

# Employees Fired Over Personal Blogs Fight Back

## Companies Implement Blogging Policies To Avoid Legal Pitfalls

BY CATHLEEN FLAHARDY

WHEN HER MOTHER died in late 2003, Ellen Simonetti started a blog as a way to cope with the grief. Her blog quickly gained a following and before she knew it, Simonetti, a Delta Air Lines flight attendant, was writing about dating, traveling and the trials and tribulations of working for an airline. But when the "Queen of Sky," as she became known to fellow bloggers, posted suggestive pictures of herself in uniform aboard a Delta aircraft in October 2004, the company fired her, claiming she had violated a company rule that prohibits employees from being photographed in their uniforms.

Simonetti isn't the first employee to be fired over content posted on a personal blog. In January Google fired project manager Mark Jen for discussing his employer's finances on his blog. Starbucks sacked Matthew Brown in September 2004 for posting comments on his blog about the company, its management and customers. ESPN gave Gregg Easterbrook the chop in October 2003 for blogging about the ethnicity of the producers of the "Kill Bill" movies. (ESPN and Miramax, the company that produced the "Kill Bill" films, are both owned by Disney.) In fact, in the past year, firings over content employees post on their personal blogs have been steadily increasing.

"The No. 1 reason these types of firings have increased is simply because more people are blogging," says Christopher Cobey, senior counsel in Littler Mendelson's San Jose, Calif., office. "Currently, there are more than 7 million people that have blogs. Today, anyone can be his or her own newspaper publisher on the Internet."

But many employees are making one big

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mistake—assuming the First Amendment protects their jobs no matter what they post on the Web. In reality, companies are well within their legal rights when they fire employees for blogging inappropriately. Considering the increase in the number of dismissals, experts believe it's time companies start implementing guidelines on blogging so employees know what is and isn't appropriate to post.

"There is a theme in the American workplace that if it's not forbidden, it's permitted," Cobey says. "And it's the employers' obligation to let their employees' know what they can and can't do."

#### Freedom Of Speech?

In a March 16 blog entry titled "The First Amendment = Freedom of Speech," Simonetti incorrectly claims Delta violated her First Amendment rights when company officials fired her. While the First Amendment gives people the right to speak freely without government interference, it does nothing to protect their employment.

"As a citizen, an employee has the right to say anything he or she wants on matters of public concern," Cobey explains. "But where it implicates the relationship the individual has as an employee of his or her employer, then you have other considerations that come into play."

One of those considerations is the common law duty of loyalty, which allows an employer to terminate an individual's employment if that employee's behavior could potentially harm the employer's reputation.

For example, Simonetti posted pictures of herself leaning forward showing her cleavage and bra strap, lying across the top of a row of seats wearing a skirt that was slightly pulled up, and standing on a seat bending over into an overhead compartment—the focal point being her backside. These photos were by no means pornographic, but she was in uniform in all of them.

Barbara E. Hoey, an employment defense lawyer and partner at Kelley Drye & Warren in New York, says Simonetti's photos could jeopardize the airline's reputation as a professional organization.

"They want passengers to respect flight attendants and obey them in the case of an emergency," says Hoey, who doesn't represent Delta. "Flight attendants are professionals that can save your life if the plane is going down. And then this? How can you regard [Simonetti] as a professional? And what does that say about the airline as a professional organization?"

Although Delta fired Simonetti over her blogging activities, it really didn't need a good reason to take action.

According to the employment-at-will doctrine, when an employee doesn't have a written employment contract and the terms of the employment are of indefinite duration, the employer can terminate the employee for good cause or no cause at all. Likewise employees have the right to quit their jobs



When Delta Air Lines flight attendant Ellen Simonetti posted suggestive pictures of herself (above) in uniform aboard a Delta aircraft on her personal blog, the company fired her. Experts say implementing guidelines outlining what is acceptable on personal blogs will help companies avoid these types of problems.

at any time with or without reason.

"The at-will doctrine, which still reigns supreme in the United States, means you could be fired for no reason at all," says Cliff Palefsky, a partner at McGuinn, Hillsman & Palefsky in San Francisco. "So even though most people believe we live in a country with a First Amendment, they don't understand it doesn't apply in the workplace the same way it would apply against the government."

And that misconception will continue to cost many employees their jobs unless companies provide them with some guidance.

#### Put It In Writing

As blogging continues to become a favored pastime, more and more companies are seeking advice on how to implement blogging guidelines. The good news is most companies already have policies governing e-mail and Internet usage. Experts say updating those rules to include blogging is all that is necessary.

When drafting blogging guidelines, companies need to make clear to employees what is impermissible, such as subjects about which they aren't allowed to blog or on which they don't have the authority to speak for the company.

"Policies should include the admonition that if employees are blogging about stuff they shouldn't be blogging about—whether it's trade secrets, confidential information or insulting company management—that could be defamatory," Cobey says. "Employers should also remind employees that this is the kind of conduct that—notwithstanding the fact that it might be done out of the office, off campus and not on business time—could still result in adverse action."

While some states, such as New York and

California, have laws that protect employees' from losing their jobs due to lawful activities in which they engage off duty, those laws may not apply to blogging. "The genesis of many of those statutes really is the use of tobacco products," Cobey says.

Hoey warns that companies should be cautious when they are considering taking action against employees who, for example, use their blogs to organize a union or complain about discriminatory behavior. "There it gets trickier," she says. "There are circumstances where an employee may have gone over the line. But there are statutes that protect employees for organizing unions or complaining about harassment. It can become a very difficult situation."

Implementing a policy, however, may help eliminate those situations.

#### Case In Point

Three years ago, Jeff Seul, vice president, general counsel and secretary of Groove Networks, a Beverly, Mass.-based software manufacturer, received an interesting request from some of the company's employees. A group of developers had created a blog with colleagues in the industry and were concerned they may unintentionally post something that might upset the company's management. Fearful of putting their jobs in jeopardy, they asked Seul to provide them with some guidance.

In response, Seul created a blog policy for all of the company's employees that not only encourages them to participate in blogging, but also provides server space for their blogs. "We hope our people feel free to express different perspectives on any issue," Seul says. "But when they do, we encourage them to do so respectfully."

### Blog Stats

For the past few years, the idea of keeping a personal journal on the Web, known as blogging, has quickly gained ground. Technorati, a real-time search engine that keeps track of what is going on in the blogosphere—the world of weblogs—tracked more than 8 million blogs. That's 16 times the number of blogs that existed in 2003. Here are some more interesting statistics about blogs:

- > The blog community is **doubling** in size about every 5 months.
- > A new blog is created every **2.2 seconds**, totaling almost 40,000 each day.
- > There are **5.8 posts** to blogs every second.
- > Events that brought the highest volume of blog activity included the **beheading of Nick Berg**, the **U.S. presidential election**, the **tsunami** and the **Super Bowl**.

Source: Technorati

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Groove Networks' policy asks, among other things, that employees make it clear in their blogs that their views aren't those of the company; that they do not disclose confidential company information; and they remain respectful to the company's customers, partners and other employees.

The company also warns that there may be times it will ask employees to discontinue blogging for a period of time. For instance, if Groove Networks at some point filed to go public, the policy says employees must respect the quiet period associated with the IPO process.

Seul points out that blogging provides employees with a creative outlet and allows them to demonstrate their knowledge and competence about matters related to their work. But he also recognizes blogs can be incredibly time consuming—the very reason he doesn't keep a blog of his own.

"If people start tracking your blog and it starts generating a lot of interaction, it can become a lot of work to maintain," he says. "If that begins to affect productivity at work, then it's a problem for both the employee and the employer."

Seul says Groove Networks fortunately has never had to fire an employee over inappropriate blogging behavior, and he credits that to the early implementation of the company's policy.

But he says while some general rules

could apply universally, guidelines on blogging really don't fall into a one-size-fits-all category.

"Any company considering creating a policy needs to think about their specific business, and identify risks and concerns that might be peculiar to their business environment," he says. "It should try to create a policy that aligns well with its corporate culture, which is something we certainly tried to do as we drafted our own policy."

The key component to Groove Network's policy was striking a balance between the employees' desire and right to express themselves and the company's legitimate interests. "It's as permissive as it is reasonably prudent while also giving employees some guidance that will help them do the right thing," he says.

Had Simonetti received guidance from Delta, she may have known that posting her photos wouldn't fall into the category of "doing the right thing."

In March, she took her complaint to the EEOC, claiming wrongful termination and defamation of character and is seeking lost future wages. On her blog, the title of which has changed from "Diary of a Flight Attendant" to "Diary of a Fired Flight Attendant," Simonetti claims "a big lawsuit is coming for Delta Air Lines." Both the EEOC and Delta declined to comment on Simonetti's complaint, but experts believe Delta did nothing wrong.

"Those pictures speak for themselves," Cobey says. "Any employer would be justified in saying that is not a professional image." ◀

"There's a movement toward using IM for day-to-day business communication and it's going to be huge," the attorney adds. "I predict that by the end of the year, a lot of companies, including ours, will decide to either lock it out, or implement a formal logging system to capture the IMs. But nobody wants to take that first step, because if they implement the logging system, it will be like yelling, 'Hey plaintiffs, come get my IMs!'" ◀

### By The Numbers: Instant Messages

- > More than **21%** of employers have had employee **e-mails and IMs subpoenaed** in the course of a lawsuit or regulatory investigation.
- > **6%** of employers **retain and archive** business-record IMs.
- > **20%** of employers **have adopted a policy** governing IM use and content.
- > **11%** of organizations **employ IM gateway/management software** to monitor, purge, retain and otherwise control IM risks and use.
- > **31%** of employees **use IM at the office**.
- > **78%** of those employees **downloaded free IM software** from the Internet.
- > **58%** of workplace users **engage in personal IM chat**.

Source: AMA/ePolicy Institute, 2004 Workplace E-mail and Instant Messaging Survey Summary.

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Daley points out that the Federal Civil Rules Advisory Committee's proposed change to Rule 34 expands the definition of "document" to include all "electronically stored information."

"The trend is that there is less and less distinction between e-mail and IM when it comes to a company's record-retention policy and litigation-hold notices," Daley says. "If employees are using IM for business purposes, the first time litigation ensues and IM is part of the investigation or subpoena, the event will trump the company's normal retention policy (and the IMs will have to be logged)."

Further, Flynn asks, what happens if another party—a customer or an employee charging the company with sexual harassment—*does* retain its IMs.

"If you end up in court, you may only have part of an IM conversation and it could be taken out of context," Flynn says. "From a legal perspective, wouldn't it be better to have a corporatewide use and retention policy in place and have full access to all your IMs?"

Clearly, corporate law departments that haven't already done so will have to establish some sort of IM policy sooner rather than later.

"As the legal department, our job is not to prevent employees from using instant messaging or any other technology," says the Fortune 100 in-house attorney. "Our job is to thoroughly explain the risks associated with using it.

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