymous posters to challenge subpoenas in court, before bowing to plaintiff demands.⁶³ Courts must then decide on the standard they should apply in determining whether to protect an anonymous poster's rights. As the issue between blogging and the right to anonymity is a new development, courts vary on defining this standard.

1. The *Dendrite* Standard

Commentators view *Dendrite International, Inc. v. Doe* as the definitive decision on the subject.⁶⁴ In *Dendrite*, a New Jersey appellate court held that a plaintiff must present a prima facie case against the defendant that would withstand a motion to dismiss.⁶⁵ Further, the plaintiff must provide sufficient evidence to support each element of the prima facie case.⁶⁶ Finally, assuming the plaintiff satisfies the previous requirements, "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."⁶⁷

In *Dendrite*, a plaintiff brought a defamation claim against anonymous defendants for posting comments that they alleged defamed them and misappropriated trade secrets.⁶⁸ The court held that although the plaintiff presented a prima facie case that would withstand a traditional motion to dismiss, the plaintiff failed to present sufficient evidence that the defendants' postings had caused any actual harm to the plaintiff's stock price or affected its hiring practices.⁶⁹ Consequently, the court denied the plaintiff's discovery request for the identities of the anonymous defendants.⁷⁰

2. The "Good Faith" Standard

Not all courts agree with the *Dendrite* court's approach to protecting an anonymous poster's rights. In *In re Subpoena Duces Tecum to America*

SLAPP PROJECT, DEFENDING AGAINST A SLAPP (2006), <http://www.casp.net/procede.html>.

63. Ekstrand, *supra* note 56, at 416.

64. *Id.* at 418; *see Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

65. *Dendrite*, 775 A.2d at 760.

66. *Id.* at 760.

67. *Id.* at 760–61.

68. *Id.* at 763.

69. *Id.* at 772.

70. *Id.*

Online, Inc. (“AOL”), a Virginia trial court rejected the *Dendrite* standard.⁷¹ In a short opinion, the court found the prima facie standard “unduly cumbersome,” because “[w]hat is sufficient to plead a prima facie case varies from state to state and, sometimes, from court to court.”⁷² Instead, the AOL court adopted a three prong test that ordered an ISP to reveal the identity of a subscriber when: (1) “the court is satisfied by the pleadings or evidence supplied”; (2) “the party requesting the subpoena has a legitimate, good faith basis”; and (3) “the information is centrally needed to advance that claim.”⁷³ The court reasoned that “the compelling state interest in protecting companies . . . from the potentially severe consequences . . . [of] communications [on the Internet] significantly outweigh the limited intrusion on the First Amendment rights of any innocent subscribers.”⁷⁴

In AOL, the plaintiff, a publicly traded company, sued five individuals for posting defamatory material misrepresentations and confidential information.⁷⁵ The company alleged that the individuals were former or current employees.⁷⁶ While the court allowed the company to proceed with the subpoena anonymously, it gave no analysis of its factual findings.⁷⁷ Instead, the court merely reiterated that the state has a compelling interest in protecting companies from misrepresentations on the Internet.⁷⁸ Thus, although the court did not provide much guidance in applying its “good faith” test, the court’s characterization of the loss of an individual’s right to anonymity as a “limited intrusion”⁷⁹ provides little hope for its protection.

The Supreme Court of Virginia overturned the decision, but on different grounds.⁸⁰ The court found that the company did not provide sufficient grounds to proceed with its subpoena request anonymously.⁸¹ While the identities of the posters were not disclosed, the court did not overturn the good faith standard.⁸²

71. *In re* Subpoena Duces Tecum to Am. Online, Inc., No. 40570, 2000 WL 1210372, at *7–8 (Va. Cir. Ct. Jan. 31, 2000), *rev’d sub nom.* Am. Online, Inc. v. Anonymous Pub. Traded Co., 542 S.E.2d 377 (Va. 2001).

72. *Id.*

73. *Id.* at *8.

74. *Id.* at *7.

75. *Id.* at *1.

76. *Id.*

77. *See In re* Subpoena Duces Tecum to Am. Online, Inc. No. 40570, 2000 WL 1210372, at *4 (Va. Cir. Ct. Jan. 31, 2000).

78. *Id.* at *7–8.

79. *Id.* at *8.

80. Am. Online, Inc. v. Anonymous Pub. Traded Co., 542 S.E.2d 377, 385 (Va. 2001).

81. *Id.*

82. *See id.*

3. Future Implications

Although the United States Supreme Court has not ruled on this specific issue, *McIntyre* indicates the Court would adopt the higher standard used in *Dendrite*.⁸³ The Court in *McIntyre* contemplated that “the right to remain anonymous may be abused when it shields fraudulent conduct,” but stated that “our society accords greater weight to the value of free speech than to the dangers of its misuse.”⁸⁴ Although the Court knew of the potential dangers of fraud in allowing anonymous pamphleteering, the Court was not willing to allow the state to ban it in its entirety.⁸⁵ The Court also recognized other motivations for blogging anonymously, including fear of economic retaliation:

The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.⁸⁶

The Court also recognized the importance of a high standard for First Amendment protections in *Gertz v. Robert Welch, Inc.*⁸⁷ In *Gertz*, the Court held that “the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”⁸⁸ The Court reasoned that allowing such damages unnecessarily “inhibit[ed] the vigorous exercise of First Amendment freedoms.”⁸⁹ Instead, the Court required actual injury supported by competent evidence.⁹⁰ The Court protected the value of free speech in the marketplace from the self-censure that would inevitably result from fear of excessive litigation.⁹¹ In essence, this holding raised barriers to plaintiffs bringing defamation actions by requiring them to present sufficient proof of harm. *Dendrite* follows this

83. See generally *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

84. *Id.*

85. *Id.*

86. *Id.* at 341–42.

87. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

88. *Id.* at 349.

89. *Id.*

90. See *id.* at 350.

91. *Id.* (noting that jury awards of punitive damages may censor unpopular opinions).

rationale by extending this requirement to the First Amendment protection of anonymity.⁹²

The *AOL* decision paid mere lip service to the right to anonymity. While parroting the Supreme Court in recognizing the value of speaking anonymously, the court failed to provide adequate protection from the chilling effect of the fear of litigation.⁹³ Instead, the *AOL* court adopted a view contrary to that of the Supreme Court by siding with plaintiffs and allowing greater intrusion on the rights of innocent posters.⁹⁴ By applying the “good faith” test, the court accorded greater weight to protecting companies from tortious acts than to protecting individuals from excessive litigation.

The cases themselves reveal the differences in the levels of protection offered by the two standards. In both cases, publicly traded companies claimed that defamation resulted in injuries to their stock prices.⁹⁵ However, only the *Dendrite* court required the plaintiff company to prove actual harm resulting from the misrepresentation.⁹⁶

The *Dendrite* court extensively scrutinized the company’s claim. The certification by Dendrite’s vice president alleged possible harm, but did not claim any actual harm to the company’s ability to hire new employees.⁹⁷ Further, the value of the stock increased on the five days immediately following a defendant’s blog posting.⁹⁸ The court found no actual harm to the company as a result.⁹⁹

A company in a jurisdiction that follows *Dendrite* likely would need to gather considerably more evidence to show harm before filing a claim. For example, the company would need to find evidence that blog statements deterred a highly recruited individual from joining the company, sent the company’s stock price down, or caused a sell-off. Given this high evidentiary requirement, companies would likely pursue only valid claims of defamation and not use litigation as a way of scaring posters.

Although courts vary in their tests, they, for the most part, adhere to a high standard.¹⁰⁰ Recently, the Delaware Supreme Court in *Cahill v. Doe*

92. See *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

93. See *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *6 (Va. Cir. Ct. Jan. 31, 2000).

94. *Id.* at *7.

95. *Id.* at *6.

96. *Dendrite Int’l, Inc.*, 775 A.2d at 772.

97. *Id.*

98. *Id.*

99. *Id.*

100. See *Doe v. 2TheMart.Com*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001) (requiring

overturned a trial court decision that followed the *AOL* good faith standard.¹⁰¹ The court stated that the “good faith . . . standard sets the bar too low to protect a defendant’s First Amendment right to speak anonymously on the [I]nternet.”¹⁰² The court held that a summary judgment standard is appropriate even when suing for harm to one’s reputation.¹⁰³ The court adopted the *Dendrite* approach, which requires that a plaintiff withstand a summary judgment standard in order to continue with discovery.¹⁰⁴ In conclusion, anonymous posters have some assurances that their rights will be protected.

C. Anonymous Blogging Is Not the Answer for Most Bloggers

While this area of law remains unsettled, the EFF, in its advice to bloggers, fails to address significant anonymity issues that are unrelated to the law. Critics of anonymous blogging argue that it defeats one of blogging’s main purposes: self-promotion.¹⁰⁵ Companies such as Microsoft and GM have promoted company-sponsored blogging because it provides cost effective corporate promotion.¹⁰⁶ Also, it was individuals who first capitalized on the blogging phenomenon. Robert Scoble made himself into a technology industry icon by blogging, which directly led to his employment with Microsoft.¹⁰⁷ Further, observers note that blogs attract more readers if the author is credible.¹⁰⁸ Anonymous blogging hurts the credibility of the source,¹⁰⁹ thus removing much of the attraction of blogging.

The First Amendment was designed to protect against tyranny. Anonymity can provide relief in oppressive regimes that have jailed people

the information sought relate to a core claim or defense); *Am. Online, Inc. v. Anonymous Pub. Traded Co.*, 542 S.E.2d 377, 384 (Va. 2001) (quoting *Doe v. Rostker*, 89 F.R.D. 158, 161 (N.D. Cal. 1981) (requiring “the presence of some social stigma or threat of physical harm to the plaintiffs before subpoena power given”); Ekstrand, *supra* note 56, at 419–21 (discussing the holdings of four Internet blogging cases, three of which denied discovery of anonymous defendants).

101. *Cahill v. Doe*, 879 A.2d 943, 946, 948–49 (Del. Super. Ct. 2005), *rev’d*, 884 A.2d 451 (Del. 2005).

102. *Doe v. Cahill*, 884 A.2d at 462.

103. *Id.*

104. *Id.* at 459–60.

105. *See Krause*, *supra* note 7.

106. *See id.*; *GM FastLane Blog*, *supra* note 8.

107. Charles Duhigg, *Can You Be Fired for Complaining About Your Boss Online?*, LEGAL AFFAIRS, Mar./Apr., 2004, at 9.

108. *See Krause*, *supra* note 7.

109. *See id.*

for blogging (e.g. Iran).¹¹⁰ This is not to say that First Amendment protections are no longer required in this country.¹¹¹ No one would claim that oppressive politics, corruption, or corporate scandal—situations which may require anonymous blogging—no longer exist in this country. However, these situations are probably not the norm for most bloggers. While the EFF's imperfect solution may be useful for some bloggers, it is not the solution for most. The technology demands other solutions that are better tailored to its uses.

V. OFFICIAL EMPLOYER POLICIES AS A CONTROL MECHANISM

Employee handbooks efficiently communicate a company's policies to its employees. They serve to promote understanding, consistency, and efficiency, and lend credibility to company policies.¹¹² These handbooks serve to promote the common understanding of employee policies and help to avoid and resolve potential problems.¹¹³ Their commonplace usage provides the best support for their effectiveness.

Commentators have pushed for, and companies are beginning to deliver, official corporate policies on blogging.¹¹⁴ Rather than continuing to operate on an ad hoc basis, companies are realizing that general communication policies written before the rise of blogging do not adequately convey the company's concerns to its employees. Further, employees are blogging whether or not companies want them to.¹¹⁵ After firing twenty-seven employees for writing harassing blog posts, the Auto Club, which did not have an official policy on blogging, began thinking about creating one.¹¹⁶

But how might the Auto Club proceed? As might be expected, the company does not have much precedent to follow. Blogging is not the same as other forms of external communications such as the telephone or e-

110. *See id.*

111. Websites such as invisiblog.com provide anonymous blogging services that prevent others from discovering a blogger's identity. *See generally* invisiblog.com, <http://www.invisiblog.com> (last visited Jan. 15, 2006).

112. *See* Joseph W. R. Lawson II, *Give Your Employees a Hand (Book): Good Employee Handbooks are Applicable and Vital—Not Stuck Away on the Shelf*, *LEGAL MGMT.*, Nov./Dec., 1999, at 26.

113. *Id.*

114. *See* Krause, *supra* note 7 (noting that Denise Howell, an intellectual property attorney who also publishes a popular blog, advocates that companies need to adopt "sensible guidelines for what is acceptable blogging"); Blawgzine, *supra* note 19.

115. *See supra* Part I.

116. *Auto Club*, *supra* note 5.

mail.¹¹⁷ Otherwise, companies could simply allow their existing policies to also cover blogging. As the Auto Club is now aware, specialized rules are required to properly regulate blogging.

A. Differing Policies on Blogging

As one might expect in a new area, companies have taken markedly different approaches to their corporate policies on blogging. Of course, one approach is to simply do nothing. In contrast, some companies are crafting complex blogging policies to protect themselves from the perceived dangers of blogging.¹¹⁸ The most unique and innovative approach wholeheartedly embraces blogging, rather than solely looking to protect company interests. This section will detail three approaches to blog regulation.

The first approach adopts the old adage, “If it isn’t broke, why fix it?” Companies following this approach, such as Microsoft, take the position that, with polices already in place that apply to all communications with external parties, new policies are unnecessary.¹¹⁹ Further, these companies fear that, by officially recognizing blogs, they may be held liable for the employee statements contained in them.¹²⁰ Michael Scoble, a Microsoft employee, stated the dilemma of the executive well:

I think executives who weblog (particularly at Microsoft) are between a rock and a hard place. If they say anything interesting, they’ll immediately get picked up in the press and their comments will probably be taken out of context.

If they give away strategy or product plans, they will help out competitors. If they talk about competitors, they’ll be welcoming lawsuits. If they give people insights into what the business is doing, they could be hit with shareholder lawsuits, or other governmental actions.¹²¹

117. See *supra* Part II.

118. See, e.g. Working Smart: Corporate Blogging Rules, http://michaelhyatt.blogs.com/workingsmart/2005/03/corporate_blog.html (last visited Oct. 22, 2005) (describing company blogging rules for Thomas Nelson Publishers).

119. See Craigrow, How to Write a Non-Fiction Best Seller: Chapter 1 Review, <http://blogs.msdn.com/craigrow/archive/2005/08/02/446278.aspx> (Aug. 2, 2005 8:30 AM) (“In the end[,] it seems the company’s position is, we have policies for communications with external parties, blogs are just one *mechanism* for that communication and our policies are *independent* of the mechanism.”).

120. See Duhigg, *supra* note 107, at 9 (citing “lawsuits holding companies liable for employee e-mails” as the source of deterrence).

121. The Schobleizer Weblog, <http://radio.weblogs.com/0001011/2003/05/28.html> (May 28, 2003 10:34:12 PM).

However, as noted above, signs indicate that things are breaking. Amid increased concern over prolific blogging amongst employees, reports have hinted that Microsoft, similar to the Auto Club, will adopt a specific blogging policy.¹²² Thus, companies themselves often realize that their interests are not best served by ignoring the issue.

Written employee policies can protect employers from employees as well as serve as a communication tool.¹²³ Not only can policies prevent potential problems, they can greatly aid in a legal defense against employees. Companies can avoid liability by setting clear policies against illegal practices.¹²⁴ Thomas Nelson Publishers, the world's largest Christian publishing company, presents an example of this approach.¹²⁵ The company decided to recognize and encourage employee blogs by creating an aggregator site to link to its employees' blogs, provided the blogs related to the company or some aspect of its business.¹²⁶ Employees can have their blogs listed on the aggregator site by submitting their blogs for approval and agreeing to a set of terms and conditions.¹²⁷ This policy contains no less than fourteen terms and conditions with disclaimers following.¹²⁸ The policy includes a comprehensive list of prohibitions: anonymous blogging, disclosure of sensitive financial and company product information, harassment of fellow employees, use of certain copyrighted information, defamation, libel, slander, the dissemination of viruses, and so forth.¹²⁹ The last term of the policy provides that the employee agrees to "assume full legal responsibility and liability for all actions arising from [the employee's] posts."¹³⁰ The policy does allow the employee to respectfully disagree with the company and its officers and comment on company competitors.¹³¹ If Microsoft's approach could be

122. Microsoft held executive meetings concerning blogging. Disclaimers appeared on employee blogs. One employee's statement showed the effect of a lack of an official policy: "From what I've been indirectly told, I'm supposed to put a disclaimer in all of my posts. Screw that. Microsoft isn't paying me to write this blog. Microsoft isn't paying for my blogging software, and Microsoft isn't paying my hosting fees to run my blog." See Mary Jo Foley, *Microsoft Blog Policy Coming Down the Pike?*, MICROSOFT WATCH, June 16, 2003, <http://www.microsoft-watch.com/article2/0,4248,1128705,00.asp>.

123. See Anne Ciesla Bancroft, *Give That Handbook a Hand*, BUSINESS LAW TODAY, Mar./Apr., 2005, at 27, 31.

124. *Id.*

125. See Blawgzine, *supra* note 19.

126. Working Smart, *supra* note 118 (detailing an earlier draft of their policies).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

symbolized as doing nothing, this approach brings in everything and the kitchen sink.

In stark contrast to Thomas Nelson's blogging policy, Sun Microsystems' approach stresses simplicity. Sun provides blogging space for its employees to blog about anything they want.¹³² Rather than providing a detailed list of terms and conditions, Sun's policy relies upon its employees' common sense.¹³³ Sun does admonish employees not to disclose company secrets, to be mindful of financial rules, and to think about the consequences of talking negatively about the company.¹³⁴ The policy even offers examples, calling statements like "Visual Development Environments for Java sucks" amateurish and instead suggesting respectful criticism such as "Netbeans needs to have an easier learning curve for the first-time user."¹³⁵ Instead of a laundry list of prohibitions, the company takes the opportunity to advise its employees: "Be Interesting," "Write What You Know," and "Quality Matters."¹³⁶ While the policy communicates effectively with Sun's employees, the question becomes whether Sun is doing enough to protect itself legally. The policy itself acknowledges such a risk.¹³⁷

B. Current Law on Employee Handbooks and Employer Liability

To understand why or how to draft an employer policy, we must first understand the laws related to such policies. First, we will look at how employee handbooks can create binding contracts between the employer and employee. Then, we will examine several aspects of employer liability law that may influence how or whether an employer drafts a blogging policy.

1. Employee Handbooks as Implied Unilateral Contracts

Nearly every state has accepted that an employee handbook can create a binding implied contract between the employer and employee.¹³⁸ As

132. Sun Microsystems Employee Blogs List, <http://www.sun.com/aboutsun/media/blogs/index.html> (last visited Oct. 20, 2005) (stating "Blogs.sun.com is a space accessible to any Sun employee to write about anything.").

133. Sun Microsystems, Sun Policy on Public Discourse, <http://www.sun.com/aboutsun/media/blogs/policy.html> (last visited Jan. 13, 2006).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* ("By speaking directly to the world, without benefit of management approval, we are accepting higher risks in the interest of higher rewards.").

138. See Rachel Leiser Levy, *Judicial Interpretation of Employee Handbooks: The Creation*

discussed in Part III, courts are relaxing the at-will presumption by relying on unilateral implied contract theory.¹³⁹

A contract requires an offer and acceptance.¹⁴⁰ Courts have generally interpreted an employee handbook as an implied contract when: (1) the handbook makes a clear offer that an employee would reasonably believe to be an offer; (2) the statement is communicated to the employee and the employee reasonably believes it to be an offer; and (3) the employee accepts the offer by commencing or continuing to work after such communication.¹⁴¹

What constitutes a clear offer in an employee handbook that would lead an employee to reasonably believe it to be an offer can vary. A handbook lacking at-will reservations and stating that employees will not be fired without good cause would clearly create an offer revoking the at-will presumption.¹⁴² However, courts have recognized an offer in other situations as well.

Courts have construed detailed lists of prohibited conduct, such as Thomas Nelson's blogging policy, as a promise to terminate the employee for only those stated reasons when such a promise would reasonably induce the employee to continue employment.¹⁴³ In *Mobil Coal Producing, Inc. v. Parks*, the court pointed to language in the employee handbook that emphasized job security to discourage employees from forming a union.¹⁴⁴ However, the court was careful not to state that any laundry list of terms would give rise to a contract.¹⁴⁵ Courts will look to the specific facts of the

of a Common Law Information-Eliciting Penalty Default Rule, 72 U. CHI. L. REV. 695, 710 (2005); Gabriel S. Rosenthal, *Crafting a New Means of Analysis for Wrongful Discharge Claims Based on Promises in Employee Handbooks*, 71 WASH. L. REV. 1157, 1167 (1996).

139. See *supra* Part III.A.

140. See E. ALLAN FARNSWORTH, CONTRACTS § 3.4 (2d ed. 1990).

141. See *Ahlgren v. Blue Goose Supermarket, Inc.*, 639 N.E.2d 922, 926 (Ill. App. Ct. 1994). See also *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 283 (Iowa 1995) (requiring three elements: "(1) the handbook is sufficiently definite in its terms to create an offer; (2) the handbook is communicated to and accepted by the employee so as to constitute acceptance; and (3) the employee provides consideration."); *Alexander v. Nextel Commc'ns, Inc.*, 61 Cal. Rptr. 2d 293, 296 (Cal. Ct. App. 1997) (stating evidence that may overcome the at-will presumption includes: "personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.").

142. See *Levy*, *supra* note 138, at 706.

143. See *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702, 707 (Wyo. 1985) (stating the employee handbook provisions changed the at-will presumption because they "create[d] an expectation on the part of an employee that they will be followed, and they induced appellee to continue his employment with appellant."); *Levy*, *supra* note 138, at 706.

144. *Mobil Coal Producing*, 704 P.2d at 707.

145. *Id.* at 706.

case to determine the reasonableness of the offer.¹⁴⁶

An employee's reasonable expectations may be affected by other terms in the handbook itself. Language that will prevent courts from finding an offer of continuous employment may include a disclaimer that employee policies do not form a binding contract or explicit terms that employment is at-will.¹⁴⁷ In sum, while courts are willing to defeat the at-will presumption, they will not do so whenever an employer writes and disseminates employee policies.

2. Vicarious Liability and the Scope of Employment

Generally, courts will find vicarious liability for defamatory statements posted by an employee if the "defamation is referable to the duty owing by the agent to the corporation and was made in the discharge of that duty."¹⁴⁸ Courts will generally consider factors such as the similarity of the allegedly defamatory conduct to what the employee was hired to perform, whether the action occurred within the spatial and temporal limits of employment, whether the action was in furtherance of the employer's business, and whether the unauthorized conduct was foreseeable in view of the employee's duties.¹⁴⁹ The result turns on an intensive factual analysis. While the Sixth Circuit found that an unauthorized and offensive e-mail from a customer representative to a customer was not within the scope of employment,¹⁵⁰ a district court in Texas held that false statements in an e-mail by a company's CEO, made for the purpose of discharging his duties, to the company's members were

146. See *Scott v. Pacific Gas & Elec. Co.*, 904 P.2d 834, 841 (Cal. 1995) (stating detailed policy in handbook of discipline system and practices sufficient to create implied contract). *But see Guz v. Bechtel Nat. Inc.*, 8 P.3d 1089, 1102-04 (Cal. 2000) (declining to find an implied contract although the employee had twenty years of service numerous promotions and handbook contained a progressive discipline system because of an express disclaimer to continued service and no evidence of reliance by the employee in continued employment); *Knights v. Hewlett Packard*, 281 Cal. Rptr. 295, 297-98 (Cal. Ct. App. 1991) (reasoning that the language of the handbook stated that the termination provision was a guideline that did not give rise to an offer).

147. See *Davis v. Consol. Freightways*, 34 Cal. Rptr. 2d 438, 444-45 (Cal. Ct. App. 1994) (stating that the progressive discipline system in the employer manual did not overcome express provisions of at-will employment in the same manual); *Abney v. Baptist Med. Ctrs.*, 597 So. 2d 682, 683 (1992) (holding as a matter of law that a disclaimer that employment was at-will meant an offer was not created); see *Levy*, *supra* note 138, at 710.

148. *Mars, Inc. v. Gonazalez*, 71 S.W.3d 434, 437 (Tex. App. 2002).

149. *Booker v. GTE.net L.L.C.*, 350 F.3d 515, 518-20 (6th Cir. 2003) (applying the factors and affirming that an offensive e-mail sent by an employee to the employer's customer under a third party name was not within the scope of the employee's duty).

150. *Id.*

within the scope of employment.¹⁵¹

Courts have further extended liability to employee conduct that takes place outside of the company's location or facilities. In *Blakey v. Continental Airlines, Inc.*, the court held that a company may be held liable for posting harassing statements on an electronic bulletin board, even when the board is not hosted by the company, when the company "knows or has reason to know that such harassment . . . is taking place in the workplace."¹⁵² The court reasoned that company employees used the forum to communicate, and the company thereby benefited.¹⁵³ Accordingly, companies may be held liable for harassment that takes place both in the workplace and in "settings that are related to the workplace."¹⁵⁴

3. Vicarious Liability and the Avoidable Consequences Doctrine

The avoidable consequences doctrine states that "a party cannot recover damages flowing from consequences which that party could reasonably have avoided."¹⁵⁵ The doctrine serves to encourage parties to mitigate damages by barring recovery of damages the parties failed to mitigate. The doctrine is not a defense to negligence but rather "a rule of damages by which certain particular items of loss may be excluded from consideration."¹⁵⁶ Nonetheless, the doctrine is gaining a prominent role in the area of vicarious liability.

The Supreme Court has borrowed from the doctrine to help resolve the issue of whether to extend vicarious liability in situations of sexual harassment between a supervisor and an employee. In *Burlington Industries, Inc. v. Ellerth*, the Court struggled with the issue of whether to extend vicarious liability in cases where the supervisor had created a hostile environment but had not gone so far as to fire the employee or withhold a promotion.¹⁵⁷ The Court recognized that some situations of sexual harassment needed deterrence and conciliation rather than litigation.¹⁵⁸ The Court turned to the doctrine of avoidable consequences as it served these

151. *Koch v. Prostep, Inc.*, Nos. Civ.A. 3:01CV1377AH, Civ.A. 3:01CV1378AH, 2002 WL 31360404, at *7 (N. D. Tex. Oct. 17, 2002).

152. *Blakey v. Cont'l Airlines, Inc.*, 751 A.2d 538, 552 (N.J. 2000).

153. *Id.*

154. *Id.*

155. 57b AM. JUR. 2d *Negligence* § 805 (2005).

156. *Id.*

157. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998).

158. *Id.* at 764 (stating that making employer liability depend in part on the creation of antiharassment policies and effective grievance mechanisms would further Congress' intention to promote conciliation rather than litigation).

same purposes.¹⁵⁹

In situations where the supervisor did not take a tangible employment action, the Court applied the doctrine of avoidable consequences to allow employers to raise an affirmative defense to vicarious liability.¹⁶⁰ The Court allowed an employer to raise this affirmative defense where: (1) “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior”; and (2) “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹⁶¹ While the court stopped at requiring an anti-harassment policy as a matter of law, the first element would analyze a company’s policies.¹⁶² A demonstration that the employee failed to take advantage of preventive or corrective opportunities would satisfy the second element.¹⁶³ The holding encourages employers to create anti-harassment policies and encourages employees to use them to avoid and to mitigate problems.

The goal of the doctrine of avoidable consequences is gaining support. The California Supreme Court recently adopted the *Burlington Industries* holding to interpret California’s sexual harassment statutes.¹⁶⁴ In conclusion, courts are considering the remedial actions of the employer when determining liability.

C. Implications

1. No Blogging Policy

Must a company have a policy on blogging? Ellen Simonetti, a former Delta Airlines attendant, would say yes. Simonetti filed suit against Delta last year, asserting that the airline made no mention of Internet activity in its employee behavior rules, and that “she was fired as a warning to other[s].”¹⁶⁵ Presumably, Simonetti will argue that, since Delta neither prohibits blogging nor sets any strict guidelines governing the activity, the airline is precluded from firing her for blogging. To succeed in her suit,

159. *Id.* (“[T]he avoidable consequences doctrine . . . and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.”)

160. *Id.* at 765.

161. *Id.*

162. *Id.*

163. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

164. *State Dept. of Health Serv. v. Superior Court*, 79 P.3d 556, 565 (Cal. 2003).

165. See Associated Press, *Delta Employee Fired for Blogging Sues Airline*, USA TODAY, Sept. 8, 2005, http://www.usatoday.com/travel/news/2005-09-08-delta-blog_x.htm.

Simonetti will need to prove that Delta revoked the presumption that her employment was at-will. The court will look to the language of Delta's policies as well as the company's past employment practices in order to decide the issue.¹⁶⁶ Simonetti will face many obstacles in pursuing this claim, as she must prove that Delta promised to terminate her only for cause and never disclaimed that promise.¹⁶⁷

Given the current state of the law, a prudent employer may take precautions to ensure that employment remains at-will. The employer should clarify to employees, in an employment contract or employee handbook, that employment is at-will, and should further disclaim any contract implied by employee policies.¹⁶⁸ Although not required by all jurisdictions, disclaimers should be made conspicuous and unambiguous.¹⁶⁹ Further, the employer should refrain from activities that would contradict at-will policies and disclaimers.¹⁷⁰ Thus, the low cost of implementing such policies should not force nor discourage an employer to implement a blogging policy.

2. Current Vicarious Liability and Blogging Policies

Current labor law leaves substantial uncertainty as to whether employers should create an employee blogging policy. The law states that an employer is liable for employee conduct if that conduct is within the scope of employment.¹⁷¹ Thus, a company without a formal blogging policy appears to have less to worry about, because that company is not explicitly encouraging blogging activity. The company could argue that any employee blogging activity was not within the scope of employment. Just as the company should not be liable for an e-mail sent by a malicious employee, it should not be liable for unauthorized activity beyond its control.

166. See *Alexander v. Nextel Commc'ns, Inc.*, 61 Cal. Rptr. 2d 293, 296 (Cal. Ct. App. 1997) (stating factors that may rebut the at-will presumption include "personnel policies or practices of the employer.").

167. See *id.*

168. See *Davis v. Consol. Freightways*, 34 Cal. Rptr. 2d 438, 444-45 (Cal. Ct. App. 1994); *Abney v. Baptist Med. Ctrs.*, 597 So. 2d 682, 683 (Ala. 1992); Levy, *supra* note 138, at 710.

169. See *Hicks v. Methodist Med. Ctr.*, 593 N.E.2d 119, 121-22 (Ill. App. Ct. 1992) (stating disclaimer on page 38 of handbook not prominently displayed and under the heading "Revisions" did not negate promises in handbook).

170. See *Leahy v. Starflo Corp.*, 431 S.E.2d 567, 568-69 (S.C. 1993) (stating that an employment contract was created, despite employee handbook disclaimers, via weekly postings of disciplinary procedures and a letter that suggested that employees disregard the aforementioned disclaimers); Levy, *supra* note 138, at 710.

171. See *supra* Part V.B.2.

The approaches of Sun Microsystems and Thomas Nelson seem more problematic. Sun's blogging policy explicitly encourages all of their employees to blog,¹⁷² while Thomas Nelson's policy implicitly encourages such behavior.¹⁷³ By encouraging their employees to blog and "tell the world about [their] work," these companies seem to have expanded the scope of employment.¹⁷⁴ Sun's policy is an easy target for such arguments because of the company's explicit encouragement. This result seems inequitable, as it punishes companies for thinking creatively and incorporating new technologies. On the other hand, if a company stands to benefit from the activity, they should be held liable for it.

Thomas Nelson's blogging policy provides clear guidelines for employee blogging.¹⁷⁵ The policy clearly states that bloggers are not to post libelous information and are to assume full liability for their actions.¹⁷⁶ Thus, Thomas Nelson seems to have protected itself from employee misconduct—the company could argue that it has not expressly authorized libelous employee activity, and therefore should not be held liable for such activity. In clear-cut cases of libel, where an employee maliciously attacks a person or entity with false statements, the company would have a good argument.

Additionally, in determining liability, courts would likely follow precedent related to e-mail and look at factors such as the nature of a statement, how the statement related to the duties of the employee, and whether the activities in question took place within the spatial and temporal limits of employment.¹⁷⁷ For example, a customer service representative's false statements about a competing product, made on the representative's personal blog, are probably beyond the scope of employment.¹⁷⁸ Whether the activity took place at work would not be dispositive.¹⁷⁹ The representative's employer may avoid liability by arguing that it had not authorized such conduct, nor was such conduct expected in view of the

172. Sun Policy on Public Discourse, *supra* note 133 ("[Y]ou are encouraged to tell the world about your work, without asking permission first.").

173. Working Smart, *supra* note 118 (stating the company's blog aggregator site's purpose is to link to external blogs written by Thomas Nelson employees who write about some aspect of the company).

174. Sun Policy on Public Discourse, *supra* note 133.

175. *See supra* Part V.A.

176. Working Smart, *supra* note 118.

177. *See supra* Part V.B.2.

178. *See Booker v. GTE.net L.L.C.*, 350 F.3d 515, 518–20 (6th Cir. 2003) (holding that an offensive e-mail sent by an employee to a customer through the employee's personal e-mail account was not within the scope of employment).

179. *See id.*

employer's duties. Like an unauthorized e-mail, the employee's site should not be considered as furthering the employer's business.

However, the result could change if instead the employee was part of a development team for the employer's product. For example, if the employee discusses an employer's product on a personal blog hosted on the employer's server, such discussion may be within the scope of employment, even where the employer provides neither guidance nor approval, since the employee's activity was related to the employee's duties.¹⁸⁰ A court could reason that the blog is used to communicate with customers about the product, is maintained on the employer's server within the spatial and temporal limits of the employment, and thereby furthers the employer's business.¹⁸¹ Thus, by knowing of and allowing its employee's blog, the employer in effect expected its employee to act as its representative when blogging. But this result would again seem to punish companies for allowing their employees the freedom to blog. The inevitable outcome in this situation would be requiring companies to constantly monitor their employees' blogging activities.

Even if the blog was not maintained on an employer's server, as in the case of Thomas Nelson, a court could follow the *Blakey* rationale in the example above. The employer clearly stood to benefit from the blog, and since the blog is used as a forum for discussing the company's product, the blog is "related to the workplace."¹⁸² In addition, *Booker* recognized that whether the employee sent the libelous e-mail through the corporate e-mail server or through personal e-mail is irrelevant.¹⁸³

Corporate attorneys often attempt to avoid liability by forcing employees who maintain such blogs to include disclaimers that any representations made in the blog are purely the opinions of that blog's author.¹⁸⁴ However, the effects of such disclaimers are uncertain.¹⁸⁵ A

180. See *Matos v. Am. Fed'n of State, County and Mun. Employees*, No. CV980578747, 2001 WL 1044632, at *8 (Conn. Super. Ct. Aug. 13, 2001) (finding employer liability because the author was authorized to do the federation's website and no conditions of pre-approval were required); *Booker*, 350 F.3d at 519.

181. See *Blakey v. Cont'l Airlines, Inc.*, 751 A.2d 538, 551–52 (N.J. 2000) (finding a computer bulletin board used by Continental crew members hosted by an independent company benefited Continental).

182. *Id.* at 552.

183. See *Booker*, 350 F.3d at 518–19.

184. See, e.g., *Working Smart*, *supra* note 118 (requiring bloggers to include the disclaimer: "[t]he opinions expressed on this site are the opinions of the participating user. Thomas Nelson acts only as a passive conduit for the online distribution and publication of user-submitted material . . . and expressly DOES NOT endorse any user-submitted material . . . or assume any liability for any actions of the participating user").

185. See *Gutman*, *supra* note 6, at 183.

company could argue that such a disclaimer strongly indicates that the blogging activity was not within the scope of employment; such a disclaimer clearly represents that the conduct was not “expect[ed] in view of the employee’s duties.”¹⁸⁶ Nevertheless, this argument may appear weak in light of more significant factors: the similarity between the blogging activity and the task the employee was hired to perform, the activity’s occurrence within the spatial and temporal limits of employment, and the likelihood that the company knew of the employee’s blogging activity and allowed the employee to continue. In balancing these factors, it appears unlikely that courts will allow a mere disclaimer to enable a company to avoid liability for authorized or encouraged conduct.

In sum, the current vicarious liability law does not address the needs of companies wanting to take advantage of blogging. The law punishes companies such as Sun for embracing this new technology by exposing it to potential liability. For other reasons discussed below, courts should find a different standard for vicarious liability for blogging.

3. A Better Alternative for Finding Employer Liability for Blogging

Bloggging differs from e-mail and traditional print in several important aspects. The characteristics of e-mail better resemble a traditional newspaper than a blog. A mass e-mail is sent very much like a newsletter, and e-mail eventually ends up in a recipient’s inbox, much like a home-delivered newspaper. In contrast, as the court in *Blakey* recognized, blogging (or “computer bulletin boards”) is more like an extension of the workplace.¹⁸⁷ The blog resides on the blogger’s server, and a reader must navigate to the blogger’s site to view the blog. The blogger has complete control over the content of the blog, including the ability to change it at any time. Thus, the blog, when used by employees for purposes related to their employment, is merely an extension of the workplace. Moreover, the employer has the ability to control and change the blog.

Additionally, as some courts have recognized, blogging is an inherently dangerous activity.¹⁸⁸ The blog can reach a vast audience like no other medium—newspapers have physical limitations as to their

186. *Booker*, 350 F.3d at 519.

187. *Blakey*, 751 A.2d at 552 (“If the maker of an old-fashioned bulletin board provided a better bulletin board by setting aside space on it for employees to post messages, we would have little doubt that messages on the company bulletin board would be part of the workplace setting.”).

188. *See In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *8 (Vir. Cir. Ct. Jan. 31, 2000) (recognizing “the potentially severe consequences that could easily flow from actionable communications on the information superhighway”).

circulation, and e-mail is limited to a list of addresses. Although e-mail address lists can be massive, as evidenced by the proliferation of “spam” mail, they still require the compilation of a finite number of addresses. In contrast, the Internet allows anyone with a computer to create, access, and edit a blog without the need to physically deliver anything or compile a list of addresses. Thus, just as quickly as a blog can disseminate useful information, it can intensify illegal activity, such as defamation, on an unprecedented level.

Given the aforementioned distinctions, courts should adopt different legal standards for finding employer liability for blogs as opposed to e-mails. The standard should not punish companies for embracing an important new technology such as blogging, although it should continue to safeguard against negligent management.

A finding of vicarious liability when an employee’s conduct falls within the scope of employment ignores the differences between blogging and other forms of media. The scope of employment standard is too narrowly focused. For example, suppose a company discovers that an employee has posted potentially libelous information on a blog. The company then moves quickly to notify the employee, and the information is promptly removed. If the employee posted information related to job duties, the current legal standard would allow a court to find employer liability even though the company did what it reasonably could to stop the activity.

This example illustrates the need to consider a company’s attempts to control its “workplace environment.” Following the Supreme Court’s decision in *Burlington Industries*, the issue can be resolved by invoking the avoidable consequences doctrine.¹⁸⁹ *Burlington Industries* provides a better model for blogging because, in both situations, companies are often dealing with potentially hazardous environments over which they exercise some degree of control.

As with sexual harassment situations, companies can institute prophylactic corporate policies to help prevent problems in blogging. The nature of blogging does not allow a company comprehensive supervision over employee publications.¹⁹⁰ However, a simple blogging policy can give employees valuable guidance as to what they can write without fear of repercussions.¹⁹¹

Also, victims claiming defamation resulting from information posted

189. See *supra* Part V.B.3.

190. See *supra* Part I.B.

191. See *supra* Part V.

on a blog can take steps to mitigate their damages. Since a blog can be changed at any time, a claimant can take steps to avoid damages by notifying the company of the illegal activity. The company could then promptly instruct the employee to correct the error, or do so itself if possible, before greater harm results.

Thus, courts should encourage companies to draft blogging policies to educate their employees on blogging by imposing an employer liability scheme. In cases where companies encourage their employees to blog, courts should allow the employer to assert an affirmative defense to liability if: (1) the employer exercised reasonable care to prevent illegal activity; and (2) the claimant failed to take advantage of available procedures of the employer that could have reasonably avoided harm. A blogging policy that educates employees and provides mechanisms that allow claimants to rectify illegal activity would factor significantly in the first element's analysis. A claimant failing to notify an employer of illegal activity would satisfy the second element. Such a mechanism for vicarious liability would deter illegal activity and help to avoid litigation.

The scheme would serve to better control the potential dangers of blogging. It would also more equitably determine employer liability by taking into account the underlying characteristics of blogging. Further, the rights of a claimant are preserved, as the scheme would still allow recovery of damages that could not have been avoided.

For example, suppose an employee makes defamatory remarks about a competing company's product in a blog. In order for a plaintiff to sue for damages, the plaintiff must first notify the company of the defamatory remarks before filing suit. The burden of remedying the problem would then pass to the employee's company. A company with the proper procedures in place could quickly correct the activity. Thus, the company could avoid liability from further harm that may have otherwise resulted absent notice.

This scheme would also promote a company's use of blogging. A company can encourage its employees to blog without fear of incurring excess liability. In turn, companies may instead focus on using these tools to provide better services or products to customers.

VI. CONCLUSION

Blogging is still in its infancy, and even if companies resist, it will continue to grow. Blogging presents a new legal challenge as it brings a new paradigm to the workplace. The businesses that have adopted blogging range from conservative religious publishing houses, such as

Thomas Nelson, to large industrial manufacturers, such as GM, to cutting-edge software companies, such as Sun Microsystems. They are all exploiting the communication abilities of blogging.

Sun is just one of the companies that have recognized the inevitability of blogging in the workplace. Just as sure as people talk and e-mail, people will blog about their life and work, whether they do it on a company's server or pay for their own private service. Sun prudently decided to encourage its employees to blog on its servers.

By discouraging or ignoring blogging, companies will only continue to exacerbate the problem. Such companies will likely continue to fire bloggers for any indiscretion that eventually arises, thereby disrupting the workplace and bringing negative publicity. These companies will inadvertently push their employees to blog anonymously. However, as mentioned above, blogging anonymously brings further legal problems that have not yet been resolved.¹⁹² Companies will likely spend time and money litigating with anonymous employees to try to uncover their identities when employees say something the companies disagree with. Ultimately, such companies will have little influence over what their employees say.

Instead, by encouraging employees to blog on its servers, Sun is actually saving time and money, as well as promoting its business. Sun hopes that if customers build a relationship with its employees, then those customers will remain more loyal. Sun understands that employees will inevitably express negative thoughts about their work or workplace. By encouraging employees to post negative thoughts in the open, the company may decrease its expenses in dealing with anonymous bloggers (i.e., litigation costs). Further, the company may better influence its employees to constructively express negativity. Lastly, by allowing critical comments on its own servers, the company stands in a better light by accepting its faults and striving to correct them. In effect, the company is looking at the long-term benefits at the expense of short term liabilities.

Employees benefit from such policies. By fostering a working relationship in a potentially contentious area, companies will avoid the type of problems with employee blogging that often result in loss of employment and lawsuits.

192. *See supra* Part IV.

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In a country renowned for innovation, courts should encourage blogging to allow companies to take advantage of this technology. Just as with the telephone and then with e-mail, new technology should be embraced, not discouraged. Courts should adopt rules that allow an employer to encourage its employees to blog while also avoiding illegal and disruptive activity.

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