

# ANTI-EMPLOYER BLOGGING: EMPLOYEE BREACH OF THE DUTY OF LOYALTY AND THE PROCEDURE FOR ALLOWING DISCOVERY OF A BLOGGER'S IDENTITY BEFORE SERVICE OF PROCESS IS EFFECTED

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## ABSTRACT

*The rapid rise in anonymous anti-employer internet blogs by disgruntled employees has created a tension between the liberty interests of employees in free speech and privacy and employers' rights to be free from defamation, disparagement and disclosure of confidential information by an employee. This iBrief argues that the anonymity of anti-employer bloggers should not shield employees from breach of the duty of loyalty claims under tort and contract law, and that Congress should enact rules to govern the disclosure of blogger identity.*

## INTRODUCTION

Merriam-Webster's Word of the Year 2004: "**Blog** *noun* [short for *Weblog*] (1999): a Web site that contains an online personal journal with reflections comments, and often hyperlinks provided by the writer."<sup>2</sup>

¶1 The rise of internet blogs has created a new and powerful information tool on the internet. The authors of anti-employer blogs often hide behind anonymity to disclose confidential information about the employer or engage in disloyal anti-employer blogging. The employer has a right to pursue breach of the duty of loyalty claims against such persons and the anonymity of the internet should not protect bloggers because tortious anti-employer speech is not protected by law.

¶2 The current method required of employers to obtain the identity of disloyal employee bloggers, filing lawsuits, is cumbersome, expensive, and inefficient. Congress should enact legislation to form a federal rule

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<sup>2</sup> <http://www.webster.com/info/04words.htm>. (last visited September 28, 2005).

allowing for the expeditious, pre-service of process discovery of blogger identity. Such a discovery rule would streamline the process for employers to legitimately obtain the identities of anti-employer bloggers. This streamlined process would promote the protection of employers from unlawful speech and employee disloyalty, while preserving the identities of innocent bloggers who owe no legal duty to the employers they criticize.

¶3 Section I of this iBrief discusses the history of blogging and the power of the anti-employer blog. Section II explains the duty of loyalty an employee blogger owes an employer. Section III explores the relationship between free speech, anonymity and blogs. Section IV analyzes case law which addresses the standards required by employers to obtain the identity of an anti-employer blogger. Finally, section V proposes a streamlined discovery process for courts to employ when faced with an employer pre-service of process request for employee blogger identity disclosure.

### I. THE POWER OF THE ANTI-EMPLOYER BLOG

¶4 Blogs, or “web logs” as originally named, emerged from the early days of the internet<sup>3</sup> when skillful computer programmers created websites which would automatically update and archive themselves and provide hyperlinks to related webpages of interest to assist others in quickly finding information.<sup>4</sup> This quick access to a listing of related sites was especially convenient in providing web surfers with presorted information in the time of slow connections and pay-by-the-minute fees. In 1997, John Barger realized the significance of the growing popularity and usefulness of these webpages and described them as “weblogs.”<sup>5</sup> This was later shortened to the slang term, “Blog.”<sup>6</sup>

¶5 While slow to start, blogging quickly took flight in the mid-1990s with the introduction of automated publishing systems, such as Pitas and Blogger.<sup>7</sup> Such systems allowed the average internet user, after following

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<sup>3</sup> Some say that Tim Berners-Lee was the first to create the blog, as he was the man credited to creating the World Wide Web. Attiya Malik, *Are You Content with the Content? Intellectual Property Implications of Weblog Publishing*, 21 J. MARSHALL J. COMPUTER & INFO. L. 439, 443 (2003).

<sup>4</sup> Paul S. Gutman, *Say What?: Blogging and Employment Law in Conflict*, 27 COLUM. J.L. & ARTS 145, 145 (2003).

<sup>5</sup> *Id.*

<sup>6</sup> See Steven Levy, *Will the Blogs Kill Old Media?*, NEWSWEEK, May 20, 2002, at 52. See also, *Timeline of Early Blogs*,

[http://www.blockstar.com/blog/blog\\_timeline.html](http://www.blockstar.com/blog/blog_timeline.html) (last visited July 15, 2005).

The term “blog” was credited to Peter Merholz in early 1999.

<sup>7</sup> Alan Nye, *Blog Wars: A Long Time Ago in an Internet Far, Far Away . . .*, 20 ME. B.J. 102, 102 (2005).

five minutes of simple directions,<sup>8</sup> to establish a personal online diary which carried no barriers to publishing, no restrictions on content, and no limit to the potential readers online.<sup>9</sup> Moreover, one of the most attractive features of a blog to a blogger who wishes to post information but remain hidden is a blog's anonymity.<sup>10</sup>

¶6 These simple and exciting qualities led to the current explosion in blog use and creation. It is estimated that over 888 million persons have access to the internet<sup>11</sup> and estimates of the number of blog sites range from 10 to 30 million.<sup>12</sup> Moreover, it has been estimated that a new blog is created every 7.4 seconds.<sup>13</sup>

¶7 In addition to the strictly personal blog, where the author maintains an online journal with hyperlinks to areas of personal interest, blogs have

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<sup>8</sup> The setup includes registering and opening an account with a weblog service provider and then constructing the blog. This construction consists of choosing a built-in template or a predesigned format which will automatically archive the posts. Malik, *supra* note 3 at 445. Blogging is not only popular for its quick setup, but also for the speed of publication. As a result, many blogs contain incorrect spelling and grammar. Orit Goldring & Antonia L. Hamblin, *Think Before You Click: Online Anonymity Does Not Make Defamation Legal*, 20 HOFSTRA LAB. & EMP. L.J. 383, 385 (2003).

<sup>9</sup> See Malik, *supra* note 3 at 443-444 (explaining the differences in creating the different processes of a web page and a blog, highlighting the ease with which blogs can be created). See also Gutman, *supra* note 4, at 147 (commenting on how the barrier to enter publication is dramatically lower than it once was when the printing press was the main form of reaching the public).

<sup>10</sup> This anonymity can be most desirable for persons who espouse controversial or unpopular views which may subject them to ridicule. Blogger anonymity is easily achieved by using a "screen name" when creating a blog. This screen name acts as a pseudonym and provides the blogger with a protective shield from discovery. Allison Stiles, *Everyone's a Critic: Defamation and Anonymity on the Internet*, 2002 DUKE L. & TECH. REV. 4 at \*3 (2002). See also David L. Sobel, *The Process that "John Doe" is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH. 3, 1 (2000).

<sup>11</sup> *Internet Usage Statistics-The Big Picture*, <http://www.internetworldstats.com/stats.htm> (last updated March 31, 2005).

<sup>12</sup> Carl Bialik, *Measuring the Impact of Blogs Requires More than Counting*, THE WALLSTREET JOURNAL ONLINE, ¶ 3 (May 26, 2005), [http://online.wsj.com/public/article/0,,SB111685593903640572,00.html?mod=2\\_1125\\_1](http://online.wsj.com/public/article/0,,SB111685593903640572,00.html?mod=2_1125_1).

<sup>13</sup> Blogs, Everyone? Weblogs Are Here to Stay, but Where Are They Headed?, <http://knowledge.wharton.upenn.edu/index.cfm?fa=printArticle&ID=1172> (last visited Apr. 6, 2005) [hereinafter Blogs, Everyone]. Statistics also show that the "blogosphere," the new expansive world of blogs, is doubling in size about every five months. Nye, *supra* note 7, at 103.

arisen to cover virtually every area of human interest.<sup>14</sup> There are personal blogs, news blogs, campaign blogs, tech blogs, sports blogs, employment law blogs, photo blogs, military blogs and many, many more.<sup>15</sup>

¶8 While the majority of blogs are politically oriented,<sup>16</sup> an ever-rising number of blogs are dedicated to complaints about work and the boss.<sup>17</sup> Specifically, blogs and message boards at sites such as F\*\*kedCompany.com<sup>18</sup> are dedicated to expressions of employee frustration about work and the boss.<sup>19</sup> Indeed, F\*\*kedCompany.com receives approximately 124,000 visits per week and actively encourages company insiders to out confidential information about their employers.<sup>20</sup> These sites, sometimes referred to as “gripe sites,”<sup>21</sup> can be very powerful.<sup>22</sup>

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<sup>14</sup> See Gutman, *supra* note 4 at 146. See also Malik, *supra* note 3 at 439-40 (explaining how blogs are now being used for journalism, education, and business).

<sup>15</sup> Jenna Thomson, *Librari\*s & Blogs: Types of Blogs*, [http://www.slais.ubc.ca/courses/libr500/03-04-wt2/www/J\\_Thomson/types.htm](http://www.slais.ubc.ca/courses/libr500/03-04-wt2/www/J_Thomson/types.htm) (last modified Apr. 16, 2004).

<sup>16</sup> See Blogs, Everyone, *supra* note 13.

<sup>17</sup> In the past, complaints “reach[ed] an audience limited both in scope and geography,” and while anti-employer activity is not a new trend, the vast and immediate effects are new and complicated. Margo E. K. Reder & Christine Neylon O’Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 MICH. TELECOMM. & TECH. L. REV. 195, 196 (2002).

<sup>18</sup> <http://www.FuckedCompany.com> (last visited July 27, 2005).

<sup>19</sup> See Goldring & Hamblin, *supra* note 8 at 388-89. These sites can also be used to express dissatisfaction with co-workers to views about general employment topics.

<sup>20</sup> The chairman of the board of General Motors recognized the phenomenon of third party encouragement of employees to be disloyal to the employer as early as 1971, when he stated, “Some enemies of business now encourage an employee to be disloyal to the enterprise. They want to create suspicion and disharmony, and pry into the proprietary interests of the business. However this is labeled—industrial espionage, whistle blowing, or professional responsibility—it is another tactic for spreading disunity and creating conflict.” ALAN WESTIN & STEPHEN SALISBURY, *INDIVIDUAL RIGHTS IN THE CORPORATION* 93 (1980).

<sup>21</sup> Gripe sites are “websites or message boards where employees post personal accounts, feedback and complaints about employers, working conditions, supervisors and benefits.” These sites can be created by more than just employees: prospective employees, customers, competitors, etc. Some employers actually use these sites to monitor employee satisfaction. See Goldring & Hamblin, *supra* note 8 at 386-87.

<sup>22</sup> Julia King, *Bitch Sites – What You Need to Know*, COMPUTERWORLD, Feb. 28, 2000, at 52, available at 2000 WLNR 6808828. Internet postings are

¶9 Anti-employer blogs pose a huge potential risk for employers, large and small, seeking to protect important business relationships and goodwill.<sup>23</sup> Indeed, in some cases, anti-employer comments posted on message boards and on blogs have done serious damage to employer stock values.<sup>24</sup> In response to the threat of critical, false, disparaging or confidential information being posted by anonymous anti-employer bloggers on the internet, many employers hire “scouring agencies” like eWatch,<sup>25</sup> to comb internet blogs, message boards and chat rooms to find postings of anti-employer comments.<sup>26</sup> Employers rely on these “electronic news clippings” to learn of damage done to the employer through blog entries by suspected disgruntled employees, who hide behind the anonymity the internet offers.<sup>27</sup>

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impossible to control, and the posting can circulate in the cyberspace world for a long time after the message was initially posted. Scot Wilson, *Corporate Criticism on the Internet: The Fine Line between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533, 535 (2002).

<sup>23</sup> Anti-employer blogging may cause several negative repercussions for the employer; “diminished sales, diversion of high-level resources . . . decreased stock value, loss of shareholder confidence and/or bruised employee morale.” John L. Hines, Jr., Michael H. Cramer, & Peter T. Berk, *Anonymity, Immunity & Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 SEDONA CONF. J. 97, 97 (2003) (explaining that cybersmear, or posting defamatory messages online, is a huge problem for employers right now that needs to be addressed. This article relies more heavily on anti-company blogging by any person, as opposed to anti-employer blogging by an employee; however, the repercussions for the company and employer are the same, as stated above).

<sup>24</sup> Southern Pacific Funding Corp. filed for bankruptcy after their stock prices fell from an all-time high of \$17 to \$1. This devastating blow came after a posting on a message board claimed company executives were covering up a multi-million dollar embezzlement, exaggerating economic forecasts, and placing the company for sale. Laura DiBiase, *Are Your Clients Smear-Savvy?*, 18-NOV AM. BANKR. INST. J. 22, 22 (1999). PhyCor is another firm which experienced severe damage to its stock price, which dropped from a high in 1996 of \$41.75 to a low in 1999 of \$1.09, as a result of anonymous postings on a message board. Many of these messages came from posters claiming to be current or former PhyCor physicians. Lisa M. Nijm, *The Online Message Board Controversy Physicians Hit with Claims of Libel and Insider Trading by Their Employers*, 21 J. LEGAL MED. 223, 224 (2000).

<sup>25</sup> eWatch is an online company which tracks print and online media for what is being reported about a client business, its competitors, and industry. Other scouring agencies include Cybercheck and Cyvillance.

<sup>26</sup> See DiBiase, *supra* note 24. See also Matt Richtel, *Trolling for Scuttlebutt on the Internet*, N.Y. TIMES, Mar. 8, 1999, at C4.

<sup>27</sup> Actual anonymity is an illusion. Digital footprints are left behind by every mouse click. Moreover, IP addresses and Internet Working Protocol numbers

¶10 Ironically, the aspect of the blog which is most appealing, anonymity, may also be the most legally problematic for the employment relationship. Nevertheless, in any legal skirmish over blogger identity disclosure, there is no question anti-employer blogs authored by disgruntled employees constitute a breach of the employee's duty of loyalty.

## II. THE EMPLOYEE'S DUTY OF LOYALTY

¶11 Employees are agents of the employers<sup>28</sup> and under traditional rules of agency, owe a duty of loyalty to employers.<sup>29</sup> Indeed, the standard of loyalty is high and an employee is obligated to refrain from behaving in a manner which would result in a derogation of an employer's interest.<sup>30</sup>

¶12 The Restatement (Second) of Agency provides that the duty of loyalty is broad and includes the duty of obedience, confidentiality and loyalty.<sup>31</sup> It specifies the numerous circumstances under which revealing confidentiality breaches this duty.<sup>32</sup>

¶13 Most courts agree that the degree of this duty of loyalty is related to the degree of responsibility and trust which the employer gives the

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can be traced back to the specific computers. *See* Goldring & Hamblin, *supra* note 9, at 385. *See also* Sobel, *supra* note 10, at 7.

<sup>28</sup> BALLENTINE'S LEGAL DICTIONARY AND THESAURUS 211 (1994). The employee/agent principle developed from the English law of master and servant, where the master accepted the responsibility to employ the servant only in lawful duties and the servant agreed to loyally serve the master in all lawful commands and to conduct himself morally while in the master's family. *See* Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL'Y 321, 321 (1999).

<sup>29</sup> RESTATEMENT (SECOND) OF AGENCY § 387 (1958). Along with the duty of loyalty, employers can reasonably expect nondisclosure and noncompetition from their employees. *See* Gutman, *supra* note 4, at 151. Employers can reasonably expect a duty of loyalty from their employees because the very nature of the employment relationship requires employers to provide the employees with two very important aspects of their business: knowledge and customer relationships. These are the very aspects that make an employer successful. Terry A. O'Neill, *Employees' Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681, 701 (1993).

<sup>30</sup> *See* Hilb, Rogal and Hamilton Co. of Richmond v. DePew, 440 S.E.2d 918, 921 (1994). With the decline of the economy and decreased job security, employees are looking out for only themselves, thus, while the standard for the duty of loyalty is high, the belief in the duty of loyalty has become weakened in recent years. This has led to the current rise in anti-employer activity.

Benjamin Aaron, *Employees' Duty of Loyalty: Introduction and Overview*, 20 COMP. LAB. L. & POL'Y J. 143, 150 (1999).

<sup>31</sup> RESTATEMENT (SECOND) OF AGENCY § 387 (1958).

<sup>32</sup> *Id.*

employee.<sup>33</sup> Some courts, however, have concluded that the duty of loyalty applies to all employees, regardless of status as an officer, director or manager of the firm.<sup>34</sup>

¶14 It makes sense that, when given heavy responsibility or access to confidential information or trade secrets, an employee will be under a different standard of care than will an employee who is not so entrusted.<sup>35</sup> Nevertheless, while employees may have varying levels of duty to an employer based upon job status,<sup>36</sup> inherent to any employer-employee relationship is a duty on the part of the employee to be worthy of trust, confidence and loyalty.<sup>37</sup>

¶15 This duty of loyalty requires an employee to forbear from a wide variety of conduct.<sup>38</sup> Cases involving a breach of the duty of loyalty by an employee have most often involved employee competition with an employer<sup>39</sup> or trade secret<sup>40</sup> or confidential information disclosure.<sup>41</sup> However, a breach of the duty of loyalty is not confined to these

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<sup>33</sup> See *Utaic v. Mackeen & Bailey*, 99 F.3d 645, 655 (5th Cir. 1990); *White v. Ransmeir & Spellman*, 950 F. Supp. 39, 43 (D.N.H. 1996).

<sup>34</sup> See *Regal-Benlit Corp. v. Drecoll*, 955 F.Supp. 849 (N.D. Ill. 1996); *Vigoro Indus., Inc. v. Cleveland Chemical of America*, 866 F.Supp. 1150, 1164 (E.D. Ark. 1994).

<sup>35</sup> Tory A. Weigand, *Employee Duty of Loyalty and the Doctrine of Forfeiture*, 42 BOSTON B. J. 6, 7 (1998). Rules are enforced to require the utmost loyalty from high-level employees. Scott W. Fielding, *Free Competition or Corporate Theft?: The Need for Courts to Consider the Employment Relationship in Preliminary Steps Disputes*, 52 VAND. L. REV. 201, 206-7 (1999).

<sup>36</sup> See *Flood v. State of Ala. Dept. of Indus. Relations*, 948 F. Supp. 1535, 1544 (1996).

<sup>37</sup> RESTATEMENT (SECOND) OF AGENCY § 387-396 (1958) (including, but not limited to, nondisclosure and noncompetition).

<sup>38</sup> This duty of loyalty has been found to “attach[] once performance commences [by the employee] and continues until it is terminated.” See *Condon AutoSales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 599 (Iowa 1999). In regards to nondisclosure of company trade secrets, employees generally are expected to comply even after termination. See Susan Street Whaley, *The Inevitable Disaster of Inevitable Disclosure*, 67 U. CIN. L. REV. 809, 817 (1999).

<sup>39</sup> See e.g. *Katz v. Food Sci. Corp.*, No. CIV. A. 99-622, 2000 WL 1022986 (E.D. Pa. July 13, 2000) (finding an officer of a firm who engaged in direct competition with his employer had breached the duty of loyalty).

<sup>40</sup> See e.g. *Lamorte Burns & Co., Inc. v. Walters*, 770 A.2d 1158 (N.J. 2001) (finding a clientele list, which included phone numbers, contract information, and other information that could not be easily discovered without the employer’s known information has been found to be a trade secret).

<sup>41</sup> Types of confidential information may include intellectual property, secret recipes, research and development, business systems or methods, business opportunities, sources of supply, statistical information, etc.

circumstances alone and may arise whenever the employee has “unclean hands.”<sup>42</sup> Accordingly, the potential reach of what might constitute the breach of the duty of loyalty could include “[h]armful speech, insubordination, neglect, disparagement, disruption of employer-employee relations, [] dishonor to the business name, product, reputation or operation” or nondisclosure of important information to the employer.<sup>43</sup> Moreover, the prevailing rule holds that an employee breaches the duty of loyalty by simply criticizing the employer’s products or services.<sup>44</sup>

¶16 Nevertheless, not all negative comments by an employee about an employer will be a breach of the duty of loyalty. Indeed, the Restatement recognizes that the duty of loyalty is not absolute and allows an exception for the release of information for “the protection of a superior interest of ... third [parties],” such as information about illegal acts.<sup>45</sup> Moreover, legislatures have recognized that public policy concerns protect certain kinds of employee criticism and disclosures. Specifically, these include whistleblower protection statutes,<sup>46</sup> statements made in connection with a legitimate labor dispute,<sup>47</sup> “SLAPP”<sup>48</sup> suits, and exceptions to the at-will

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<sup>42</sup> The Unclean Hands Doctrine does not aim to favor either the employee or employer in the dispute; it instead seeks to deny relief for the person that has conducted himself unjustly, or illegally, in the matter in dispute. When an employee disregards the duty of loyalty in an illegal way, he has “unclean hands.” See BALLENTINE’S LEGAL DICTIONARY AND THESAURUS 103 (1994). See also Howard W. Brill, *The Maxims of Equity*, 1993 ARK. L. NOTES 29, 34 (1993) (maintaining that the maxim of “He who wants equitable relief, must first come with clean hands”).

<sup>43</sup> See Weigand, *supra* note 35, at 7.

<sup>44</sup> Cynthia L. Estlund, *What do Workers Want? Employee Interest, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 982-83 (1992).

<sup>45</sup> RESTATEMENT (SECOND) OF AGENCY §§ 387-396 (1958).

<sup>46</sup> Most states and the federal government have recognized that the public has an interest in protecting employees who refuse to condone illegal or fraudulent activity by an employer and wish to report it anonymously through blogs or other methods. Statutes have been enacted which protect such employees from termination, or other retaliatory action, when they disclose evidence of employer wrongdoing. See e.g. Elletta S. Callahan and Terry M. Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 275 n8 (1992).

<sup>47</sup> Section 7 of the National Labor Relations Act provides that employees may “engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” Much of the activities engaged in by labor unions, or labor organizers, could be seen as “disloyal” conduct towards the employer. The Act is designed to shield employees for terminations based upon legitimate labor rights endeavors. Employees must be careful not to overstep the bounds of Section 7, as the United States Supreme Court in *NLRB v. Local*



employment doctrine available in most states.<sup>49</sup> Nevertheless, the recent case of *Marsh v. Delta Airlines, Inc.*,<sup>50</sup> illustrates how strong the employer's position in breach of the duty of loyalty claims is against a disgruntled employee who publishes negative comments about the employer.

¶17 In that case, Marsh, an employee of Delta Airlines for twenty-six years, was working as a baggage handler when he wrote a letter to the editor in which he criticized Delta. The letter, which was eventually published in the *Denver Post*,<sup>51</sup> read as follows:

My trusted and faithful employer of more than 26 years has become infected with two of the latest industrial diseases going around—'re-engineering' and 'cost-cutting.' Delta Air Lines, a company which is renowned worldwide for its corporate family culture, enthusiastic and professional employees and superior service to customers, has decided to flush 60 years worth of care and paternalism down the executive washroom toilet, putting thousands of loyal Delta employees and their families on hold or in the street. The company is convinced it can continue to deliver its traditional high levels of customer service with \$6 an hour help. The thinking here, apparently, is that what works for the fast-food industry should work for the airline business just as handily. Expenses and costs are so critical, we are told, that the company is spending \$500 million to cut costs and enhance that sacred bottom line. Analysts, accountants, consultants and lawyers are hard at work, it would seem, destroying another fine American institution, and most of them probably have never had any practical experience in the world of airline complexities. In betraying the trust and loyalty of more than 60,000 dedicated employees, Delta has lost the very thing that made it so prosperous and efficient over six decades. And now has

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*Union NO. 1229*, 346 U.S. 464, 471 (1953) held that employer critical handbills distributed by disgruntled employees "deliberately undertook to alienate [the] employers customers by impugning the technical quality of its product" was not protected activity under the Act.

<sup>48</sup> A Strategic Lawsuit Against Public Participation is a suit in which a corporation or developer sues an organization in an attempt to scare it into dropping protests against a corporate initiative. Many states have "anti-SLAPP suit" statutes that protect citizens' rights to free speech and to petition the government. See e.g. CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2001).

<sup>49</sup> While the common perception among employees remains that termination may only be for "cause," forty-nine states retain, at least in some form, the ancient employee at-will doctrine. Most states have modified this doctrine to provide that an employee may not be terminated if doing so would: (1) violate a public policy concern; (2) breach the implied covenant of good faith and fair dealing; or, (3) violate some implied contractual obligation. Six states retain a strict at-will approach. See Gutman, *supra* note 4, at 156-57.

<sup>50</sup> 952 F. Supp. 1458 (D. Col. 1997).

<sup>51</sup> *Id.* at 1460.

come the ultimate insult: Delta employees were called together and told that they would be responsible for training the cheap contract help that would be replacing them. This curious mandate speaks to corporate arrogance and ignorance of the first magnitude.<sup>52</sup>

¶18 Delta learned of the letter's publication and fired Marsh on the determination his actions constituted "conduct unbecoming a Delta employee."<sup>53</sup> Marsh filed a wrongful discharge claim. The trial court rejected his claim and granted summary judgment in favor of Delta, concluding Marsh's critical letter "breached the bona fide occupational requirements of an implied duty of loyalty."<sup>54</sup> The court also concluded that Marsh was not an employee who was trying to expose public safety concerns, rather he was a "disgruntled worker venting his frustrations to his employer whom he felt betrayed him and his coworkers."<sup>55</sup>

¶19 In light of the foregoing discussion, it is evident that, absent one of the previously discussed exceptions, an employee who posts entries on an internet blog which criticizes his employer's products, services or operation methods, and reveals confidential information, or otherwise harms the reputation of his employer, has breached the duty of loyalty. When the identity of a disloyal employee blogger is known, a firm is likely to terminate the employee.<sup>56</sup> Such was the case in the following examples.

¶20 While going to work at Microsoft's print shop, Michael Hanscom noticed a shipment of Apple computers being delivered to a Microsoft

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<sup>52</sup> *Id.* at 1460-61.

<sup>53</sup> *Id.* at 1461.

<sup>54</sup> *Id.* at 1463. In this case, the court relied upon COLO. REV. STAT. § 24-24-402.5, which prohibited an employer from terminating an employee for off-the-job, lawful activity. That statute, however, provided an exception for breach of an implied breach of the duty. COLO. REV. STAT. § 24-24-402.5 (1)(a). So notwithstanding the legality of Marsh's behavior, it nevertheless constituted a breach of the duty of loyalty.

<sup>55</sup> *Marsh*, 952 F. Supp. at 1463.

<sup>56</sup> See Krysten Crawford, *Have a Blog, Lose Your Job?*, CNN MONEY, Feb. 15, 2005, <http://money.cnn.com/2005/02/14/news/economy/blogging/>. While some employers choose to terminate these seemingly disloyal employees, other employers choose different forms of discipline, including suspensions, demotions, and intimidations. In a recent study by the Society for Human Resource Management (SHRM), 3 percent of employers found they were disciplining employees for the content of their blogs. In this same survey, 30 percent of employees have been disciplined for non-work related internet use, 20 percent of these employees were fired. *Discipline for Inappropriate Technology Use*, SHRM ONLINE, Jan. 4, 2005, [http://www.shrm.org/hrresources/surveys\\_published/archive/How%20are%20employees%20disciplined%20for%20inappropriate%20technology%20use%20at%20work\\_.ppt](http://www.shrm.org/hrresources/surveys_published/archive/How%20are%20employees%20disciplined%20for%20inappropriate%20technology%20use%20at%20work_.ppt).

loading dock. Hanscom found the situation humorous due to the reputed animosity between Apple and Bill Gates. He took a picture of the arriving Macs and added it to his daily personal blog. Microsoft discovered the blog photographs, determined their postings violated Hanscom's duty of loyalty under the nondisclosure principle, and expeditiously terminated Hanscom.<sup>57</sup>

¶21 Jeremy Wright faced a similar situation while he worked for Manitoba Health Services. Wright published the following blog while the server at his employer's office was down for three hours due to a virus: "Getting to surf the web for 3 hours while being paid: Priceless. Getting to blog for 3 hours while being paid: Priceless. Sitting around doing nothing for 3 hours while being paid: Priceless. Installing Windows 2000 Server on a P2 300: Bloody Freaking Priceless." The company felt Wright's blog posting was an infringement of his nondisclosure duty of loyalty by revealing to the public that there was a glitch in the employer's system.<sup>58</sup> He was fired.

¶22 Finally, the case of Matthew Brown confirms that employees who anti-employer blog will find themselves out of a job. Matthew Brown was an employee of Starbucks, and when his boss would not let him go home sick, he blogged that night about his irritation at the employer. When his employer discovered the critical blog, Brown was terminated.<sup>59</sup>

¶23 While the foregoing illustrates employees who did not realize they were illegally engaging in anti-employer banter, there is still a strong moral obligation to the employer, and the unintentional damage has still been done with grave effects due to the vast supply of people ready to read such slanderous statements provided on the internet; therefore, even an unintentional breach of the duty of loyalty needs to be addressed and disciplined.<sup>60</sup> The above shows that anti-employer blogging can, and often does, lead to employees being terminated.<sup>61</sup> In all of the above cases, the

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<sup>57</sup> Microsoft managers instructed Hanscom's boss not to allow Hanscom to remove the offensive blog post, but to escort him immediately off Microsoft premises. Jon Bonné, *Blogger Dismissed from Microsoft*, MSNBC NEWS, Oct. 30, 2003, <http://msnbc.msn.com/id/3341689/>.

<sup>58</sup> Wright, like Hanscom, was also not allowed to remove his post, but was instead terminated immediately. Jeremy Wright, *The Whole Story (. . . or as much as I know anyways)* (Jan. 6, 2005), <http://www.ensight.org/archives/2005/01/06/the-whole-story-or-as-much-as-i-know-anyways/>.

<sup>59</sup> Peter Brieger & Sean O'Shea, *When Does Criticizing an Employer Become a Firing Offense?*, NATIONAL POST & GLOBAL NEWS (Sept. 3, 2004), available at <http://blogcritics.org/archives/2004/09/04/141004.php>.

<sup>60</sup> Wilson, *supra* note 22, at 536.

<sup>61</sup> See Curt Hopkins, *Statistics on Fired Bloggers* (Dec. 28, 2004), <http://morphemetales.blogspot.com/2004/12/statistics-on-fired-bloggers.html>.

employer knew the identity of the offending employee blogger. However, what about the circumstance where the anti-employer blogger hides behind the shadow of internet anonymity to make disloyal anti-employer comments or disclosures? The problem of anonymity for the employer seeking to reveal who is it that is posting negative comments about the firm is profound because anonymous speech is constitutionally protected.

### III. INTERNET SPEECH ANONYMITY AND BLOGS

¶24 The First Amendment to the United States Constitution provides that “Congress shall make no law ... abridging the freedom of speech.”<sup>62</sup> It is a long-standing principle that anonymity plays an important role in free speech and expression and, accordingly, constitutional principles are invoked whenever a threat to that anonymity is posed. Indeed, the right to speak anonymously or pseudonymously has its roots in a long tradition of American political thinkers who published their works anonymously.<sup>63</sup>

¶25 The seminal case articulating the constitutionally protected privacy interests of an anonymous speaker is the 1995 Supreme Court case of *McIntyre v. Ohio Elections Commission*.<sup>64</sup> There, the central issue was whether an Ohio statute,<sup>65</sup> which prohibited the distribution of anonymous campaign literature, violated an individual’s free speech rights to distribute anonymous pamphlets opposing a school tax levy. The Court found, in sum, that regarding issues of public concern, anonymous speech is protected under the First Amendment. The Court declared that Ohio could not “seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented.”<sup>66</sup>

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<sup>62</sup> U.S. CONST. amend. I.

<sup>63</sup> James Madison, Alexander Hamilton, and John Jay authored the Federalist Papers under the name “Publius,” referring to a defender of the ancient Roman Republic. Dawn C. Nunziato, *Freedom of Expression, Democratic Norms, and Internet Governance*, 52 EMORY L.J. 187, 252 n. 250 (2003). “It has been asserted that, between 1789 and 1809, six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published anonymous political writings.” Jennifer B. Wieland, *Note: Death of Publius: Toward a World Without Anonymous Speech*, 17 J.L. & POL. 589, 592 (2001) (relying on *Comment, The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084 (1961)).

<sup>64</sup> 514 U.S. 334 (1995).

<sup>65</sup> OHIO REV. CODE ANN. § 3599.09 (A) (1988).

<sup>66</sup> *McIntyre*, 514 U.S. at 357. See also *Talley v. California*, 362 U.S. 60, 65 (1960) (anonymous pamphlets seeking boycotts of allegedly racially discriminatory businesses); *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 232 F.Supp.2d 205 (S.D.N.Y. 2002) (right to wear masks at KKK rally).

¶26 Two years later, the Supreme Court applied the principle of constitutionally protected anonymous speech to internet postings in *Reno v. American Civil Liberties Union*.<sup>67</sup> There, the Court was asked to review the constitutionality of the Communications Decency Act<sup>68</sup> provisions seeking to protect minors from harmful material on the Internet. In that landmark decision defining free speech rights on the internet, the Court rehearsed how the internet provides for virtually unlimited capacity for communication of all kinds. Indeed, the Court observed:

This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.<sup>69</sup>

¶27 The Court, harkening back to its decision in *McIntyre*, ultimately concluded that “the vast democratic forum of the internet” would be stifled if users were unable to preserve their anonymity online.<sup>70</sup> Quoting *McIntyre*, the Court observed that compelled identification can have a chill on freedom of speech and expression, and that “[a]nonymity is a shield from the tyranny of the majority.. It thus exemplifies the purpose behind the Bill of rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society.”<sup>71</sup>

¶28 While it is abundantly clear nondisclosure of identity is a fundamental principle of a free society, it is also necessarily critical for the preservation of blogs which espouse unpopular or underrepresented views, engage in legitimate exposure of employer illegal practices, promote labor issues or deal with sensitive, job-related issues like mental health or substance abuse problems in the workplace. Nevertheless, the unconditional wording of the First Amendment does not protect all forms of speech and expression.<sup>72</sup> Free speech protections are not available for tortious conduct, in general, or anti-employer speech which is defamatory,

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<sup>67</sup> 521 U.S. 844 (1997).

<sup>68</sup> Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104 § 502, 110 Stat. 56, 133-35 (1996).

<sup>69</sup> *Reno v. ACLU*, 521 U.S. at 870.

<sup>70</sup> *Id.* at 868.

<sup>71</sup> *McIntyre*, 514 U.S. at 357.

<sup>72</sup> *Roth v. United States*, 354 U.S. 476, 483 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (libel); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (fighting words).

specifically.<sup>73</sup> Moreover, the First Amendment does not protect copyright infringement.<sup>74</sup> When an employer believes that an anonymous anti-employer blogger has engaged in defamation or disparagement by posting a false statement on a blog, the employer may file suit for defamation and seek to subpoena from the anonymous defendant's Internet Service Provider ("ISP") the blogger's identity.<sup>75</sup> Several recent cases have dealt specifically with the issue of firms seeking the identity of anonymous internet users.

#### IV. INTERNET BLOGGER IDENTITY DISCLOSURE CASES

¶29 As noted above, courts have traditionally held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns. The Supreme Court in 1958, for example, held that a discovery order mandating the NAACP to reveal membership lists interfered with the First Amendment freedom of assembly.<sup>76</sup> Thirty years later, the United States Court of Appeals for the Sixth Circuit declined, on First Amendment grounds, to enforce a subpoena duces tecum authorized by the National Labor Relations Board to compel a newspaper to disclose the identity of an anonymous advertiser.<sup>77</sup> In recent years, however, courts have had to address motions to quash subpoenas seeking to identify anonymous internet blogger identity information from ISPs. Some courts have required disclosure, others not. Under the Federal Rules of Civil Procedure a subpoena will be quashed if it "requires the disclose of privileged or other protected matter and no exception or waiver applies."<sup>78</sup>

##### *A. Recent Lawsuits Seeking the Identity of Internet Source Based Upon a Claim of Defamation*

###### *1. In re Subpoena Duces Tecum to America Online, Inc.*

¶30 In 2000, the Circuit Court of Virginia was asked to decide whether the First Amendment right to anonymity should be extended to communications by persons utilizing chat rooms and message boards on the

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<sup>73</sup> See, RESTATEMENT (SECOND) OF TORTS § 558(a) (1977).

<sup>74</sup> See, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-556 (1985).

<sup>75</sup> As outlined in Yahoo!, all users must agree to the Terms of Service. Yahoo! Terms of Service, <http://docs.yahoo.com/info/terms/> (last visited July 15, 2005); see also AOL.com: Agreement to Rules of User Conduct, <http://www.aol.com/copyright/rules.html> (last visited July 18, 2005).

<sup>76</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

<sup>77</sup> *NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir. 1998).

<sup>78</sup> Fed.R.Civ.P. 45(c)(3)(A)(iii).

internet in *In re Subpoena Duces Tecum to America Online, Inc.*<sup>79</sup> There, a company known as “APTC”<sup>80</sup> sued five John Does in state court for allegedly posting defamatory statements about the corporate giant in an internet chat room which AOL maintained.<sup>81</sup> Accordingly, APTC sought by subpoena to AOL to discover the identity of the persons posting the negative comments. AOL, on behalf of itself and the John Does, refused to divulge client information and filed a motion to quash. The Circuit Court of Appeal found that authorizing a subpoena in such a case would have an oppressive effect upon AOL, but that the question remained as to whether the subpoena was reasonable in light of all surrounding circumstances.<sup>82</sup> The court indicted that the question

[M]ust be governed by a determination of whether the issuance of the subpoena duces tecum and the potential loss of the anonymity of the John Does, would constitute an unreasonable intrusion on their First Amendment rights. In broader terms, the issue can be framed as whether a state’s interest in protecting its citizens against potentially actionable communications on the Internet is sufficient to outweigh the right to anonymously speak on ... [the Internet]. There appear to be no published opinions addressing this issue either in the Commonwealth of Virginia or any of its sister states.<sup>83</sup>

¶31 In its argument to the court, AOL proposed the Court adopt a two-prong test to determine when a subpoena request is reasonable and would require AOL to identify subscribers: (1) the plaintiff must plead with specificity a prima facie claim that it is the victim of recognized tortious conduct, and (2) the subpoenaed information must be centrally needed to advance that claim.<sup>84</sup> The court found the AOL test too cumbersome<sup>85</sup> and proffered this rule:

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<sup>79</sup> No. 40570, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000). Interestingly, this case was subsequently heard by the Supreme Court of Virginia. There, the Court, in a de novo review, determined the trial court erred when it allowed the plaintiff employer “APTC” to proceed anonymously without showing need. The matter was remanded to the trial court for a determination of that issue, without a discussion of the standards required for blogger identity disclosure. See *America Online, Inc. v. Anonymously Traded Co.*, 542 S.E.2d 377, 364-365 (2001).

<sup>80</sup> *Id.* at \*1. This Indiana-based company filed its lawsuit under a pseudonym, Anonymous Publicly Traded company, APTC.

<sup>81</sup> APTC claimed that the John Does misrepresented material, thus being defamatory, and also posted confidential material insider information. *Id.*

<sup>82</sup> *Id.* at \*5.

<sup>83</sup> *Id.* at \*7.

<sup>84</sup> *Id.* at \*8.

When a subpoena is challenged ..., a court should only order ... [an ISP] to provide information concerning the identity of a subscriber (1) when the court is satisfied by the pleadings or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of [actionable] conduct ... and (3) the subpoenaed identity information is centrally needed to advance that claim.<sup>86</sup>

¶32 The court denied AOL's motion to quash, concluding under its new test that all three prongs had been satisfied by APTC and ordered the identity of the John Does released.<sup>87</sup> In sum, the court found that the "compelling state interest in protecting companies such as APTC from the potentially severe consequences that could easily flow from actionable communications ... significantly outweigh[ed] the limited intrusion on the First Amendment rights of any innocent subscribers" whose identity must be revealed.<sup>88</sup>

## 2. *Dendrite International, Inc. v. John Doe*

¶33 In 2001, a New Jersey state court faced a similar problem in *Dendrite International, Inc. v. John Doe*,<sup>89</sup> and developed the "Dendrite test." In that case, a John Doe No. 3, under the pseudonym, "xxplr," published comments on the Yahoo! message board questioning Dendrite revenue accounting practices, marketing strategies and its value to investors.<sup>90</sup> Dendrite filed suit alleging defamation and sought discovery to disclose the identity of "xxplr." The court adopted the following test to determine if the subpoena should be granted:

1. The plaintiff should make efforts to notify the anonymous poster that they are the focus of a subpoena or application for an order for disclosure, and give the fictitiously named defendants a reasonable opportunity to file and serve opposition to the application. The notification must consist of a posting, on the ISP's pertinent message board, announcing to the anonymous poster that an identity discovery request was made.

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<sup>85</sup> *Id.* (deciding that while making a prima facie case varies from state to state and from court to court, this Court was not going to set a precedent with which other judges would have to rely).

<sup>86</sup> *Id.* at \*9.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> 775 A.2d 756 (N.J. 2001).

<sup>90</sup> *Id.* at 764.



2. The plaintiff must identify and submit the exact statements made by each anonymous poster that the plaintiff claims constitutes actionable speech.
3. The plaintiff has to produce sufficient proof in support of each element of its cause of action on a prima facie basis.<sup>91</sup>

¶34 If all these elements are met, the court then balances the defendant's First Amendment rights of anonymous speech against the strength of the plaintiff's case and the necessity for the disclosure of the defendant's identity.<sup>92</sup> Anonymous or disguised speech is allowed as long as its rendering is not a violation of law.<sup>93</sup>

¶35 Applying this analysis, the court granted John Doe No.3's motion to quash on the basis that Dendrite had failed to show the posting resulted in any harm to the firm. Indeed, in the days subsequent to the postings Dendrite actually enjoyed an upsurge in stock value and so the court found it impossible to establish a causal link between the posting and any harm.<sup>94</sup>

### *B. Recent Lawsuits Seeking The Identity of Internet Source Based Upon a Claim of the Breach of the Employee's Duty of Loyalty*

¶36 In the case of blogger defamation or disparagement, establishing a prima facie case for a tort is straightforward and simple. One of the main requirements the employer has to prove is merely that the statements made were false.<sup>95</sup> To make the case of a breach of the duty of loyalty is much more difficult because one of the elements an employer must establish is that the critical blogger statements were made by an employee. However, under the federal rules of discovery, for example, the employer has to request the "disclosure of privileged" information, and, "a subpoena shall be quashed if it 'requires disclosure of privileged or other protected matter.'"<sup>96</sup> In accordance with this rule, the defendant's motion to quash will likely be

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<sup>91</sup> *Id.* at 767-68.

<sup>92</sup> The "Dendrite test" has been relied upon by other courts facing similar issues. See e.g., *Rocker Management LLC v. John Does*, No. 03-MC-33, 2003 WL 22149380 at \*1 (N.D. Cal. May 29, 2003); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp.2d 556, 564-566 (S.D.N.Y. 2004).

<sup>93</sup> See Wilson, *supra* note 22, at 539 (quoting *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (1999)).

<sup>94</sup> *Dendrite*, 775 A.2d at 764, 770.

<sup>95</sup> RESTATEMENT (SECOND) OF TORTS § 558(a) (1977). The other requirements to prove defamation are publication, fault, and harm. RESTATEMENT (SECOND) OF TORTS § 558(b)-(d) (1977).

<sup>96</sup> *Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 561 (S.D.N.Y. 2004) (quoting FED.R.CIV.P. 45(c)(3)(A)(iii)).

successful because, without having access to the knowledge of whether the blogger is actually an employee or not, an employer will simply be unable to establish the prima facie case. There are two recent developments that are the exception.

### 1. *Immunomedics, Inc. v. Doe*

¶37 In July 2001, New Jersey again faced this question in the case of *Immunomedics, Inc. v. Doe*.<sup>97</sup> An anonymous internet poster<sup>98</sup> sought to quash a subpoena for her identity to her service provider, Yahoo!.<sup>99</sup> Immunomedics discovered an anonymous internet poster was revealing confidential information about the company which could have only come from an informed employee. Specifically, the internet messages reported the company was out of stock for products in Europe and was planning to fire its European manager.<sup>100</sup> The information was true, but the anonymous poster, if an employee, would have breached the confidentiality agreement by disclosing it.<sup>101</sup> The Court applied the Dendrite framework and struck the balance in favor of disclosure, finding Immunomedics had sufficiently proven the poster was an employee, they had executed a confidentiality agreement, and that the context of the posted messages revealed a breach of that agreement.<sup>102</sup> The court warned that, although anonymous speech is protected, there must be an avenue of redress for those who are wronged and individuals cannot avoid punishment through invocation of the First Amendment.<sup>103</sup>

### 2. *Raytheon Co. v. John Does 1-21*

¶38 In *Raytheon Co. v. John Does 1-21*,<sup>104</sup> Raytheon claimed a breach of contract and disclosure of proprietary information by company employees after reading messages posted on a Yahoo! message board. After filing suit, Raytheon subpoenaed Yahoo! for the identities of the

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<sup>97</sup> 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001).

<sup>98</sup> “moonshine\_fr” was the pseudonym of the poster. *Id.* at 774.

<sup>99</sup> Immunomedics was able to discover that the gender of the poster was female by searching the publicly-available member directory of the ISP. Evidently the employee had disclosed her gender on the membership directory. *Id.* at n.1.

<sup>100</sup> *Id.* at 774.

<sup>101</sup> There, the Court held the employee not only violated the confidentiality agreement she had signed, but several provisions in the employee handbook. The Court concluded that an employee may “contract away” free speech rights. *Id.* at 774-75.

<sup>102</sup> *Id.* at 777.

<sup>103</sup> *Id.* at 777-78.

<sup>104</sup> Civil Action No. 99-816 (Commonwealth of Massachusetts Superior Court, Middlesex County, Filed Feb. 1, 1999). The complaint is available at <http://www.netlitigation.com/netlitigation/pleadings/raycomp.html>.

suspected employee posters which was granted. After obtaining the identities of the Does, Raytheon voluntarily dismissed its lawsuit, presumably to address any employee breach of the duty of loyalty claims in an extra-judicial way.<sup>105</sup> This case has been criticized as an abuse of the discovery process in lawsuits.<sup>106</sup> That is not so. When anti-employer speech is engaged in by an employee, it is correct for the employer to hold a breach of the duty of loyalty claim and pursue the identity of such an employee by the only legal measures available. An abuse would only occur if the lawsuit was filed merely to ferret out individuals who were complaining about an employer without justification for believing the anti-employer bloggers were, indeed, employees.

¶39 As *Immunomedics* and *Raytheon* show, an employer may eventually, after filing expensive lawsuits, successfully subpoena the identity of suspected, anti-employer bloggers. However, there remains two fundamental problems with the process as it currently exists.

¶40 First, the employer seeking relief must file a lawsuit in order to seek the pre-process subpoenas. This is inefficient, costly, and time-consuming for both the employer and the courts. This promotes the filing of lawsuits, which may not be necessary if the blogger identities discovered prove not to be employees. Notwithstanding the expensive and difficulty to the complaining employer, the lawsuit does provide the suspected disloyal anonymous employee blogger with the important ability to seek to quash the subpoena duces tecum.

¶41 Second, the process wholly violates the privacy rights of the nonemployee bloggers who may face disclosure and harassment by an employer to whom they owe no duty of loyalty and with whom they have no connection. The intrusion into the anonymity of a person wholly unconnected with a complaining employer is an altogether, unacceptable intrusion. For example, in *Raytheon*, twenty-one names were discovered by the employer as being associated with anti-employer disclosures.<sup>107</sup> But following the release of those names, Raytheon dropped its lawsuit.<sup>108</sup> This raises the questions: did Raytheon drop the suit because it wished to pursue disciplinary matters against employees internally, or did it withdraw the suit because none of the twenty-one persons identified were employees. If they were not employees, then Raytheon was able to discover the identities of persons critical of them through contrivance.

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<sup>105</sup> See The Associated Press, *Raytheon Drops Suit over Internet Chat*, N.Y. TIMES, May 29, 1999.

<sup>106</sup> See Sobel, *supra* note 10, at 15.

<sup>107</sup> Civil Action No. 99-816, ¶ 1.

<sup>108</sup> *Id.*

¶42 Persons who have participated in anti-employer criticism, but who have done no wrong, should be able to participate online without fear of retaliation from someone who seeks their identity simply to harass or embarrass them.<sup>109</sup> Filing a frivolous lawsuit and gaining the power of the courts to order discovery of their identity would make this possible.<sup>110</sup>

#### V. CREATING A STANDARD FOR EMPLOYER PRE SERVICE OF PROCESS DISCOVERY OF ANONYMOUS SUSPECTED EMPLOYEE BLOGGER IDENTITY

¶43 This iBrief suggests that the current methods for employers to discover the identity of disloyal employee bloggers is cumbersome, promotes frivolous lawsuits, and fails to protect the identity of innocent anti-employer bloggers. Consequently, Congress should establish a single federal pre-service of lawsuit discovery rule governing the disclosure to plaintiff employers of anti-employer blogger identities. That statute should provide for a simplified process for obtaining the identities of anti-employer bloggers who are suspected employees, short of filing a lawsuit. In other words, there should be established a judicial process whereby a complaining employer may seek the identity of anonymous bloggers without having to go to the trouble and expense of filing a formal lawsuit.

¶44 To that end, Congress should establish a procedure under the Federal Rules of Civil Procedure to be employed for all cases where a party seeks the identity of an anonymous internet blogger or other source, either in state or federal court, entitled, "Motion For Disclosure of Internet Identity." That motion would require the following:

¶45 First, a complaining employer would have to provide the reviewing judicial officer with: (a) an exact copy, with date and time indicated, of the anti-employer internet statements which give rise to the complaint; (b) the identity of the poster's Internet Service Provider; (c) a computerized, searchable file listing all former and current employees of the complaining employer; (d) a showing that if such statements were made by an employee they may constitute a tort action for breach of loyalty.

¶46 Second, upon receipt of this information, the judicial officer would then require the ISP to provide the court with the identity of the suspected employee.

¶47 Third, if the identity of the anti-employee blogger does not appear on the listing of current or former employees of the complaining employer,

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<sup>109</sup> *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999). Columbia Insurance sought to protect its name by preventing another from the use of Seescandy.com and Seecandy.com domain names.

<sup>110</sup> *Id.*

the court informs the complaining employer that the anti-employer blogger is not a current or former employee of the firm, and the matter is closed. If, on the other hand, the judicial officer discovers the anti-employer blogger is listed as a current or former employee of the complaining employer, the court then would notify the suspected anti-employer blogger of the request for release of identity.

¶48 Fourth, the employee blogger would then be afforded a period of time in which to file a motion to quash the Motion for Disclosure under the normal procedures provided under the federal rules. A short hearing on the motion could then be held by the federal court to determine its merits, without the expense and time consideration associated with a lawsuit.

¶49 Fifth, if the employee failed to seek a motion to quash within the time allowed, or the motion to quash failed on the merits, the reviewing federal court would then release the identity of the blogger to the employer.

¶50 Sixth, after discovery of the offending employee's name, the employer then would be free to take whatever legal action available to it under the law; i.e., nothing, discipline short of termination, termination, or termination and the filing suit for a breach of the duty of loyalty.

¶51 Under this approach all would benefit. Courts would be relieved of unnecessary lawsuits brought solely to seek the identity of anti-employer bloggers. Anonymous bloggers without connection to the employer they criticize would be free from unnecessary intrusion into First Amendment speech protections. Anti-employer employee bloggers would still be afforded the right to seek to quash any motion to reveal identity. And finally, the employer would be able to obtain the identities of disloyal employees who hold no privilege to engage in anti-employer speech and who reveal confidential firm information online.

¶52 This recommendation is decidedly pro-employer. However, it is justified because the employee holds, absent any exception, no free speech rights to engage in tortious anti-employer criticism due to her duty of loyalty and so the speech sought to be curtailed is unprotected speech.

## CONCLUSION

¶53 The rise of internet bloggers has created a new and powerful information tool on the internet. The authors of anti-employer blogs often hide behind anonymity to disclose confidential information about the employer or engage in disloyal anti-employer blogging. The employer has a right to pursue breach of the duty of loyalty claims against such persons and the anonymity of the internet should not protect them because anti-employer speech is not protected. The current method required by employers to obtain the identity of disloyal employee bloggers is

cumbersome, expensive, and inefficient. Congress should enact legislation, in the manner suggested above, to form new federal rules allowing for the expeditious pre-service discovery of blogger identity. Such new discovery rules would streamline the process for employers to legitimately obtain the identities of anti-employer bloggers. This streamlined process would promote the protection of employers from unlawful speech and employee disloyalty and preserve the identities of innocent bloggers who owe no legal duty to the employers they criticize.