

2009 HOSPITALITY LAW CONFERENCE

How Do We Manage Blogs, Instant Messaging,
Phones with Cameras, How to Discipline & Avoid
Loss of Trade Secrets



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Presenters



- Steven M. Gutierrez
- Mr. Gutierrez is the chair of the Labor and Employment practice group and Holland & Hart LLP.
- He has substantial litigation experience focusing on labor and employment, tort and product liability litigation.



Technological advances and challenges

- Over the past few decades, technological advances have brought about a revolution in business and in nearly all aspects of our lives.
 - People communicate with each other in seconds, over vast territory
 - There is no longer a need to be physically near clients and co-workers; instead employees can communicate effectively at home



Technological advances and challenges

- New technologies offer a wide variety of services and opportunities, and to some increase efficiency and productivity, but challenges remain:
 - employers increasingly see a need to adopt ways to manage the widespread use of new technologies, find ways to prevent the inevitable loss of face-to-face interpersonal skills and a deterioration of relationships in the workplace, and prevent liability.



What technological advances:

- Blogs

- Blog is web log or personal journal posted on the Internet
- Blogosphere is considered the world of blogs, or interactive diaries posted on the Internet
- Blogs can be accessed via internet to anyone, unless restricted by creator
- Allows posting by visitors



Blogs

- Approximately 10 million Americans maintain a blog
 - Like the Internet and electronic communications in general, the blogging community has grown and will continue to grow at a phenomenal rate.
 - In 2004, there were about 8 million blogs on the Internet.



Blogs

- By February 2006 that number had jumped to 27.7 million, with a growth rate of 75,000 new sites per day (or about one per second).
- As of March 2007, there were some 70.9 million blogs, growing at a rate of 175,000 per day.
- Every day, bloggers are making over 1.6 million new posts to those sites.



Blogs

- Blogs can serve any purpose an individual can think of:
 - Political commentary
 - Recruitment
 - Venting
 - Commenting on a person's work life, includes
 - Co-worker
 - Supervisors
 - Employer
 - Customers



Blogs



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For more information about Steve Gutierrez, please [click here](#).

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June 05, 2008

JAMES GONZALES WINS INDEPENDENT PUBLISHER BOOK AWARD

DENVER (May 30, 2008) - Holland & Hart attorney James Gonzales won the 2008 Independent Publisher (IPPY) award for the best non-fiction work in the south-east region of the United States. This award was presented by Independent Publisher magazine at an event today in Los Angeles.

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June 04, 2008

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By Thomas E.J. Hazard and Kerri J. Atencio
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Blogs

- Canadian model Liskula Cohen filed an order for pre-action disclosure against Google in hopes of revealing the identity of a person who anonymously posted insulting remarks, which she claims are defamatory and malicious.
- Google owns the blog site where the anonymous blogger posts his information on a blog called “Skanks in NYC.”



What technological advances:

- Instant Messaging
 - Employers have increased the use of instant messaging as an alternate means to communicate with their employees and customers
 - Ideal for quickly transmitting short amounts of information or written communication
 - Employees' use of instant messaging should be restricted to work-related matters



What technological advances:

- Email
 - According to Proofpoint, Inc., a maker of e-mail security products, more than 1/3 of Employers surveyed in 2006 investigated a suspected e-mail leak of confidential or proprietary information
 - In a survey conducted by the ePolicy Institute, 15% of Employers have battled a workplace lawsuit triggered by Employee e-mail



What technological advances:

- Camera and Cell phones
 - 2005: 89 million sold
 - 89% of all cell phones sold have:
 - Hidden camera feature
 - Immediate downloads to computers, faxes and multi-media messaging services



What technological advances:

- On New Year's Day at Vail Ski Resort, a skier fell through chairlift and hung upside-down and half-naked for the approximately 7 minutes it took ski patrol members to get him down.
- An employee of SharpShooter Imaging, a company that employs photographers to take pictures of people at Vail and other resorts, took a photograph of the man while on duty and sold it to a local newspaper. The photograph is now posted on multiple websites and blogs.
- SharpShooter has placed the employee on suspension while they finish an investigation into the facts.



What technological advances:

- **Cyberloafing**

- Cyberloafing is a term used to describe Employees who surf the Internet, write e-mail, or engage in other non-work related Internet activities on the Employer's time

- 86% of Employees use their Employer's electronic resources for personal use
- 51% of Employees surf the Internet for personal reasons at work between one and five hours a week
- 25% of companies have dismissed at least one Employee for misuse of Internet access



Potential Liabilities

- The theories of liability are not premised on new causes of action, but are based upon existing principles such as respondeat superior, agency, Title VII harassment/hostile work environment, and securities fraud.
- Under the theory of respondeat superior, an employer may be liable for the acts of its employees that are within the scope of their employment.
 - Restatement 3d of Agency § 204 (2006).



Potential Liabilities

- Conduct is in the scope of employment if: (1) it is the kind the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the master; and (4) the force is intentionally used by the employee against another.
 - *Ludden v. Sprague Energy Corp.*, 2006 U.S. Dist. LEXIS 2381 (D. Me. Jan. 23, 2006).



Potential Liabilities

- Employer may be held liable for negligent retention or supervision when it places an unfit person in a situation involving an unreasonable risk of harm.
- For example, in *Booker v. GTE.NET LLC*, 350 F.3d 515 (6th Cir. 2003), plaintiff claimed negligent supervision where a customer service representative authored offensive electronic communication to a customer using plaintiff's identity.
 - Claim was dismissed based upon plaintiff's inability to establish that the employer knew or should have known of the employee's bad conduct, still a viable claim may be established where an employer has prior knowledge of similar behavior.



Potential Liabilities

- **Security Breaches and Loss of Trade Secrets**
 - Employees who share information learned at work, knowingly or unknowingly through communication with friends and family or through blogging and email, may create liability for the company.
 - Communications regarding research and upcoming projects may reveal trade secrets to business competitors creating a loss for the company.



Potential Liabilities

- The risk of a breach of privacy may also come in the form of loss of proprietary information and client confidentiality, in addition to violations of state and federal securities laws, and HIPAA provisions.
- Patents may be implicated.
 - Publications regarding an upcoming patent, more than one year prior to the application for a patent in the United States, may prohibit the granting of such patent. 35 U.S.C. §102(b)



Potential Liabilities

- A printed publication is anything which is printed and can include documents duplicated by modern techniques and methods.
 - The questions to be answered are whether a publication via a blog or an email was printed, published and accessible to the public.
 - *Phillip Electronics & Pharmaceutical Ind. Corp. v. Thermal & Electronics Industrial Inc.*, 450 F.2d 1164 (3rd Cir. 1971).



Potential Liabilities

- Trade Libel
 - Trade libel is an injurious falsehood that interferes with business that is directed at goods sold, or the character of the business.
 - *Idaho Norland Corp. v. Caelter Industries, Inc.*, 509 F. Supp. 1070 (D. Colo. 1981).
 - For example, in *Shyron Bynog v. SL Green Realty Corp.*, 2007 U.S. Dist. LEXIS 19110 (S.D.N.Y. March 20, 2007), defendant filed a trade libel claim in an attempt to enjoin a terminated employee's post-termination website postings detailing events of her termination.
 - Although the defendant's motion for injunction was denied, the litigation is an indication of the steps that may be required by an employer to protect its image and products and services from disparagement.



Potential Liabilities

- **Securities Fraud**

- [15 U.S.C. § 77e](#) prohibits the use of any medium to issue an offer to buy or sell securities unless a registration statement is in effect for that security.
- During that period, the federal securities laws limit what information a company and related parties can release to the public. See <http://www.sec.gov/answers/quiet.htm>
- Employers could be liable where an employee uses an internet chat room, blog or email to post information about securities. Could be more harmful because of breadth of distribution.



Potential Liabilities

- Defamation -- Slander/Libel
- Defamation, slander and libel claims arising out of the workplace can be common.
 - In *Blakely v. Continental Airlines*, 164 N.J. 38 (2000), the court specifically considered whether an employer, who provides an internet forum - an electronic bulletin board - for employees to use, has a duty to monitor e-mail postings to ensure that employees are not harassing or defaming each other.
 - Not surprisingly, the Court affirmed the employer's duty to remedy inappropriate behavior.



Potential Liabilities

- Discrimination Liability – Title VII/Harassment
- Title VII of the Civil Rights Act of 1964 prohibits sexually explicit material downloaded from a website, a screensaver that is viewed as derogatory to a group of employees because of their gender or race, an inappropriate joke shared in an e-mail, or harassing materials forwarded to an employee or customer.



Potential Liabilities

- Chevron Oil Co. settled a lawsuit for \$2.2 million brought by a group of employees alleging that Chevron allowed its internal e-mail system to be used to disseminate sexually explicit content.
- One email gave 25 reasons why beer is better than women.



What can an employer do to regulate new technologies

- Ellen Simonetti, a Delta Air Lines' flight attendant, maintained a personal blog, "Queen of the Sky: Diary of a Flight Attendant."
 - Ms. Simonetti was allegedly fired by Delta for posting photos of herself in uniform on an airplane and for comments posted on her blog which her employer deemed inappropriate.
 - Ms. Simonetti sued her former employer for wrongful termination, discrimination and defamation.
 - Although the merit, if any, of Ms. Simonetti's claims is still unresolved, the time and fees expended by an employer when defending employment-related litigation can be financially crippling and virtually irrecoverable.



How to regulate

- Avoiding such litigation and its associated costs is what motivates employers to create, publish and update employee policies and procedures and to invest in training their employees regarding avoiding discrimination and harassment – and with good reason.
- One survey reported that “labor and employment” litigation was the category with the most numerous litigation matters pending against companies in the past year.



How to regulate

- A survey of large companies in 2006 found that only 2% of companies had terminated an employee for blogging
- A different survey in 2007 found that 3% of all employers had actually disciplined employees for blogging
- Though most companies had internet and e-mail policies, most had not amended those policies for other technologies



Computer-Use Policies

- Written employee policies notify employees regarding their rights and obligations with regard to their employment.
 - Thus, an employee's expectation of privacy in the employee's office, desk, physical and electronic files and email may be reduced or eliminated by way of employer policies and actual practices.
- Clear company policies can also reduce the risk of employee theft, leak of confidential information, and employer liability for employee email and Internet abuse by notifying employees that their e-activities will be monitored.



Computer-Use Policies

- At the same time, it should be noted that, if an employer fails to enforce its computer use policy or has knowledge of illegal or wrongful acts and fails to take prompt action, a policy might be used against the employer in the litigation context.



Formulating A Policy

- Employers should inform employees that the computer system, E-mail, Internet and/or voicemail, cell phones, are for business purposes, and the extent to which personal usage is allowed (if at all) should be very limited.
- The policy should make clear that the existence or use of employee generated passwords prohibit the transmission of any discriminatory, offensive, or unprofessional messages, as well as limiting employee access to any discriminatory or offensive Internet sites.



Formulating A Policy

- The Policy should contain the following:
 - A statement that all computer/communication equipment, as well as any data on that equipment is the property of the company, and there should be no expectation of privacy or confidentiality.
 - Clear guidelines detailing whether using company equipment or time to blog or post online is permitted.
 - Advise employees that private off-duty blogs could result in disciplinary action including and up to termination.



Formulating A Policy

- This explanation may include some, or all, of the following:
 - Advise that private communication (blogs) may be reviewed/monitored;
 - Discourage anonymous blogging;
 - A statement that off-site communications reflecting on the company may be considered for disciplinary action in accordance with the law;
 - Require a disclaimer regarding the views expressed;



Formulating A Policy

- Require that all employees, customers, vendors and competitors must be treated with dignity and respect;
- Prohibit against using company logos, trademarks, slogans, and other copyrighted materials on personal sites;
- Prohibit employees from identifying themselves as a company employee, or prohibit them from discussing customers, vendors or competitors;



Formulating A Policy

- Prohibit all offensive communication (such as sexual, racial, religious, etc., comments), regardless of whether they are intended in jest;
- Require employees to report any offensive communications;
- Prohibit viewing, transmitting, downloading or saving any offensive materials;
- Prohibit the transmission, illegal downloading or use of copyrighted material and trade secrets;



Formulating A Policy

- Advise the employees that violation of the policy may result in appropriate disciplinary action, including termination.
- Apply the policy consistently and fairly;
- Prohibit links to the Employer's website.



Legal Restrictions

- Retaliation/Protected Activity
 - Numerous statutes prohibit retaliation against an employee for engaging in protected activity.
 - Employers must carefully consider the nature of employee's complaints in a blog or other technology before taking any adverse action.
 - For example, if the employee is claiming harassment or discrimination in the workplace, he/she may be engaging in protected activity.



Legal Restrictions

- Whistleblower protection
 - Employees speaking out on issues of corporate wrongdoing to matters of public concern may have rights that must be considered.
 - *The Sarbanes-Oxley Act (SOX)*; 18 U.S.C. § 1514A. Employees of publicly-traded companies are protected when they speak about corporate fraud or financial/securities matters.
 - *Wrongful discharge in violation of public-policy* -- Court-created exception to the at-will doctrine prohibits action against an employee who refuses to perform an illegal act.



Legal Restrictions

- *National Labor Relations Act (NLRA).*
 - You are probably aware that employees subject to a bargaining agreement can only be disciplined in accordance with its terms.
 - You should also be aware, however, regardless of whether you have a union workplace; employees are protected whenever they engage in “concerted activity.”



Legal Restrictions

- In *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002), a pilot invited mostly other pilots to the site, requiring them to obtain and enter a password.
 - The CEO obtained a password from another pilot and learned he was being called a Nazi and accused of fraud and incompetence.
 - Although federal law does not protect false, defamatory, “disloyal” or other unlawful statements, the court found “federal law gives a union license to use intemperate, abusive or insulting language....”



Legal Restrictions

- *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002)
 - This case also demonstrates the potential dangers of how an employer who accesses a website-circumventing a security system may violate the Wiretap Act and Stored Communications Act.
 - See also Computer Fraud and Abuse Act



Legal Restrictions

- *Free speech/Political speech.*
 - Public employers must consider whether state or federal protection of free speech applies to their employees' blogs. In addition, some states protect political expression for both public and private employees.



Legal Restrictions

- *Off-duty Conduct Laws*
 - A number of states have passed laws that prohibit employers from disciplining or firing employees for activities they pursue off-site, on their own time.
 - Example, in *Watson v. Public Service Co. of Colorado d/b/a Xcel Energy*, Case No. 07CA1024 (Colo. App. Oct. 16, 2008), an off-duty employee called the Occupational Safety and Health Administration (OSHA) to report what he believed were certain unsafe working conditions. The next day the Xcel manager fired the employee for unrelated reasons. Ultimately, the Court of Appeals agreed with the trial court that the statute protects employees engaged in “private off-the-job activity that is unrelated to their job duties,” but remanded the case for retrial on other grounds. Cases like these should give employers pause before discipline employees for off-duty conduct such as blogging.



Technological advances and challenges

- **Business Concerns**
 - *Economic concerns.* Whether the statements are true or false, blog postings can have a direct economic impact. For example, Southern Pacific Funding Corporation's stock dropped from \$17 to \$1 (resulting in Bankruptcy) after bloggers claimed executives were embezzling funds and cooking the books.
 - *Confidential information.* Whether from a disgruntled employee or just inadvertent posting of trade secrets and other proprietary corporate information on a blog, email may result in immediate, irreparable damage.
 - *Trademark/Copyright.* Use of company trademarks and copyrighted material can dilute company intellectual property or associate the company with undesirable positions and activities.



Technological advances and challenges

- *Union organizing.* Unions have quickly recognized the power of the blog in spreading the union message from what at least appears to be an independent messenger. Unions, such as the SEIU, have made blogging technology available without charge to its local unions. See blog.afcio.org
- *Loss of productivity.* Regardless of whether you have a policy on Internet use, employees with Internet access may use work time to read and post on their own and others' blogs.



Technological advances and challenges

- Internal Liability
 - *Harassment/discrimination.* An employer may find itself in the middle when one employee (or customer, vendor, etc.) decides to “cybersmear” another.
 - *Tort claims.* Claims of defamation, intentional infliction of emotional distress, or other tort claims against the employer.
 - *Private information.* Revealing private information about other employees obtained through work may result in liability for the employer under statutes such as HIPAA.



Technological advances and challenges

- External Liability
 - *Defamation and other tort claims.* External statements can lead to defamation claims if made by an employee with apparent authority or under the guise of representing the company by using the employer's logo or link.
 - *Security law violations.* Under state and federal securities laws, an employer must protect confidential information about mergers, stock splits and buybacks, and other non-public corporate information.